The Record

JOURNAL OF THE APPELLATE PRACTICE AND ADVOCACY SECTION

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Inside the Fourth District Court of Appeal

The Fourth DCA[1]

Introduction

So deluged is the Fourth District Court by the steady stream of appellate matters from circuit courts and agencies in six diverse counties, that the Court conducted two, and even three oral argument calendars simultaneously during the weeks that this article was being prepared. Nonetheless, each and every one of the judges of the Fourth District still cheerfully gave of their "spare" time to participate in the interviews and information-gathering process that this series requires. While the judges themselves generally were disinclined to offer conclusory characterizations of the "personality" of their Court, the willingness of all the judges to participate in this project should offer the readers some insight into the Fourth District's makeup.

This installment in the series offers an informational and entertaining history of the Fourth DCA, a fairly comprehensive look at the internal workings of the Court, many practical tips for practice before the Fourth District, from basic pointers to matters of fine-tuning, and glimpses into the backgrounds of the members of the Court. My collaborative author from the Court is Marilyn N. Beuttenmuller, who received her M.B.A. from the University of Florida in 1972 and her J.D. from the University of Miami School of Law in 1977. She was a Fourth District Court of Appeal Staff Attorney for Judge Gavin Letts for 13 years before being appointed Clerk of the Fourth District Court of Appeal on July 1, 1991.

History and Jurisdiction of the Fourth District

"For some time Florida, like all Gaul, was divided into three parts — the First, Second and Third District Courts of Appeal. As Florida grew, so did the incidents of crime and civil disputes and, with it, the number of appeals escalated until, in the latter part of 1964 and early 1965 the legal field knew that a new district would need to be formed. This was to be

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Message from the Chair

This is the year for each member of the Section to take individual steps to improve and add to the services we provide to our group and the appellate process. This is a call for volunteer leadership. Most of us are willing to act when asked to perform a specific task for groups like bar organizations. "Yes" is the answer I almost always hear when I ask one of our members to write a piece for publication, to speak at a CLE seminar, or to represent the Section at a function.

But we need to exhibit the kind of volunteer leadership which the founders of the Section showed when they formed our group. No one appointed our founders to a committee to study forming this Section, because there was no such committee. Our founders took on the task themselves because they are leaders.

Don't wait for someone to appoint you to a committee or ask you to undertake a project. Take on a task, tell us about it, and the Section will react to support your efforts. We are not asking you to do it all yourself without help from our existing structure. Many good ideas from volunteers like you will fall within the mission of existing committees. If you have

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ideas to increase membership, consider joining our Membership Committee. If you want to work to change the Board Certification process, join the group which represents the Section in that process, and so on.

A list of existing committees and their Chairs is contained inside this edition of *The Record*. Also included is a Volunteer Leadership Form on which you should indicate your willingness to serve on our existing committees. Even if you already are on a committee, please complete the form to indicate a willingness to remain on the committee. Our committee Chairs will be updating their lists to delete those who are unable to continue serving on a particular committee.

Many of you may have ideas for one-time or long-term projects which do not fall neatly within our existing committee structure. Use the enclosed form to tell me about your ideas and we will look for ways to assist you. Warning: you will be agreeing to Chair or serve on any group created to work on a good idea you have. Volunteer leadership is not just coming up with a good idea for others to develop.

This call for volunteer leadership applies equally for judges and lawyers. Our per capita participation by appellate judges is remarkable, but we want to continue to invite those who have not yet become active on both sides of the bench.

Thank you for your willingness to be volunteer leaders. I am looking forward to seeing you at our next meeting.

book review

Reviewed by Scott D. Makar

"A Book of Legal Lists: The Best and Worst of American Law"
by Bernard Schwartz

Law professor Bernard Schwartz led an interesting and prolific life. He is widely known for his accounts and analysis of the inside workings of the United States Supreme Court's decision-making and opinion-writing processes. His *Unpublished Opinions* series, which presented the preliminary drafts of opinions in significant cases from the Warren, Burger, and Rehnquist courts, were highly regarded for their insight into the innermost workings of the Supreme Court.

Shortly before his recent death, Professor Schwartz published a collection of his personal top ten "bests" and "worsts" in the legal arena. His book, *A Book of Legal Lists: The Best and Worst of American Law* (Oxford 1997 $25.00), presents his top ten for the following categories: greatest and worst Supreme Court Justices, greatest and worst Supreme Court decisions, greatest dissenting opinions, greatest non-Supreme Court judges, greatest and worst non-Supreme Court decisions, greatest law books, greatest lawyers, greatest trials, and greatest motion pictures. He also provides 300 pages of written commentary accompanying his selections.

My favorite categories are the greatest dissenting opinions, greatest law books, and greatest movies. On the dissenting opinion list are three by Justice Oliver Wendell Holmes (i.e., the Great Dissenter — though he only wrote 72 dissents, compared to 486 by Justice William O. Douglas) and three by Justice Louis D. Brandeis, who together "formed the most famous dissenting team in judicial history."

The law book list includes standard classics, such as *The Federalist* (1788), Cardozo's *The Nature of the Judicial Process* (1921), Holmes's *The Common Law* (1881), and Story's *Commentaries on the Constitution of the United States* (1833). But it also includes a few that are not as widely known, such as James C. Carter's *Law: Its Origin, Growth and Function* (1907) and James Kent's *Commentaries on American Law* (1826-1830). I must sadly admit I was not familiar with these latter works. I was heartened to see that Judge Richard Posner's *Economic Analysis of Law* (1973) had made the list. According to Professor Schwartz, "[n]o law book has been more influential during the second half of the twentieth century" particularly in the tort, antitrust, and other laws where the balancing of costs and benefits is appropriate for judicial decision-making.

The criteria that Professor Schwartz used for his legal movie list is that they must be "outstanding as films, but they also tell us important things about the law. They instruct as well as entertain. Most important, in them the law is not warped by the need to attract a mass audience." Indeed, his list includes the classics: *Anatomy of a Murder* (1959), *To Kill a Mockingbird* (1962), *Twelve Angry Men* (1957), *Inherit the Wind* (1960), *The Paper Chase* (1973), *The Verdict* (1982). Three movies, not as widely known, are *The Magnificent Yankee* (1950) (biography of Holmes), *The Wrong Man* (1956) (a Hitchcock film) and *Compulsion* (1959) (based on the Loeb-Leopold trial, also listed in the top ten trial list).

There is also a top ten list of greatest Supreme Court "Might Have Beens," which are events in Supreme Court history that either were close cases that could have been decided differently or fortuitous events that dramatically changed the judicial landscape. In the former category are cases such as *Marbury v. Madison*, *Baker v. Carr*, and *Brown v. Board of*

Education (all of which are on the top ten greatest Supreme Court decisions list). Professor Schwartz also lists *Mapp v. Ohio* (1961) in which the issue on appeal was whether an Ohio statute criminalizing possession of obscene books and pictures violated the First Amendment. After argument and conference, a majority agreed that the statute violated the First Amendment due to overbreadth. The majority, however, held an "impromptu 'rump caucus'" on an elevator as they were leaving conference. As the story goes, Justice Clark (who was assigned to write the majority opinion) turned to the other justices present and suggested that the case presented an opportunity to extend the exclusionary rule to state court convictions. Although this would require overturning the Court's 1949 decision in *Wolf v. Colorado*, a majority agreed. As a consequence, the majority opinion became a major *Fourth* Amendment (rather than a minor First Amendment case) on an issue that was not raised on appeal, not briefed or argued by the parties, and not discussed at the Court's conference.

In the latter category are the chief justiceships of John Marshall and Earl Warren, both of which molded the nature of constitutional adjudication and the Court's authority. President Eisenhower had agreed to appoint Warren as solicitor general (to hone up on his legal skills which he hadn't practiced in many years) as a prelude to appointing him to the "next vacancy" on the Court. But then Chief Justice Fred M. Vinson died unexpectedly and President Eisenhower had a dilemma — does the "next vacancy" mean for an ordinary seat on the Court or the powerful chief justiceship? Because the President had no viable Republican on the Court to fill the spot, he was forced to consider Warren much earlier than anticipated. He was reluctant to appoint Warren so soon, and dispatched Attorney General Herbert Brownell to California to "sound out Warren." During the hastily set meeting, Warren "made it plain that he regarded the present vacancy as the 'next vacancy.'" President Eisenhower announced Warren as his nominee the next day.

A Book of Legal Lists is a great book for spawning discussion and debate about the law, judges, lawyers, and other topics included in the lists. It is also a good source of trivia and contains 150 "Court and Judge Trivia Questions" — and answers.

"Jurismania: The Madness of American Law"

by Paul F. Campos

Mania, n. Mental disturbance characterized by great excitement or elation, extravagant delusion, and overactivity.[1]

We are a law-crazed society, particularly those who make a living off the judicial system. The legal profession is fascinated with itself and its self-importance in society. Little wonder that members of the public are embittered and disillusioned when they turn to lawyers and the judicial process for justice. The populace can't help but feel that the American system of law is no more than an elaborate smoke and mirrors production, whose performers know — but won't admit — is broken. A media machine that has an insatiable appetite for courtroom dramas and talking-head programs populated by arrogant, pontificating legal "experts" doesn't help matters. Even the staunchest defenders of the system increasingly are overwhelmed by the daily avalanche of complex laws, rules, regulations, orders, decisions, and guidelines on every conceivable legal topic — from aviation law to zoo law. How can anyone respect the law when few can even keep current on what it is?

This type of criticism of the legal system is as old as the hills. But recent criticism has struck a chord because of the system's increased complexity, uncertainty, and incomprehensibility. The best-seller, *The Death of Common Sense*, took the legal and political system to task. Now, University of Colorado law professor Paul Campos narrows the sights of his critics scope on the American legal mind. In *Jurismania: The Madness of American Law* (Oxford 1998 $23.00), Professor Campos describes the legal thought process as a "culturally sanctioned form of obsessive-compulsive behavior." His scorn and contempt for ceremonious legal hypertrophy drips from every page.

In his diatribe, he draws examples from the now all-too-prevalent "three-day deposition, the six-month trial, the decade-long appeal, and the various textual progeny of these rituals: the 100-page appellate court opinion, the 200-page, 500-footnote law review article, the 1,000 page statute, the 16,000-page set of administrative regulations." He examines with glee his small-town public library's code of conduct, which is written in IRS Code-like fashion to cover conduct that "any nonpsychotic person of minimally functional intelligence" know are prohibited. So why post the code in prominent places around the library? Because such "actions represent our legal culture's equivalent to the practice of nailing garlic over the doorways to repel vampires." We must "do something" — so we play the Jurismania game.

Take for instance his view on Supreme Court opinions. You may recall that the Supreme Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) consisted of numerous opinions spanning 169 pages in the United States Reports. Professor Campos prefaces his analysis of the decision with the quoted premise that "'people who are about to say something that sounds silly seldom come right out and say it. Usually a set of rhetorical or stylistic devices is employed to avoid having to say it in words of one syllable.' So it is in the law." He derides one law professor's praise of the joint plurality opinion in *Planned Parenthood*, and concludes:

> If one can somehow keep a grip on what *Planned Parenthood v. Casey* actually is — the bureaucratic work product of twenty something judicial clerks, whose relevant life experience consists for the most part in getting good grades and otherwise ingratiating themselves with various authority figures — one is tempted to conclude that the eminent professor who penned this encomium had lost his mind. How wholesome, by contrast, seems Oliver Wendell Holmes' philosophically modest observation that he considered a law constitutional unless it made him want to 'puke.'

The Holmes test is reported to have been related by the Justice to his law

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THE FOURTH DCA
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done by dividing the Second District to make up the Fourth District Court of [A]ppeal encompassing ten counties right in the middle of the central east coast of Florida." Kathryn DeForest, *The Fourth District Court of Appeal 25 Years Young* at 1 (1990). (This article draws so heavily upon the Court's history as recounted in the 18-page pamplet, that the balance of this historical discussion should be considered directly attributable to it, at least for information up to 1990.) A constitutional amendment was approved by voters at a special election in 1965 to create the new court, which originally was headquartered in Vero Beach, in Indian River County. The original jurisdiction of the Fourth District encompassed Brevard, Broward, Indian River, Martin, Okeechobee, Orange, Osceola, Palm Beach, St. Lucie, and Seminole Counties.

Using borrowed books for its library until a new budget was enacted to provide basic research tools, the Fourth District set up shop in a building on South Dixie Avenue in Vero Beach that formerly had been used as a lock factory. Reminiscing about the first days of the Court in late November and early December 1965, one of the secretaries of one of the first judges wrote on the occasion of the Fourth District's 25th Anniversary: "[T]he court started out with a backlog of 480 cases, and, as far as I can remember, has never had that low a backlog since." *Id*. at 4.

Oral argument sessions were held at first in the Vero Beach City Hall Council chambers. In the early part of 1966, the Court moved its operations to offices on the second floor of the Vero Beach City Hall, while a site was sought for a permanent headquarters for the Court on the shore of the Indian River. The first three judges on the newly created Fourth District were Sherman Smith, Jr., Charles O. Andrews, Jr., and James H. Walden. Characteristic of the fierce independence of all the judges who would sit on the Fourth District, the first decision issued by the Court, "a two sentence per curiam affirmed, citing one authority, also had a two-page dissent!" *Id*. at 5 (citing *Culyer v. Elliot*, 182 So. 2d 55 (Fla. 4th DCA 1965) (Barns, A.J., dissenting)).

Early in 1967, Judge Smith returned to private practice and Judge Spencer C. Cross became a member of the Court. Then Judge Andrews left the Court to return to private practice and was replaced by John A. Reed, Jr. The number of judges was increased to five during 1967 when David L. McCain from Fort Pierce and William C. Owen, Jr., from West Palm Beach joined the Court. Also in 1967, the Florida Legislature voted to move the headquarters of the Fourth District from Vero Beach to West Palm Beach. The move was another chapter in the saga of political wrangling between a faction that wanted the Court situated in Orlando and the Palm Beach County faction, which had resulted in the Court's original location being selected as a compromise. In December of 1967, the City of West Palm Beach deeded property for the Court headquarters at its present location on Palm Beach Lakes Boulevard.

But it was not until 1970 that the Fourth District moved from Vero Beach to its new headquarters, where the first open session of court was held on June 11, 1970. Also in 1970, Judge McCain was elevated to the Florida Supreme Court and became the youngest justice on that Court at the time. Governor Claude Kirk appointed Gerald Mager to replace Judge McCain.

In 1973, Judge Reed left the Fourth District to become a United States District Judge for the Middle District of Florida. Judge James C. Downey, a native of West Palm Beach and judge of the Fifteenth Judicial Circuit, was appointed to fill Judge Reed's position and joined the Court on October 1, 1973.

Things remained relatively stable at the Fourth District for three years, when a series of changes occurred in 1976. Judge Owen retired from the Court to go back into private practice. Two new judgeships were created for the Fourth District, which were filled by Judges Anstead and Letts. Judge Owen's seat was filled by James E. Alderman, who had been a circuit judge on the 19th Judicial Circuit. Judge Walden left the Court to resume a six-year period in private practice in 1976 and Judge Mager reentered private practice in that year as well. In 1977, Judge James C. Dauksch, Jr., and Judge John R. Moore joined the Court to fill the vacancies left by Judge Walden and Judge Mager. It was to be little more than one year until the complexion of the Court changed again. In April of 1978, Judge Alderman was elevated to the Florida Supreme Court. John R. Beranek, a circuit judge from the Palm Beach Circuit Court, was appointed to replace Judge Alderman.

. The ever-growing case load of the Fourth District resulted in an eighth judgeship being approved by the Legislature in 1979. Also in 1979, the Legislature voted to create the Fifth District Court of Appeal, to be comprised of the counties within the Fifth, Seventh, Ninth, and Eighteenth Judicial Circuits. Judge Dauksch and Judge Cross left the Fourth District to start the new Fifth District Court of Appeal, and their

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16 months, Judge Barkett was elevated to the Florida Supreme Court in November of 1985, where she became the state's first female Chief Justice. She has since left the Supreme Court to join the United States Court of Appeals for the Eleventh Circuit.

Judge Bobby Gunther, a circuit judge from the Seventeenth Judicial Circuit, was appointed to replace Judge Barkett and joined the Fourth District in January of 1986. Also in 1986, Judge Hurley sought a transfer to the Fifteenth Judicial Circuit, and was replaced on the Fourth District by Judge Barry Stone, who had been a circuit judge in Broward County. Judge Hurley now sits on the United States District Court for the Southern District of Florida in West Palm Beach.

Significant changes occurred in the Court's support staff structure, technological facilities, and operating procedures over the next several years. Notwithstanding such measures taken to increase efficiency and handle the burgeoning caseload, more judges were needed still. In 1989, three new judicial positions were approved by the Legislature. Judge Mark Polen, Judge Eugene Garrett, and Judge Martha Warner were sworn in as members of the Fourth District in 1989. Changes on the bench continued with the retirement of Judge Downey and Judge Walden and the passing of Judge Letts. Judge Gary Farmer joined the Court in 1991. Three new judges joined the court in 1993: Larry Klein, Barbara Pariente, and Matthew Stevenson.

Two Fouth District judges have been elevated to the Florida Supreme Court in recent years. Judge Anstead filled the seat left by Chief Justice Barkett's move to the Eleventh Circuit, and Judge George A. Shahood, from the Broward County Circuit Court, has been appointed as his successor. And just recently, Judge Pariente was appointed to the Supreme Court.

Six counties now compose the jurisdiction of the Fourth District Court of Appeal: Broward, Indian River, Martin, Okeechobee, Palm Beach, and St. Lucie. Although the geographical size of the district is as small as it ever has been, and the number of judgeships on the Court is larger than ever, due to the overwhelming crush of new appeals being filed, each judge is as busy as ever before. Therefore, it is incumbent upon the practitioner appearing before the Fourth District to familiarize himself or herself with the required procedures to be followed in practice before the Court, to assist the Fourth District in coping with its workload.

Practice Before the Fourth District

"[O]ne staple in the upper left hand corner, without any brief covers," is where the Fourth District stands on the "great brief-binding controversy" which has taken up so much time and attention at meetings of the Appellate Court Rules Committee over the last several years and in other quarters. When asked whether he was familiar with the kind of brief covers lauded by other appellate judges for its ability to securely bind the brief while permitting the brief to remain open at a selected page, Chief Judge Dell expressed familiarity with that style of covers, but wasted no time in communicating the Court's position regarding the design vis-a-vis all others: "We rip them off when the briefs come in, and staple the briefs back together."

At least the Fourth District does not return all nonconforming briefs bearing offensive covers (like a certain court in Atlanta would), although the idea was somewhat interesting to Court Clerk Marilyn Beuttenmuller. However, demonstrating her pragmatic style as a manager, Clerk Beuttenmuller quickly concluded that the personnel time required in removing and discarding unwanted covers is significantly less than that which would be required to package and mail sets of briefs back to lawyers. Hopefully, after publication of this article, the Clerk's office will detect a measurable decrease in the number of briefs enclosed in binders, of whatever color, in recognition of this distinctive practice requirement of the Fourth Dis-

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Volunteer Leadership Form

Appellate Practice and Advocacy Section

Name: _____

Address: _____ Phone: _____

I am willing to serve on the following committees:

_____

_____

I have an idea for a project or activity for the Section on which I am willing to volunteer, as follows:

_____

_____

Signature: _____ Date: _____

Fax completed form to Roy D. Wasson (305) 666-2636 or mail to him at Suite 450 Gables One Tower, 1320 South Dixie Highway, Miami, FL 33130.

trict Court of Appeal.

From Deputy Sheriff Joe Blakely — who greets the public from his station just inside the security checkpoint at the Court's front door — to the Chief Judge, the judges and staff members offered tips for practitioners appearing before the Court. "Leave your weapons in your car," was Deputy Blakely's advice, recounting that at least a few lawyers have returned briefly to their cars upon seeing an armed deputy just inside the courthouse. He could only speculate whether they were returning something that should have been left outside to begin with.

Any discussion of tips for practice before a court needs to include an overview of the Court's total caseload and procedures for managing that load, be it heavy or light. The caseload at the Fourth District is tremendous. During calendar year 1993, the total number of cases added, including appeals, petitions for certiorari and other writs, and reinstated cases, totaled 3,886. One hundred more cases were disposed of than were added, however, of which 1,485 were by written opinions. Fourteen thousand orders were issued by the Court on motions filed. Motions for rehearing or other post-decision relief were filed in the astonishing number of more than half of the number of cases decided by written opinion! It is no wonder that the Court reminds counsel in an information sheet sent out at the beginning of every new case not to file unnecessary motions. The Fourth District has suffered from "motion sickness" for at least fifteen years. *See Dubowitz v. Century Village East, Inc.*, 381 So. 2d 252 (Fla. 4th DCA 1979).

The caseload statistics for the first eight months of 1994 are similarly staggering. Using the average number of filings and extrapolating over a twelve-month period, 3,846 new cases will have been filed by the end of 1994, just about two-thirds of those civil cases and one-third criminal. Using twelve as the number of judges deciding cases, an average of more than 304 cases will have been decided or otherwise concluded for each judge on the Court in 1994. The actual disposition figures will no doubt be greater than these projections, in light of the multiple simultaneous argument panels being used.

The Fourth District's efforts at controlling its temendous caseload have for years included screening newly filed notices of appeal for jurisdictional defects that necessitate dismissal. Prior the amendment to the Rules of Appellate Procedure requiring attachment of a conformed copy of the order being appealed to the notice of appeal, the Fourth District required attachment of a certified copy of the order so its appealability and the timeliness of the appeal could be determined *sua sponte*.

Therefore, the appellant's attorney would be wise always to attach a date-stamped conformed copy of the order on appeal that reflects when it was filed (and hence, "rendered" within the meaning of Rule 9.020(g)), especially where the order was *signed* more than thirty days prior to filing the notice. While clerks of the lower tribunals frequently do not file final orders for several days after they are signed, thereby extending the time for filing the notice to well after thirty days from the time an order is signed by the judge, where the notice is filed more than thirty days after the order is signed the Fourth DCA will not wait for a motion to dismiss your appeal from the appellee before ordering you to show cause why the case should not be dismissed as untimely. Nothing can ruin your day like scrambling to obtain a date-stamped judgment from an out-of-town clerk in response to an order to show cause. The same advice holds true for attaching date-stamped copies of post-judgment orders on motions that suspend rendition.

A final tip on filing the notice of appeal is the following directive from the Court: "The full name of the trial court judge who entered the order(s) sought to be reviewed shall be on the Notice of Appeal." The 4th DCA Notice to Attorneys that contains that directive is not sent out to the appellant's counsel until after the notice of appeal is received, so if you are new to practice before the Court you should add this requirement to your pre-filing checklist now.

Once the notice has been properly filed and the appellant has survived the initial screening, the time for ordering the record and transcript has arrived. The 4th DCA Notice to Attorneys and Parties that is sent to both sides contains two items that pertain to preparation of the record. First, do not direct the clerk of the lower tribunal to include any physical (non-documentary) evidence in the record without prior permission of the Fourth District. Second, "[m]otions that pertain to preparation of the record . . . shall contain a certificate that opposing counsel has been consulted and state whether there is an objection to the motion." The Fourth DCA is now among the courts that require a docketing statement.

Attorneys should double-check the record before briefing to make sure that all key documents are included. Where documents are filed in discovery or as attachments to notices of filing, they will not be included in the record unless counsel expressly directs the clerk to do so.

There just is no excuse for many of the motions filed in the Fourth District, prompting the Court to call upon the members of the Bar to police ourselves and to file motions only where really necessary. Where motions must be filed, additional requirements of the Court should be followed. In addition to requiring counsel's certificate that opposing counsel has been contacted on motions for enlargement of time (as required by Rule 9.300) and on "[m]otions that pertain to preparation of the record," as discussed above, the Notice to Attorneys requires a certificate on motions to reschedule oral argument. Better practice dictates that such a certificate be included in most if not all motions filed in any appellate court, but it is a requirement on these three types of motions in the 4th DCA. And please note that your certificate must reflect the other side's position, not just that efforts were made to discern it: "Attempts to contact opposing counsel are not sufficient."

On a motion to supplement record or other motion that requires attachment of exhibits or supporting papers, do not merely staple the documents to the motion. Instead, follow the Court's requirement that "[a]ll

record material supporting a motion shall be contained in an appendix with the motion." As the readers no doubt are aware, an appendix must contain an index of its contents, and motions have been denied for failure to follow the foregoing filing requirement.

The motion for enlargement of time for the service of a brief is, of course, a category of frequently filed motions in appellate courts. In the Fourth District, the Clerk of the Court has been delegated the authority to grant unopposed motions for a first extension of up to thirty days for a principal brief, and subsequent extensions not exceeding an aggregate of fifty days. Extensions for reply briefs shall be similarly granted by the Clerk for a period of up to fifteen days. Additional extensions and opposed requests for extension are decided by judges.

When a new final appeal is filed, the case is assigned to a motion panel, which remains on the case until all briefs and the record have been filed and the case is calendared for disposition, at which time the case is assigned to a merits panel. Most motions requiring judicial attention can be granted by a single judge. More substantive motions require two judges to concur, and case-dispositive motions require the attention of three judges, two of whom must concur.

One area in which the attorney should proceed with caution is in relying upon the automatic tolling provision of Rule 9.300 after filing of motions. While the Court recognizes that "[e]xtensions of time for preparation of the transcript or the record on appeal automatically extend the time for service of the initial brief," the Court imposes a limitation upon the automatic tolling provision by providing "that a motion to supplement the record filed by a party who has received an extension for a brief shall not toll the time for the brief."

On the subject of motions filed with the Fourth District: If you represent the movant, do not file a reply memorandum after receipt of the response in opposition to your motion. Such a reply is unauthorized and "will be stricken without consideration."

Not only are too many motions filed in the Fourth District, far too many so-called "emergency" motions are filed, as well as so-called "emergency" petitions for certiorari and other writs. If you have a true emergency requiring immediate action, be sure to deliver a copy of your petition or motion to opposing counsel by hand delivery or facsimile, so that it reaches your adversary as fast as it reaches the Court. Doubts are raised about the appropriateness of labeling a petition an "emergency", where it is hand-delivered to the Clerk's office on the Friday morning before a long weekend, but served by ordinary mail on the Respondent's counsel, to be received four days later at the earliest.

Most cases characterized as emergencies do not involve true emergency situations warranting application of the emergency procedures employed at the Court. Those procedures bring to a halt other work by the involved personnel, as the purported emergency is addressed. Judicial time and attention is often inappropriately consumed by matters mis-characterized as emergencies.

Clerk Beuttenmuller and Judge Dell suggest that the level of seeming urgency of most so-called emergencies could be appropriately conveyed to the Court — and the level of disruption kept to a minimum — if in such cases the Petitioner or movant requested that the matter be handled on an expedited basis, rather than call the matter an "emergency," when it is not an emergency.

Certain matters receive expedited handling as a matter of course. The Fourth District "has a policy of expediting, upon proper motion, appeals which concern . . . child custody, visitation privileges, or other substantial interests of children." The Court also has expedited procedures for adoption and termination proceedings. Judge Glickstein, long active in all manner of groups involved in children's issues, explained in an interview for this piece that expediting such cases is important because "time to a child is very different than to an adult."

Successful brief writing in the Fourth District is not any different than that practiced before any appellate court. Judge Farmer advises appellate attorneys to keep briefs short to hold the judges' attention, and reminds the readers to focus their arguments on a few strong issues (usually no more than three) rather than

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Should We Shorten the Section's Name?

Our Section's official name is a mouthful. Some of our members have been heard referring to us by shorthand versions such as "Appellate Section" or "Appellate Practice Section." Please note your feelings on the issue below. If there is sufficient interest in shortening the name, we will take further action to address the issue through appropriate channels, giving everyone ample opportunity to present their positions.

I feel that the name of our Section (check one):

____should be shortened

to_____.

____ should remain "Appellate Practice and Advocacy Section."

Signature: _____ Date: _____

Fax completed form to Roy D. Wasson (305) 666-2636 or mail to him at Suite 450 Gables One Tower, 1320 South Dixie Highway, Miami, FL 33130.

to use the shotgun approach.

Judge Klein advises that "candor is the most important thing" in the presentation of an advocate's position. "Admit your weak points" in the beginning, Judge Klein counsels, and you will gain the trust of the judges in advancing your strong points. Judge Warner warns that the Court will strike briefs that are single spaced, and that a committee is looking at other rule violations which may warrant the sua sponte striking of a brief, such as exceeding the page limitation.

One difference in preparing a brief for filing in the Fourth District: the Certificate of Interested Parties. The Certificate is required for recusal purposes and, as described in the Notice distributed to counsel at the beginning of a case, is much like the one required by the Eleventh Circuit: "The certificate shall immediately follow the cover page within a brief and shall precede the text in a petition or response . . . [,] shall list persons and entities in alphabetical order, have only one column, and be double spaced."

In addition to the usual number of hard copies, please send to the Court a 3½ inch diskette of the briefs on the merits. Unless your word processor is WordPerfect (or one that can save in WordPerfect format), you should check with the Clerk as to the format that can be read by the court's system. This procedure is voluntary, but compliance if feasible will be greatly appreciated. Also, label the diskette and envelope containing the diskette to avoid erasure. The Court now has a home page on the internet, address: http://justice.courts.state.fl.us/courts/4dca. As the Fourth District develops its computer capabilities, it hopes to use its internet site to get more information to the public.

Once the briefs are completed, all motions are decided or carried with the case, and the record is filed, the appeal is assigned to a merits panel. One of the three judges on the merits panel is designated as the "assigned judge," with initial responsibility for the disposition of the case, and whose identity is not disclosed to persons outside the Court.The decision-making process of the merits panel is assisted by the efforts of Staff Attorneys. Each judge on the Court is assigned two Staff Attorneys. One of the jobs of a Staff Attorney is to review the briefs and, where necessary, resolve conflicts in the statement of the facts by resort to the record on appeal. More than one of the judges emphasized the need for absolute accuracy in stating the facts and other matters of record in briefs. A misstated factual representation will not succeed in the first place, and the attorney's loss of credibility from such a misstatement (whether intentionally made or the result of carelessness) will remain beyond the case in which it occurs.

Staff Attorneys read all authorities cited by the parties in their briefs. A representation that a certain case stands for a certain proposition will not be accepted without verification by a Staff Attorney, a trained lawyer who checks cited authorities every day. The Staff Attorney's job does not stop there, however. The Staff Attorney performs independent research on important points of law in every case, and prepares a memorandum for use by the merits panel.

The memorandum contains an introduction, a statement of the issues as phrased by the parties (and as may be necessary, restated by the Staff Attorney in light of research), a statement of the facts, and an analysis section. In the analysis, the Staff Attorney discusses the dis-positive cases, applies them to the facts, and makes a recommendation for the decision in the case.

The assigned judge on the merits panel is charged with the responsibility of preparing and distributing this detailed written preliminary analysis of the case to the other panel members. All panel members review the briefs and that preliminary analysis, and conduct such other research as they see fit.

The Fourth District has a distinctive personality when it comes to oral arguments. The Court now screens all cases requesting oral argument, and requires a request for oral argument to state reasons why the court should grant the request. In some cases the Court completely dispenses with oral argument, and in others it limits the time for argument. Also, oral arguments at the Fourth District are tape-recorded. The tapes are kept until a decision is rendered and becomes final, and copies may be purchased from the Clerk's office. Unlike the Third District, the Fourth has a timed-light system to signal the advocate when argument time is running low and has expired. Judge Dell relates that the purpose of the signal lights is to serve as a visual reminder to the panel as much as to the attorneys. Apparently some panels of the Court have in the past disapproved of the use of physical evidence as demonstrative aids during argument. It would therefore be prudent to seek prior approval instead of setting-up a display in the courtroom without warning. Oral argument is not granted in a non-final appeal, extraordinary writ, or on a motion, except in exceptional circumstances. The time for oral argument in most civil and criminal final appeals in which it is requested and granted is twenty minutes per side. Judge Gunther advises the advocate to spend his or her oral argument time on the stronger issues, rather than arguing points that the briefing process has revealed are comparatively insubstantial. Where all else seems equal, the attorney presenting oral argument should be sensitive to questioning from the bench to disclose the areas on which more time should be spent. Other judges also counsel attorneys not to view questions as an interruption of their canned speech, only to return to the prepared text as soon as the question is directly answered, but as a means to move to the issue of interest to the questioner.

Judge Stone advises attorneys presenting oral argument to view the matter as "your chance to get our attention as to the principal reason why your case has merit." Judge Stone emphasized that the key word in his advice was "attention." Judge Farmer advises the advocate to quit while he or she is ahead, recalling one argument in which an attorney for one side was seemingly on the verge of winning the panel over, "and then he talked himself out of it." Especially where the panel has given your adversary a tough time you should

consider limiting yourself to a few choice words, invite questions, then sit down.

Immediately after oral argument, the panel has a preliminary decision conference at which the judges express their views. If in the majority, the assigned judge drafts and circulates the initial opinion. If the assigned judge is in the minority, the junior member of the majority prepares the initial opinion. In cases in which oral argument is denied or not requested, the merits panel meets each Thursday to conduct its decision conference and all other procedures are the same as in cases orally argued.

In addition to the two Staff Attorneys assigned to each judge, the Court also utilizes Central Staff Attorneys. Central Staff at the Fourth District Court of Appeal is a five-attorney office, which is responsible for screening and making final recommendations on all extraordinary writ petitions, and for making final recommendations on all non-final appeals, final appeals in summary criminal proceedings (filed under Fla. R. Crim. P. 3.800(a) and Fla. R. Crim. P. 3.850) and criminal appeals in which defense counsel has moved to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). It also assists the judges in collateral research questions as requested. These types of petitions and appeals, by their very nature, often call for expedited review and consideration. By concentrating on these cases, Central Staff facilitates their prompt screening and processing through the Court, and allows the judges and their own staffs to focus on the final appeals.

Section 11 of the Court's Manual of Internal Operating Procedures contains the procedures for en banc determination of cases, both prior to circulation of an opinion and on rehearing. Rule 9.331 prohibits requests for initial en banc hearings, and insofar as the Internal Operating Procedure section pertains to such pre-decision en banc review, it is offered for informational purposes only.

One more thing should be mentioned: The Court has a "Fastrack Method" of handling single-issue appeals. In appropriate cases, the time and expense of preparing a record on appeal and lengthy brief can be reduced where the parties elect to proceed under the Fastrack. Instead of a record, the parties in Fastrack appeals execute an agreed statement of the case and facts, may attach a short appendix, and are limited to fifteen-page briefs. Oral argument, if granted under the Fastrack, is limited to ten minutes per side. The Clerk's office will be more than happy to provide further information concerning the Fastrack. However, Judge Warner reports that this procedure is rarely used anymore.

The Judges of the Fourth District

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

John W. Dell has sat on the bench of the Fourth District since 1981. During his thirteen years as an appellate judge, he has served as Chair of the Conference of Appellate Judges Committee on Statistics and Workload, Chair of the Florida Conference of District Court of Appeal Judges Education Committee and is currently Immediate Past President of the Florida Conference of District Court of Appeal Judges. Judge Dell has also served as an ad hoc member of the Judicial Qualifications Commission. His Bar activities include service as Vice-Chair of the Rules of Judicial Administration Committee, of which he has been a member from 1986 to the present. Judge Dell has also served as member of the Appellate Rules Committee. As a lawyer, he served on the Florida Bar Grievance Committee, and was active with the Palm Beach County Bar Association in several committee posts. Born and raised in Dubuque, Iowa, Judge Dell received his LL.B. from the University of Notre Dame in 1962, converted to a J.D. Degree in 1967. From 1962 to 1971, he practiced with the firm of Miller, Cone, Owen, Wagner & Nugent. In 1971, he formed the law firm of John W. Dell, P.A., later known as Dell & Casey, P.A. In 1981, Governer Graham appointed him to serve on the Fourth District Court of Appeal. He served as Chief Judge of the Fourth District Court of Appeal from 1993 to 1995. He serves on the Rules of Judicial Administration Committee on Standards of Conduct Governing Judges now known as the Supreme Court Judicial Ethics Advisory Committee. He served as President of the Florida Conference of District Court of Appeal Judges from 1994 to 1995. He is a member of the Judicial Management Council of Florida and a member of its Long-Range Planning and Steering Committees. His publications are the "Professional Corporation Litigation," *Notre Dame Lawyer*; "Crop Damage Cases," *1967 Leading Cases, Trials and Techniques 211, American Trial Lawyers Association, 1968.* Judge Dell also received the Msgr. Jeremiah P. O'Mahoney Award for Outstanding Catholic Lawyer, 1986.

Gary M. Farmer, who enjoys his duties as an appellate judge so much

continued...

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the Appellate Practice and Advocacy Section of The Florida Bar.

that his wife says he would do the job for free, refers to the position as "an intellectual banquet." Judge Farmer preceded his higher education with three years of service in the United States Marine Corp. He received his Associate of Arts degree from Broward Junior College in 1968 with Highest Honors. Judge Farmer's baccalaureate decree was bestowed by Florida Atlantic University in 1970, where he was the Woodrow Wilson Fellow runner-up. Judge Farmer received his law degree from the University of Toledo in 1973. After graduation from law school, Judge Farmer served as a clerk for a United States District Court judge until 1975. From 1975 to 1991, he practiced law in Broward County, Florida and became active in Florida Bar activities including serving for several years on the Appellate Rules Committee, the Broward County Grievance Committee, and the Civil Rules Committee. Judge Farmer has sat on the Fourth District since 1991.

Hugh S. Glickstein, a native of Florida who was born in Jacksonville, received his undergraduate degree from Washington and Lee University (*Cum Laude*) in 1953, and his law degree from Washington and Lee two years later. Upon graduation from law school, Judge Glickstein entered active duty with the United States Naval Reserve, where he served until 1957. Prior to taking the bench, Judge Glickstein was in private practice in Broward County from 1957 to 1979. In the 1960s, he served as a part-time Assistant State Attorney, and in the 1970s served as City Attorney for Lauderdale Lakes, counsel to the Hollywood Civil Service Board, and special counsel to the cities of Plantation and Hallandale. In 1979, Judge Glickstein commenced his judicial career on the Circuit Court for the Seventeenth Judicial Circuit. Before completing one year on the circuit court bench, Judge Glickstein was elevated to the Fourth District. Judge Glickstein has sat on the Fourth District since 1979, where he has served as Chief Judge in the past. Judge Glickstein has served on the Board of Governors of The Florida Bar. In past years, he has been selected Judge of the Year by the Young Lawyers Section of The Florida Bar and by the Florida Chapter, American Association of Matrimonial Lawyers; and as Child Advocate of the Year, Children's Home Society, Intracoastal Division. He has received an Award of Merit from The Florida Bar, the Gina Ann Delgardia Memorial Award of Palm Beach County, and an award from the Florida Guardian Ad Litem Program. In 1989, The Florida Bar's Legal Needs of Children Committee created the Hugh S. Glickstein Child Advocate of the Year Award. He was the first chairperson of the above committee and of the ABA Family Law Section's Task Force for Children. His publications include: "1992: A Year to Rediscover the Best Interests of the Child," *University of Denver Law Review*; "The Appellate Judge's Role in Children's Issues that Sets a Model for the Nation," *American Family*; "Six Essential Ingredients of Extraordinary Judging and Lawyering: Craftsman-ship, Industry, Sensitivity, Courage, Fun and Service," The Florida Bar *Journal*. Judge Glickstein has been an adjunct professor at Nova Law Center and on the faculty of programs sponsored by the Broward and Palm Beach Bar Associations, The Florida Bar's Public Interest Law Section and the Florida Courts Administrator. He was the producer and moderator for the ABA program on perinatal addiction and was the Florida reporter for the Federal Eleventh Judicial Circuit, Appellate Judges' Conference Newsletter.

Robert M. Gross, the court's newest member, was born and raised in Washington, D.C. He is married and the father of two sons. Judge Gross received his undergraduate degree from Williams College in 1973 (Phi Beta Kappa, *Magna Cum Laude*), and his law degree from Cornell Law School in 1976. It was in law school that Judge Gross met Professor Irving Younger who ignited his interest in evidence and trial practice. He was appointed to the Fourth District Court of Appeal in November 1995 by Governor Lawton Chiles. Prior to his appointment, he served four years as a circuit judge in the civil and family divisions. Before his elevation to the circuit court, he was a county court judge for seven years, serving as the Administrative Judge from 1988 to 1990. Judge Gross began his legal career as an Assistant District Attorney under Robert Morgenthau in New York County. He served as an Assistant State Attorney in Palm Beach County and worked as an associate attorney with the West Palm Beach Law Firm of Moyle, Jones & Flanigan from 1981 through 1984. Judge Gross served on Governor Lawton Chiles' Task Force on Criminal Justice and Corrections, which issued its final report in 1995. He has been a faculty member of the Florida Judicial College since 1989, teaching evidence and building a judicial style.

Bobby W. Gunther received her B.A. and J.D. degrees from the University of Florida in 1963 and 1965, respectively. A native Floridian, she was in private practice handling civil litigation until 1973, when she joined the Broward County Court. She served for four years as Administrative Judge of that court. In 1981, Judge Gunther was elevated to the circuit court bench in the 17th Judicial Circuit. Throughout her tenure as a trial judge in both county and circuit courts, Chief Judge Gunther was very active with Bar committees and programs, serving as Chair of the Legal Aid Committee in 1975, on the Judicial Poll Committee in 1977, on the Bench Bar-Bench Liaison Committee from 1978 to 1981, on the Courts Committee, and on the Judicial Selection and Tenure Committee. Her Florida Bar activities include service as Vice Chair of the Summary Procedure Rules Committee, service as a member and Vice Chair of the Judicial Evaluation Committee (formerly Judicial Polls Committee) and service on the Judicial Nominating Commission Committee. Judge Gunther's civic activities include service as an instructor for Nova University's College Accelerated Program for Police Officers, service as Secretary and member of the Broward Commission on the Status of Women, membership on the Women's Detention Center Advisory Committee, Faculty Advisor for the general section of the National Judicial College, Instructor at the Florida College for New Judges, appointment

by Chief Justice Sundberg as a member of the Judicial Coordinating Counsel, appointment by Governor Graham as a member of the Governor's Task force on Criminal Justice System Reform, and appointment by Justice McDonald as a member of the Gender Bias Steering Committee and Gender Bias Commission. Judge Gunther is a member of the Education Committee Council of Chief Judges of Courts of Appeal 1995 to 1996. Judge Gunther was also the Chief Judge for the Fourth District Court of Appeal from July 1, 1995 to June 30, 1997.

Larry A. Klein, born in Cincinnati, Ohio in 1939, is one of those rare people named "Larry" instead of being a "Lawrence" with a nickname. Married and the father of three children, Judge Klein took the bench at the Fourth District in 1993. Prior to becoming a judge, he practiced appellate law as a solo practitioner and a partner with the appellate law firm of Klein and Walsh, following ten years as a partner with the Cone, Wagner, Nugent law firm in West Palm Beach. Judge Klein received his B.A. degree from the University of Michigan in 1962. He attended law school at the University of Florida School of Law, where he received his J.D. in 1964. Upon graduation from law school, Judge Klein became a research aide with the Second District Court of Appeal. Judge Klein's many Bar activities include service of a three-year term as Chair of the Florida Bar Appellate Rules Committee. He was a member of the Supreme Court Rules Advisory Committee from 1978 to 1982, and was member of a special committee appointed by the Florida Supreme Court to examine criminal appeals. Judge Klein served as Chair of a special committee appointed by the Florida Supreme Court to make recommendations on reducing appeals. On a local level, Judge Klein served as President of the Palm Beach Bar Association in 1975 to 1976. Judge Klein's honors and awards include membership on the Editorial Board of the University of Florida Law Review, listing in the "Best Lawyers in America" publication in four editions over the past 11 years, and listing in the "Best Lawyers in the United States" of *Town & Country Magazine*, June 1985 edition. He is also a fellow of the American College of Trial Lawyers, the American Academy of Appellate Lawyers, and the American Bar Foundation. Judge Klein's many civic activities include service on the Board of Directors of the United Way of Palm Beach County, the Board of Directors of the Florida Rural Legal Services, and the Board of Directors of the Palm Beach County Legal Aid Society, where he was President in 1974. He has served as a member of the Fifteenth Circuit Judicial Nominating Commission, and he has been a member and Chair of the Fourth District Court of Appeal Judicial Nominating Commission. Judge Klein's many publications include works on brief writing and other issues in appellate practice, as well as works on subjects as diverse as damages in injury to property cases to sovereign immunity. From 1967 to 1970, Judge Klein was the editor of the *Academy of Florida Trial Lawyers Journal*.

Mark E. Polen, a married father of six children, was born in 1945 in Aurora, Illinois. He received his Bachelor of Business Administration Degree from the University of Iowa in 1966. Judge Polen left Iowa immediately after graduation to attend the University of Miami School of Law, where he received his Juris Doctor in 1969. Upon graduation from law school, Judge Polen worked as a staff attorney, and later head attorney, for the Economic Opportunity Legal Services Program, Inc., in Miami. Thereafter, Judge Polen entered private practice, engaging in general civil practice with an emphasis on workers' compensation claimant's practice and appellate practice. Governor Askew appointed Judge Polen to be a Judge of Industrial Claims for Broward County in March of 1977. He served as an Associate Commissioner of the Industrial Relations Commission in Tallahassee for a period during 1978, then returned to his seat as a Judge of Industrial Claims on the county level until being appointed to the circuit court by Governor Graham in 1979. During his ten years as a Circuit Judge in Broward County, Judge Polen served in the Civil Division, Criminal Division, and Juvenile Division, where he also served as Administrative Judge. He gained experience as an appellate judge, serving two periods as an Associate Judge at the Fourth District in 1986 and 1988. Judge Polen has been very active in Bar and community organizations and activities. He has served on the Rules of Civil Procedure Committee, the Family Court Rules of Procedure Committee, the Rules of Judicial Administration, Selection & Tenure Committee, and as a member of the Executive Council, Chair-elect, and Chair of the Family Law Section. He is active with the Florida Conference of Appellate Judges, where he is a member of the Legislative Committee and has served on the Florida Conference of Circuit Court Judges. He is also a past President of the B'nai B'rith Justice Unit. Somehow he has also arranged his busy schedule to remain active in the Boca Raton Dog Club. Awards and honors bestowed on Judge Polen include an award for the Freshman Moot Court Competition at the University of Miami School of Law, election to the Bar and Gavel Honorary Society, and status as a founder of the International Law Society Journal: *Lawyers of the Americas*. He received the Gavin K. Letts Memorial Jurist of the Year Award from the American Academy of Matrimonial Lawyers in 1994. Judge Polen was appointed to the Fourth District by Governor Martinez in January 1989. In addition to his responsibilities on the Court, Judge Polen served as an adjunct professor at Nova Law School's Family Law Litigation Workshop from 1988 to 1996.

George A. Shahood was appointed to the Court late in 1994 to fill the vacancy left by the elevation to the Supreme Court of Justice Anstead. Prior to his appointment, Judge Shahood sat as a circuit court judge in the Broward Circuit Court, where he was appointed by Governor Bob Graham in 1981 and was subsequently elected and re-elected to that position. Judge Shahood received his law degree from Mercer University's Walter F. George School of Law in 1968. He received his Bachelor of Arts degree in political science from Emory University in 1959. Between college and law school, Judge Shahood served in the United States

continued...

Army for two years and worked for three years in the accounting department of a major manufacturing corporation. He attended the National Judicial College in Reno, Nevada. Among his many bench and Bar activities, Judge Shahood has served as Chairman of the Code and Rules of Evidence Committee of The Florida Bar, as a member of the Judicial Nominating Procedure Committee, a State Delegate to the American Bar Association Convention from the Conference of County Court Judges, and as an active member of many other state, local, and national professional community organi-zations.

W. Matthew Stevenson, was appointed to the Fourth District in November 1993 by Governor Lawton Chiles. He previously served for four years on the Palm Beach County Circuit Court bench where he was assigned to the civil and juvenile divisions. Prior to his initial appointment to the bench, Judge Stevenson served as a Chapter 120 Administrative Hearing Officer with the Division of Administrative Hearings in Tallahassee, worked in private practice as a certified circuit court mediator and was a trial attorney and commissioned officer in the United States Navy Judge Advocate General's Corps. In addition, he has served as a law clerk for the Honorable Joseph W. Hatchett on both the Florida Supreme Court and the United States Court of Appeals for the Fifth Circuit. Judge Stevenson's past and present professional associations include membership in the F. Malcolm Cunningham Bar Association, the Craig F. Barnard American Inn of Court, the Florida Chapter of the National Bar Association, and the National Council of Family and Juvenile Court Judges, the Florida Conference of Circuit Judges, and the Florida Conference of District Court of Appeal Judges. Judge Stevenson serves on the Board of Trustees of Palm Beach Atlantic College and on the Executive Board of the Boy Scouts of America, Gulfstream Council. Judge Stevenson is a native of Miami and resides in West Palm Beach with his wife and their three children. In furtherance of his solid commitment to the positive development of young people, Judge Stevenson officiates both little league and varsity high school football games throughout Palm Beach County.

Barry J. Stone, married and the father of three children, was born in Los Angeles in 1939. Judge Stone received his undergraduate degree from the University of Florida in 1960, and his law degree from the University of Florida in 1963. Judge Stone has served on the Fourth District since 1986, following appointment by Governor Bob Graham. Prior to becoming an appellate judge, Judge Stone sat on the circuit court bench in Broward County, having been appointed by Governor Graham in 1979 and re-elected without opposition in 1980. He is currently Chief Judge of the Fourth District Court of Appeal and President-Elect of the Conference of District Court of Appeal Judges. On the circuit court, Judge Stone served as Administrative Judge of the Criminal Division from 1985 to 1986. He has previously taught law students as an adjunct professor at Nova University. Prior to becoming a judge, Stone engaged in the private practice of law in Fort Lauderdale and Pompano Beach. His many past and present bench and Bar activities include membership on the Executive Committee of the Florida Conference of Circuit Court Judges, Presidency of the North Broward Bar Association, membership on the Executive Committee of the Broward County Bar Association, service on the Bench-Bar Commission and Bench Bar Implementation Committee of the Supreme Court and Florida Bar, among other committees and groups too numerous to mention. Judge Stone's many civic and community activities have included service of several terms as Chair of the Pompano Beach Planning Board, several terms as Chair of the Pompano Beach Local Planning Agency, membership on the Broward County Criminal Justice Task Force, the Broward County Criminal Justice Planning Council, the Broward County Mental Health Board, the United States Selective Service Board, and civic organizations including the Board of Trade, Chamber of Commerce, and Kiwanis. Judge Stone is formerly the President of the B'nai B'rith Justice Unit and the Stephen R. Booher Chapter of the American Inns of Court. He has also served as a synagogue president.

Martha C. Warner, has served as a judge on the Fourth District Court since 1989. From 1986 to 1988, Judge Warner sat on the Circuit Court bench of the 19th Judicial Circuit. She was engaged in the private practice of law from 1974 to 1985. Born in Saint Louis, Missouri, Judge Warner is married and the mother of three children. She graduated in 1971, Magna Cum Laude, from Colorado College, in Colorado Springs, Colorado where she received her Bachelor of Arts Degree, and was awarded Phi Beta Kappa. Judge Warner commenced her legal education at the University of Chicago Law School, which she attended from 1971 to 1972. Thereafter, Judge Warner trans-ferred to the University of Florida School of Law, where she received her J.D. degree with high honors in 1974. Judge Warner was a member of the Phi Kappa Phi Honorary Social Science Fraternity, and was elected to the Order of the Coif while at law school. She was a member of the editorial board at the University of Florida Law Review. Judge Warner has continued her legal studies while on the bench, participating in the University of Virginia's Masters of the Judicial Process Program, from which she received her L.L.M. in 1995. Judge Warner's Bar and bench activities include membership on the Florida Supreme Court's Standard Jury Instruction Committee from 1987 to the present, the Faculty of the Florida College of Advanced Judicial Studies from 1992 to 1997, the Appellate Rules Committee from 1990 to 1993, and the Court Education Trust Fund, from 1992 to 1995. Judge Warner is a member of the appellate workload sub-committee of the Judicial Management Council and has served on the Appellate Education Com-mittee of the Appellate Judges' Conference for the past five years.

Conclusion

We hope this article has been of interest to the readers and will be of assistance to the Court as the prac-

tice preferences of the Fourth District become more well-known to the appellate practitioner.

[1] The original version of this article appeared in the December 1994 edition of *The Record* and was prepared by Roy D. Wasson of Miami with assistance from Marilyn Beuttenmuller, Clerk of the Court. This version of the article was updated by Scott Mager of Fort Lauderdale.

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Section Conducts First Appellate Skills Workshop

Twenty-four attorneys recently spent three-and-a-half days improving their skills as appellate lawyers at an appellate workshop co-sponsored by the Section and the CLE Department of Stetson Law School. The principal instructors for the course were nine current or former appellate judges and former Section Chair Tom Elligett, who teaches appellate practice at Stetson. This was an intensive participatory workshop in which students wrote briefs, participated in writing exercises, and a number of mock oral arguments culminating with a final oral argument on the last day of the workshop. The oral argument was conducted with the same formality as an actual oral argument before a Florida District Court of Appeal.

Each student had an opportunity to have their brief reviewed by one of the judges and then sit down with that instructor in a one-on-one session for an extensive review of the brief, which included suggestions for improvement. Tracy Gunn, a member of the Section and a former law clerk to Judge Chris Altenbernd of the Second District Court of Appeal, attended the program and said "It's one of the best seminars I have ever been to. I would definitely recommend it for any attorney who wishes to practice appellate law, including experienced appellate attorneys."

There will be a more in-depth report about this program in the next edition of *The Record*, including information about how to register for next year's program.

Appellate Practice Workshop Faculty from left to right: Judge Peter Webster, Former Justice Steven Grimes, Judge Steven Northcutt, former Judge John Scheb, Judge William Van Nortwick, Tom Elligett, Judge Chris Altenbernd, Judge Martha Warner, Judge Jacqueline Griffin, Judge Larry Klein, Thomas Hall and Dan Pearson.

BOOK REVIEW CONT.
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clerks — in private, of course. *See Richard A. Posner, Overcoming Law* 192 (1995). The merits of the test aside, it is consistent with Professor Campos's desire for brevity.

What about jury instructions and law professors? As to the former, they "are often barely comprehensible to the lawyers in the courtroom, and there is no reason to imagine that the jury takes away more than the most rudimentary understanding of how it is being told to go about deciding the issues at hand." As to the latter, he states:

> Many a time I have sat among superbly educated, intellectually gifted legal academics, listening to a subtle discussion of some deeply controversial issue, waiting for that inevitable moment when the miracle of ethical judgment will be performed. For at that moment this group of talented legal scholars will metamorphose . . . into a veritable warren of rationalist rabbits, their heads bobbing in a blissful community of agreement, as the question is begged and the magic words uttered: "justice," "fairness," "principle," and of course, "reason."

You get the idea. Reading *Jurismania* is a curmudgeonly journey through familiar legal territories. You may enjoy it or, you may find it — in a phrase — Non Campos Mentis.

Scott D. Makar *is a partner in the Jacksonville office of Holland & Knight LLP. His practice includes trial and appellate litigation as well as administrative and legislative matters.*

[1] *The New Shorter Oxford English Dictionary* 1685 (Oxford, 1993).

Appellate Practice and Advocacy Section

Minutes Of The Executive Council Meeting

Held on June 18, 1998
Buena Vista Palace

I. Call to Order

Chair Christopher Kurzner called the meeting to order at 10:15. All persons in attendance signed the attendance sheet.

II. Approval of Minutes

The minutes of the previous meeting were approved.

III. Chair's Report

Chris Kurzner provided a brief report on the activity of the Section during the last year. Chris Kurzner noted Section accomplishments this past Bar year, which included:

A. *The Record*, the Section's newsletter, which did very well this year, given that all four issues were published.

B. CLE had greatly picked up and improved, including a successful federal seminar. Chris thanked Jack Aiello and Kitty Pecko for all their hard work on the seminar.

C. New Projects — Web page and the appellate workshop

D. The *Amicus Curiae* Committee, which under John Crabtree's proposal, has become more active and greatly improved.

IV. Committee Reports

A. Publications Committee

Cindy Hofmann reported on the Publications Committee. She thanked Angela Flowers, Editor, and Kim Staffa, Executive Editor, and noted that we had four excellent issues of *The Record* this year. Cindy then mentioned that the *Guide* was published this year without the rules—as a cost savings measure - and with updates on the DCA series with the help of Nancy Copperthwaite. Cindy sought feedback on this latest version of the *Guide*.

Finally, Cindy noted that three of our Section members published articles in The Florida Bar *Journal* this year: Raoul Cantero, III, Tom Elligett, and Hala Sandridge. Tracy Gunn is currently working on an article for the next issue and Jennifer Carroll will follow with another article. She invited all in attendance to think about future articles for The Florida Bar *Journal* and to forward them to Ben Kuehne, the next Chair of the Publications Committee.

B. CLE Committee

Jack Aiello, Chair of the CLE Committee, reported on the various seminars sponsored by our Section this past year.

1. The certification review course went very well and 55 attended. The goal was to bring in new speakers, which was done, and the seminar produced $6076 in profits. This is one seminar where profits are not shared. Jack Aiello noted that all eight who received their appellate certification attended the course.

2. Another seminar sponsored by the CLE Committee was the Eleventh Circuit seminar. There were 80 in attendance, with the video. As of yet, revenue figures were unavailable.

3. The CLE Committee is currently looking at new and creative ideas for the seminars.

4. The CLE Committee will continue to hold the Hot Topics Seminar. Again, it will be held in Tampa. This year, however, only judges will speak, with each District Court and the Supreme Court represented. The seminar is entitled "May It Please the Court: Hot Appellate Topics."

5. The Family Law Section wants to co-sponsor a seminar and the Committee presently has a Fall 1999 target date.

6. Tom Hall spoke on the Appellate Workshop, scheduled for July 22-25 at Stetson Law School. Tom reported that 25 had registered for the seminar (it was limited to 40) and that there will probably be a $2,500-$3,000 profit. The program and core group are excellent: enthusiasm is very high and everyone involved has put in a lot of time. Those attending will receive 24 hours of advanced credit.

C. Council of Sections

Ben Keuhne discussed the Council of Section's proposal with respect to possible restructuring of The Florida Bar CLE Committee which addresses broad policy issues. Some members of the Bar believe the CLE Committee is getting too large (it currently has 54 members) and would like to make it smaller, more select, and more of a

public policy group (president-elect Coker wants to reduce it to 14).

The proposal would allow the President to appoint half the members and the Council to appoint the other half. The proposal would not allow the Sections to appoint any members to the CLE Committee. The CLE Committee voted to oppose this effort and recommended changes to its Bylaws to streamline bureaucracy. Chris Kurzner requested a motion with respect to the Council's proposal. After discussion, Tony Musto moved in favor of each Section having a representative of their choice on the CLE Committee. This motion passed unanimously.

D. Other Business

John Crabtree reported on the *Amicus Curiae* committee. A discussion ensued about the difficulties inherent in operation of this committee. The main problem is that there is not much response from the Bar. To combat this problem, there will be flyers, a mail-out, and a Bar Journal article on *amicus curiae* practice. John prepared a proposal on the scope and functions of the committee. Raoul Cantero commented that, in other Sections, because of the bureaucracy, rarely, if ever, do they submit *amicus* briefs. John countered that we can be brisk and that we need to explain to our members the lead time needed. John's proposal was then submitted for vote and it passed unanimously.

Angela Flowers requested that individuals contact her with ideas for articles in *The Record*. A discussion then ensued about using *The Record* to advertise the Appellate Workshop using "quotes" from attendees.

V. Old Business

A. Section Web Page

Steve Stark reported on the status of the web page. The Section currently has software and numerous ideas for establishing the web page. Bob Glazier is providing Steve with assistance. The web page will not divulge material provided to members. By the September Bar meeting, a preliminary version will be available for review. The final version will probably be completed in early 1999. Steve urged the Council members to provide input.

B. Vendor Neutral Citation

Tom Hall briefly reported on the status of vendor neutral citations and indicated that there is less enthusiasm than there was originally to move to vendor neutral citations. If there is a change, Tom stated the Section will have the opportunity to comment.

VI. New Business

A. Chris Kurzner announced the nominations for officers and the Executive Council. All nominations were voted on unanimously.

B. Steve Stark announced the Sam Daniels' proclamation. Sam Daniels recently passed away. He was a real pioneer in appellate practice and a true professional. We will miss his wit and wisdom. Steve asked we vote for a proclamation recognizing Sam Daniels' contributions to appellate practice and recognizing him as an individual that appellate practitioners will continue to admire and respect in future years. The motion passed unanimously and the proclamation will be published in The Florida Bar *News*.

C. Judicial Management Council

Judge Webster reported on the activities of the Judicial Management Council:

1. The Council has concluded that there is an immediate need for a 6th District Court and in the next 10 years, a 7th District Court. The Council is leaning toward recommending that we implement both *now* so that we do not have to redraw districts later. The Council is now considering the proposal which would include a maximum of 12 judges in each district court. This number reduces problems regarding inconsistency and disharmony, and encourages collegiality.

Initially, the District Courts would have 10 judges which should be sufficient for the next 30 to 40 years. The Council does not presently know where the new District Courts would be located. Relief is needed most urgently in South Florida. The 1st, 4th and 2nd District Courts could also use some relief. The big question is whether there will be sufficient funds to create the new District Courts. Judge Webster requested that input be received by September. Each District Court costs approximately $20 million to implement.

It was moved that we support the work of the Committee with respect to implementation of two additional District Courts, and, at least, immediately one, and that both be implemented within two to four years. The motion passed unanimously.

2. Judge Webster also provided an update on the PCA Committee. Judge Webster stated the Committee has not decided anything yet. The Committee is contemplating holding a panel discussion on how appellate courts decide cases, with a question and answer session.

D. Appellate Court Judicial Evaluation Plan

Judges Webster and Judge Davis stated that the plan was in effect.

VII. Informational

A. Chris Kurzner referenced the statement of operations.

B. Chris Kurzner invited anyone who wants to attend the Section Leadership Conference to attend.

VIII. Final Remarks and Presentation of Awards

Chris Kurzner, as outgoing Chair, presented numerous awards, including awards to: Jennifer Carroll, who was active on many projects and CLE matters; Kim Staffa and Angela Flowers for their work on *The Record*; Lucinda Hofmann, our "utility infielder," who helped on the *Guide* and did a great job as Chair of the Publications Committee; Kitty Pecko, for her hard work on the federal seminar; Hala Sandridge; Jack Aiello, one of our Section's hardest workers; Judge Webster and Tom Hall for their work on the Appellate Workshop; and, last but not least, Jackie Werndli, who did a great job all year long keeping us on our toes, and who, sadly, will be leaving us soon. Roy Wasson, the incoming Chair, then presented Chris Kurzner with a plaque. Roy noted that Chris engineered the Section's creation and has provided us with four years of hard work. Chris responded that he was merely a "young pup with an idea." Chris indicated that it has been very gratifying to be a part of our Section and that he looks forward to staying active, although not quite as active as he has been this last year!

IX. Adjournment

The meeting was adjourned.

continued...

State Civil Case Update

by Keith Hope, Miami

Florida Supreme Court

"Pass-through" jurisdiction to the Florida Supreme Court will "pass through" said Court without review when the proceeding to be determined is not an appeal. *State of Florida v. Matute-Chirinos*, 23 Fla. L. Weekly S386 (Fla. July 16, 1998).

Yes, this is a criminal case, but sometimes it pays for civil appellate practitioners to read criminal cases (or at least the summary) because appellate issues and rulings that may apply to civil cases may be lurking there. In this case, having first accepted jurisdiction of a non-final order in a capital murder case pursuant to Article V, § 3(b)(5), the Court reconsidered and discharged the case for lack of jurisdiction.

Article V, § 3(b)(5) provides that the Florida Supreme Court

> [may review any order or judgment of a trial court certified by the district court of appeal *in which an* ***appeal*** *is pending* to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(Emphasis added). The non-final order in *Matute-Chirinos* which was certified by the district court involved a ruling granting defense motions concerning certain aggravating factors. The State filed a petition for common law certiorari in the Third District and requested that court pass through jurisdiction of the petition to the Florida Supreme Court, which the district court did. The Court held that "this constitutional provision does not provide this Court with jurisdiction to accept a case certified by the district court and pending in the district court, not on appeal but rather on a petition for a writ of certiorari." *Id*. at S386.

Both Article V, § 3(b)(5) and Fla. Rule App. P. 9.125 are routinely used to confer jurisdiction on the Supreme Court in civil cases as well as criminal cases. See, *e.g.*, *Krischer v. McIver*, 697 So. 2d 97 (Fla. 1997). Thus, the holding in *Matute-Chirinos* will apply equally to civil proceedings other than appeals, such as common law certiorari or those other non-appeal writs listed in Rule 9.100(a). Rule 9.125, however, does not contain the constitutional language of Art. V, § 3(b)(5): "in which an appeal is pending." Thus, it may be a good idea for the Appellate Court Rules Committee to consider a clarifying amendment in light of this decision.

District Courts of Appeal

(In the past, I have been remiss in not reviewing many (any?) family law, workers' compensation and probate cases. I start here trying to atone).

***FAMILY LAW CASE*: DISMISSED. Non-final order non-appealable. When does "*the*" issue of liability mean "*all*" issues of liability? *All* the time.**

Kalantari v. Kalantari, 23 Fla. L. Weekly D1461 (Fla. 3d DCA June 17, 1998).

In this case, the wife appealed from an interlocutory order denying a motion to set aside an antenuptial agreement under Rule 9.130(a)(3) (c)(iv), contending that the order determined "the issue of liability in favor of a party seeking affirmative relief[.]" The wife asserted that the order had the effect of granting affirmative relief to the husband, *i.e.*, by enforcing the antenuptial agreement. The Court dismissed the appeal for want of an appealable order.

It was the wife who sought affirmative relief — equitable distribution; whereas, the husband interposed the antenuptial agreement as a *defense*. Thus, the order was not one in favor of a party seeking affirmative relief. In addition, the Court stated in a footnote that it had previously held that Rule 9.130(a)(3)(iv) permits an appeal "*only* where the non-final order determines *all* of the liability issues, because the rule requires that the order determine '*the* issue of liability.'" *Id*. at D1461, n. 2. (emphasis in italics in original; in bold, added). In this case, there was another liability issue (child support), so the order also did not determine *the* issue of liability.

***WORKERS' COMP. CASE:* DISMISSED. Another non-final order which merits non-review because it is non-appealable for failing to contain the magic words.**

Cadco Buildings, Inc v. Roberts, 23 Fla. L. Weekly D1490 (Fla. 1st DCA 1998).

In this case, the claimant sought permanent total disability and other benefits. The employer/carrier ("e/c") raised defenses including that the claimant was ineligible for benefits under the e/c's policy. After a hearing, the Judge of Compensation Claims ("JCC") ruled for the claimant on this issue. The order recited that the parties had jointly moved for bifurcation to limit the hearing only to the issue of compensability and for the JCC to reserve jurisdiction regarding all other issues. The order stated:

> In the interest of judicial economy and efficiency, due to the financial concerns of the litigants in reducing the costs of further discovery and after giving consideration to the substantial amount and variety of benefits that are in dispute, the undersigned [JCC] granted the motions regarding bifurcation and reservation of jurisdiction.

Id. at D1490. After the Court's own motion to show cause why the appeal should not be dismissed issued responded to by the e/c, the Court dismissed the appeal for lack of jurisdiction. The Court reasoned that the order did not contain language satisfying the requirement of Rule 9.180(b)(1)(C) which permits an appeal from a nonfinal order that adjudicates compensability. The Court stated that a specific requirement of the rule requires the lower tribunal to *expressly* "certify in the order that determination of the exact nature and amount of benefits due to claimant will require substantial expense and time." The Rule does not contain the word "expressly" but the Court strictly construed the Rule to mean that citing to a 1984 decision of the Florida Supreme Court which said that review of nonfinal orders wastes court resources and needlessly delays final judgment. The Rules, however, which

are approved by the Supreme Court, permit appeal from a variety of nonfinal orders.

***PROBATE CASE*: DISMISSED. A "final" determination of a right or obligation of an interested person depends on whose ox is being gored.**

In re Estate of: Mary Helen Nolen; Owens v. Swindle, 23 Fla. L. Weekly D1266 (Fla. 2d DCA May 22, 1998)(On Motion to Dismiss).

In this case, the caretaker and her husband ("Caretakers") of a deceased 97 year old woman (Mrs. Nolen) appealed an order of the probate court which authorized the administrator ad litem to file an action against the Caretakers to set aside Mrs. Nolen's last will and revocable living trust which named the Caretakers as beneficiaries. The personal representative of the Estate moved to dismiss the appeal which the Court granted. The Court noted that Rule 9.110(a)(2) authorizes an aggrieved person to appeal a wide variety of orders entered by probate courts, many of which are interlocutory orders. To be appealable under the Rule, however, an order must "*finally* determine a right or obligation of an interested person." (e.s.) The Court also noted that the Rule became effective on January 1, 1997, and that before that date, jurisdiction for similar appeals was located in Florida R. Probate 5.100 which rule did *not* limit appeals to final determinations. However, prior case law under the probate rule normally recognized such a restriction.

The Court cited a recent Fourth District decision that held that Rule 9.110(a)(2) did not abrogate prior case law holding that a party's right to appeal arises when the judicial labor terminates on the issue involved as to such party. The Second District concluded that the appellate rule also did not abrogate prior case law which held that finality must be viewed *from the perspective of* the appellant who is challenging the order. Thus, in this case, while the order authorizing the lawsuit against the Caretakers may arguably have determined a right or obligation of the administrator ad litem, *from the perspective of the Caretakers*, the interlocutory order merely permitted the filing of the suit. The Caretakers are not aggrieved by this order because whether or not the outcome will be adverse to them will only be determined in the future. In other words, the order appealed from does not end the judicial labor on this issue as to the Caretakers and it does not finally determine any of their rights or obligations. As such, it was not an appealable order.

To preserve errors in jury selection, one must object (at least twice).

Mazzouccolo v. Gradner, McLain & Perlman, M.D., P.A., 23 Fla. L. Weekly D1465 (Fla. 4th DCA June 17, 1998).

In this med-mal case, during voir dire, defendants' counsel used three peremptory strikes on women and plaintiff's counsel made timely, gender-based objections. However, the objections apparently did not include mentioning the requirement that defense counsel articulate a gender-neutral reason for the strikes because the trial court did not require such articulation. That was error. However, plaintiff's counsel failed to preserve the error for appellate review by ultimately *accepting the jury* "without renewing his gender-based objection or conditioning his acceptance of the jury on the previous objection." *Id*. at D1465-66. Don't be nice — object twice.

And the final category for this time is: Knowing what *not* to do is good for you.
***E.g.*, Don't Do This! Tell the truth and the whole truth.**

Wood-Cohan v. Prudential Ins. Co., 23 Fla. L. Weekly D1614 (Fla. 4th DCA July 8, 1998)(Order Dismissing Appeal and Assessing Attorney's Fees Against Counsel for Litigating in Bad Faith).

In this case, counsel was not candid with the Court by not advising it on several pertinent occasions, that the final judgments being appealed were actually entered erroneously by clerical error and the trial court had so held and vacated them. Furthermore, when the truth finally became known to the Court, the same counsel filed a 15 page memorandum trying to justify jurisdiction to hear the appeals and making other equally meritless arguments. The Court granted the motion to dismiss the appeal and to impose attorney's fees and costs against appellant's counsel. The Court also noted that counsel's actions violated both Rule 4-3.1, Rules Regulating The Florida Bar ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous"), and Rule 4-3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client").

Another thing not to do:
If you certify that *you* have contacted opposing counsel regarding agreement for an extension of time for a brief, then *you* better have made the call.

Publix Supermarkets, Inc. v. Arnold, 23 Fla. L. Weekly D582 (Fla. 5th DCA Feb. 27, 1998).

In this case, appellant's counsel moved for an extension to file a brief and certified in the motion that he had contacted opposing counsel and that she had no objection to the motion. After the Court granted the motion, appellees' counsel filed an objection stating that she had not been contacted and that she did object to the extension because of the advanced age and failing health of her clients. The Court required moving counsel to respond and noted that to his credit, he admitted that he had made false statements to the Court but thought that his assistant had in fact contacted appellees' counsel and obtained agreement for the extension.

The Court pointed out that Rule 9.300(a) contemplates that *counsel*, not an assistant or secretary, contact opposing counsel regarding extensions. The Court held that because moving counsel knew that *he* had not made the call, he had failed to comply with the Rule and had made erroneous representations to the Court. The Court imposed a small monetary sanction.

In light of this decision, many of us will need to modify the common practice of having an assistant or secretary call for agreement to a motion for an extension for a brief. Appellate lawyers count heavily on extensions for briefs and the appellate courts

continued...

STATE CIVIL CASE UPDATE
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have mostly been generous in granting them. We should follow the Rules to the letter to ensure that this generous policy continues.

Well, that's it for this time. It's strange, but there seemed to be a common thread running through most of the cases reviewed — DISMISSAL!

Keith Hope *practices appellate law and litigation support in Miami. If anyone knows of an interesting case with appellate issues that would be of interest to the Section members, please contact him at (305) 361-3991; or by e-mail: hopeapp@aol.com.*

Evidence Sufficiency Issues and Fundamental Error in State Criminal Cases

by Richard J. Sanders

This Article addresses the following question: in criminal cases, can evidence sufficiency issues be considered as fundamental error, or is a contemporaneous objection necessary to preserve them?

In Florida, evidence sufficiency issues are considered fundamental error in some circumstances, but not in others. The courts, however, have rarely discussed why this is so. In those cases that have, the crucial question is this: could the state possibly have cured the evidence deficiency if the defendant had raised the issue at trial? If the answer is no, fundamental error may be found; if yes, the contemporaneous objection rule applies.

Even so, the distinction the courts are trying to draw here, while valid in the abstract, is meaningless as a practical matter. This is because, as discussed in Section 3 below, Florida Rule of Criminal Procedure 3.380 (c) authorizes post-verdict acquittal motions. Clearly, if an evidence sufficiency issue is raised post-verdict, the state cannot cure the defect with additional evidence. Thus, because an objection to evidence sufficiency may be considered timely even though made too late to cure the defect, it cannot be argued that the timely objection is required to promote that purpose in the first place.

Further, appellate courts should not be in the business of speculating on what the state "could have proven", had an issue been raised at trial. When the record contains no evidence to prove a particular fact, there is no principled basis on which the court can determine whether the state did or did not have evidence available to prove that fact.

The analysis in this Article will proceed as follows: the contemporaneous objection rule and fundamental error will first be discussed, followed by an analysis of theapplicable procedural rules and a discussion of the case law addressing this issue. The author will conclude that 1) the purposes of the contemporaneous objection rule would not be frustrated if evidence sufficiency issues were recognized as fundamental error; 2) the applicable rules could be read as supporting that same conclusion; and 3) the reasoning of those cases holding otherwise is flawed and has been undermined by more recent case law (*i.e.*, the cases that hold that a) double jeopardy bars retrial if an evidence sufficiency issue is successful, and b) such issues can be initially raised post-trial).

The Contemporaneous Objection Rule and Fundamental Error

The contemporaneous objection rule ensures that trial judges have an opportunity to address objections and correct errors at the trial level when the recollections of witnesses are freshest rather than years later in a subsequent trial or post-conviction relief proceeding.[1] This, in turn, "prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant."[2] More precisely, the rule

> ensures that a trial court will have the opportunity to avoid or correct alleged trial errors when they occur which in turn advances the orderly administration of justice. With the evidentiary issue properly presented below, the trial court is more likely to reach a satisfactory result and thus obviate the need for appellate review thereon. And even where an appeal ensues, the need for unnecessary retrials is considerably reduced. . . .
>
> Moreover, it is not wise to require a trial judge to assume the role of advocate by noticing and correcting alleged trial errors not complained of or properly brought to his attention. This runs contrary to the place of the trial judge in our system of justice and is on the whole unworkable to implement. . . .
>
> Finally, requiring proper objections to evidence tends to remove the gamesmanship from trials by eliminating the incentive for counsel to avoid making objections to trial error in the hope of winning a jury verdict while being assured of a reversal on appeal in the event of an adverse verdict. Counsel is required to object or waive the error for appellate review. Unnecessary re-trials taxing already overburdened judicial resources are thereby discouraged and the cause of justice advanced. . . .[3]

The contemporaneous objection rule is a functional procedural rule designed to achieve certain results. The role does not create substantive rights, and it is not to be blindly followed without regard to its purpose. The cases indicate that its primary purpose is to promote judicial economy by ensuring that potential error is identified and corrected as quickly as possible, thus obviating the need for appeals and retrials. Secondary purposes include keeping the trial judges in their proper role as neutral arbiters, and curbing unseemly "gamesmanship".

These purposes do not apply with equal force at all stages of trial proceedings:

> [T]he real purpose of the contemporaneous objection rule applies during a jury trial to assure correct rulings by the trial court on questions relating to the admissibility of evidence and instructions of law to the jury because judicial errors in those instances cannot be effectively corrected after the jury renders a verdict and is discharged and dissolved. There is no need to apply the rule strictly to pure rulings of law which can be corrected independent of a jury verdict. . . .[4]

Similarly, "[t]he purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge."[5]

Fundamental errors are exceptions to the contemporaneous objection rule, and, as such, the fundamental error doctrine is the converse of the contemporaneous objection rule. Thus, all appellate issues must be classified as falling under one or the other. Since the contemporaneous objection rule is grounded in policy considerations, one might assume the same of the doctrine of fundamental error.

However, unlike the contemporaneous objection rule, the fundamental error doctrine possesses a substantive component. Fundamental error is not limited to those circumstances in which the policy objectives of the contemporaneous objection rule do not apply; rather, fundamental error will occasionally be found in circumstances where the purposes of the contemporaneous objection rule are clearly present (*e.g.*, issues concerning jury instructions, closing arguments, or evidence admission).[6]

Thus, fundamental error may be found even where the system will suffer some burden if error is recognized, and even though the error could have easily been corrected if timely raised. Error is recognized in these cases because the circumstances leading to the defendant's conviction were so basically flawed that the reliability of the conviction is clearly questionable.

There are several definitions of fundamental error in the Florida case law. It is an "error which goes to the foundation of the case or goes to the merits of the cause of action",[7] or "amount[s] to a denial of due process."[8] It has also been said that "the doctrine of fundamental error should be applied. . . where the interests of justice present a compelling demand for its application",[9] or where "a verdict of guilty could not have been obtained without the assistance of the alleged error."[10]

Evidence Sufficiency and Fundamental Error — In General

A conviction based on legally insufficient evidence would appear to be a quintessential example of fundamental error. "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[11] Thus, it would seem that a conviction on insufficient evidence would amount to a denial of due process, as recognized in *Castor*. Similarly, as enunciated in *Smith*, the interests of justice would seem to present a compelling demand for a waiver of the contemporaneous objection rule in cases where the defendant was convicted on legally insufficient evidence. Certainly, a verdict of guilty could not have been obtained in accordance with *Delva*, had a proper acquittal motion been made.

Further, the policy objectives of the contemporaneous objection rule would not be undermined if fundamental error is recognized in this context. It does not appear that the judicial system would be unduly burdened at either the appellate or the trial level. Nor would it force the trial court into an improper role, or encourage any improper "gamesmanship".

At the appellate level, requiring a contemporaneous objection to preserve evidence sufficiency issues is not likely to significantly reduce the court's workload, particularly if fundamental error is recognized in at least some circumstances. As it stands now, appeals from criminal convictions are virtually automatic, yet evidence sufficiency issues are not raised all that often. Extra judicial work, therefore, would be needed only in those rare cases where there is a serious question concerning evidence sufficiency that was not raised at trial. Presumably, in those rare cases, appellate counsel would argue that: 1) the issue was preserved, and/or 2) the issue is one of fundamental error under the existing exceptions to the contemporaneous objection rule. Thus, the appellate court would have to address these issues in any event.

Since evidence sufficiency issues, on the merits, tend to be relatively simple, it is likely that judicial economy would best be served by recognizing a blanket fundamental error doctrine in this context. Such a recognition would allow appellate courts to proceed straight to the merits without being detoured into issues of preservation and the scope of the existing limited fundamental error doctrine.[12] Thus, maintaining the contemporaneous objection rule — particularly a rule with exceptions — would not significantly reduce the courts' workload on direct appeal.

Furthermore, the trial courts' workload would not significantly increase if fundamental error is recognized in evidence sufficiency issues. The trial court would have additional work only in those rare cases where the issue actually succeeds, and, the remedy in those rare cases — remand for entry of a judgment of acquittal — is no more burdensome than a remand to correct an illegal sentence.

Conversely, the contemporaneous objection rule seems to increase the courts overall workload at another point: motions for post-conviction relief based on trial counsel's failure to raise the evidence sufficiency issue. Failure to raise a valid evidence sufficiency issue would appear to be per se ineffective assistance of counsel. What tactical reason could possibly justify the failure to raise such an issue? True, counsel may legitimately forego making a motion during trial because he or she does not wish to alert the state to the deficiencies in its evidence (which it might be able to cure), but what could possibly justify counsel's failure to make a post-trial motion? It would appear that post-conviction relief would be automatic in this context.[13]

Thus, addressing evidence sufficiency issues as fundamental error on direct appeal may serve the purpose of judicial economy best, as doing so

continued...

EVIDENCE SUFFICIENCY ISSUES

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would eliminate the need for post-conviction proceedings (which would not commence until after the defendant had tried to convince the appellate court to address the issue on direct appeal). This, in turn, means that requiring contemporaneous objections for evidence sufficiency issues would not significantly advance the goal of judicial economy, and may, in fact, hinder it. Furthermore, recognizing fundamental error would not put trial judges in the position of being advocates with respect to evidence sufficiency issues. Indeed, as discussed in the next Section, Rule 3.380(a) of the Florida Rules of Criminal Procedure specifically authorizes trial judges to consider such issues on their own initiative.

Finally, a contemporaneous objection requirement does not advance the policy of removing the gamesmanship from trials,[14] at least as long as Rule 3.380 allows post-trial acquittal motions. As just noted, while there may be tactical reasons for foregoing an acquittal motion during trial, there are no such reasons for failing to make a post-trial motion. Further, since the defendant is the only one who suffers from the delay if a valid evidence sufficiency issue is not raised at trial, there is no tactical advantage to be gained from deliberately failing to raise it in a post-trial motion and then attempting to achieve appellate relief under the doctrine of fundamental error. Thus, the failure to raise the issue in a post-trial motion is an oversight, not some sneaky "gamesmanship". All this leads to the conclusion that there is no reason for applying the contemporaneous objection rule in this context.

However, as discussed below, the Florida cases do not adopt this reasoning. Before discussing these cases, however, two procedural rules will be analyzed: the rule of criminal procedure addressing acquittal motions and the rule of appellate procedure outlining the scope of criminal appellate review.

Rules 3.380 and 9.140(h)

Rule 3.380 provides:

> **(a) Timing.** If, at the close of evidence for the state or at the close of all the evidence in the case, *the court* is of the opinion that the evidence is insufficient to warrant a conviction, it *may, and on the motion of the prosecuting attorney or the defendant shall*, enter a judgment of acquittal.
>
> **(b) Waiver.** A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant, but after introduction of evidence by the defendant, the motion for judgment of acquittal must be renewed at the close of all the evidence. The motion must fully set forth the grounds on which it is based.
>
> **(c) Renewal.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, the *defendant's motion may be made* or renewed *within 10 days after the reception of a verdict and the jury is discharged* or such further time as the court may allow.[15]

The emphasized language should be immediately noted. Subsection (a) gives the trial court the discretion to grant an acquittal even in situations where neither party moves for it. This eliminates any argument that the contemporaneous objection rule is needed to keep trial judges from assuming the role of advocate with respect to acquittal motions. Further, this language also indicates that unpreserved evidence sufficiency issues could be raised on direct appeal without resort to fundamental error: the issue could be phrased as "the trial court abused its discretion by failing to grant an acquittal on its own motion." There are no Florida cases addressing the validity of this argument.

Subsection (c) undermines any argument that the contemporaneous objection rule serves any "cure of defect" purpose in this context. Under this subsection, "[a] ground for judgment of acquittal may be raised for the first time in a post-trial motion."[16] In *State v. Stevens*,[17] the defendant was convicted of auto theft for failing to comply with the terms of a long-term auto lease. In a post-trial motion, he argued for the first time that the evidence was insufficient "because the State failed to prove that the creditor has complied with the requirements of Section 812.014(3), under which there is no violation of the theft statute when there is a lease for one year or longer unless a written demand for the property is made."[18] After concluding that subsection (c) authorized the post-trial raising of such an issue, the court went on to assert:

> Moreover, our conclusion will further the interests of justice in Florida. Our interpretation of the rule provides a procedural mechanism through which a substantive error can be corrected within the time allowed for this motion. Empowering a trial court with the ability to enter a judgment of acquittal when it is of the opinion that the evidence is insufficient to warrant a conviction upon motion under the requirements of Rule 3.380(c) will thus promote judicial economy.[19]

Clearly, the state could not reopen its case to prove the missing element in *Stevens*. Further, the issue that succeeded in *Stevens* seems to present a prime example of the type of deficiency that the state may have been able to cure had the issue been raised at trial. The court, however, seemed unconcerned by this indicating that it did not feel that acquittal motions should serve any "cure the defect" purpose.

Stevens' assertion that the recognition of post-trial acquittal motions "further[s] the interest of justice [and] promote[s] judicial economy", should also be noted.[20] As discussed earlier, the contemporaneous objection rule serves similar interests. Thus, it may appear that *Stevens* implicitly endorses the contemporaneous objection rule in this context. But, if the interests of justice and judicial economy are furthered by allowing the trial court to initially consider an evidence sufficiency issue in a post-trial motion, these same interests should be equally served by recognizing such issues as fundamental error.

Presumably, when *Stevens* talks of "promot[ing] judicial economy", it means that the trial court's granting of a post-trial acquittal motion would eliminate the need for an appeal. But it would only eliminate the need for a *defense* appeal; the state can (and, probably quite often, does) appeal the granting of such motions.[21] If *Stevens* means that justice and judicial economy are best served by considering evidence sufficiency issues as soon as possible, then such issues

should be recognized as fundamental error.

It is true the subsection (b) of Rule 3.380 requires that "[acquittal] motion[s] must fully set forth the grounds on which [they are] based", and seems to indicate that the issue is waived if the grounds are not "fully set forth."[22] However, as discussed in the next three Sections, it is beyond question that evidence sufficiency issues will not be considered to be waived, in at least some circumstances, even though subsection (b) appears to adopt a blanket waiver rule. Further, as noted in the previous Section, a waiver rule in this context serves no useful purpose.

In sum, Rule 3.380, as interpreted by *Stevens*, forecloses any argument that a contemporaneous objection rule serves any valid purpose with respect to acquittal motions. *Stevens* also indicates that judicial economy is best served by recognizing fundamental error in this context.

The other procedural rule to note here is Florida Rule of Appellate Procedure 9.140(h), which outlines the scope of appellate review in criminal cases:

> The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled. In death penalty cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.[23]

The rule could be read as pointing in both directions on this issue. The second sentence seems to recognize the doctrine of fundamental error; but is the defendant "entitled" to a judgment of acquittal "in the interest of justice" if the issue was not preserved? The third sentence is also ambiguous: does it mean that "insufficiency of the evidence" can be fundamental error only in death penalty cases, or does it simply direct the court to consider the sufficiency of the evidence in such cases even if the issue is not raised (and thus does not address the issue of fundamental error in the non-capital context)?

As discussed in the next Sections, the Florida Supreme Court ruled in 1974 that the "interests of justice" language in Rule 9.140(h) does not classify evidence sufficiency issues as fundamental error.[24] However, in 1987 (after it had been established that retrial after a successful evidence sufficiency appeal violated principles of double jeopardy), a district court reached the opposite conclusion in *Williams v. State*.[25] There are no other relevant cases interpreting this rule.

Thus, although Rules 3.380 and 9.140(h) are subject to some interpretation, they can easily be read as supporting the argument that the contemporaneous objection rule does not apply to evidence sufficiency issues. We turn now to a discussion of the cases.

Florida Supreme Court Cases

The Florida Supreme Court has considered this issue on several occasions. The cases establish a general rule requiring a contemporaneous objection, subject to a limited fundamental error exception. However, the logic supporting these cases is unclear.

In *State v. Barber*,[26] the defendant argued that the state had not proven the value of the property in a grand larceny prosecution. The Court held "unless the issue of [evidence] sufficiency . . . is first presented to the trial court by way of an appropriate motion, the issue is not reviewable on direct appeal. . ."[27] The Court also said the issue could not be addressed on direct appeal under the rubric of ineffective assistance of counsel because appellate courts cannot address issues not ruled upon by the trial court. Finally, the Court held that relief could not be obtained under the "interests of justice" language quoted above[28] because "Cr. P. R. 3.850 provides a means [to raise] this issue."[29]

Barber did not discuss why a contemporaneous objection is required in this context. However, when *Barber* was decided, a successful appellate argument on evidence sufficiency generally resulted in a remand for a new trial as it was only later established that double jeopardy principles barred a retrial.[30] Thus, when *Barber* was decided, the contemporaneous objection rule may have been justified by its "judicial economy" purpose.[31] However, *Barber* was recently followed in *Archer v. State*.[32] Again, the Court did not discuss what purpose the contemporaneous objection served.

Ten years after *Barber*, the Court recognized an exception to its contemporaneous objection requirement. In *Troedel v. State*,[33] the defendant broke into a private home and killed two persons. He was convicted of two counts of first degree murder and two counts of burglary: one count of armed burglary and one count of burglary with assault. The trial court entered judgment on both burglary counts, but only sentenced on one, asserting the two counts were "the same charge."[34] The defendant did not challenge the entry of the two convictions for burglary, either at trial or on appeal.

Nonetheless, the Court held that, since the two forms of burglary were both enhancements of the same basic burglary offense and there was "no evidence of more than one such lawful entry", the trial court committed fundamental error in not merging the two burglary counts into a single conviction. The court said it could reach the issue even though the defendant never raised it because "*a conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error*."[35]

Troedel does not cite to *Barber*, and it is not clear whether the cases are consistent. Granted, there are factual distinctions between these cases, yet, *Troedel* flatly says it is fundamental error to be convicted of "a crime totally unsupported by evidence".[36] *Barber*, however, just as flatly states that "unless the sufficiency of the evidence . . . is first presented to the trial court [in] an appropriate motion, the issue is not reviewable on direct appeal . . . ."[37]

These cases cannot be reconciled by simply stating that *Troedel*'s language is a bit overbroad and that the case creates only a very narrow exception to *Barber*. Two problems arise with this approach. First, how (and on what basis) do we rephrase *Troedel* to reach its "true" narrow meaning, and, second, assuming we can do that, why do we only allow this narrow exception and not a broader one?

Thus, *Troedel* could be rephrased along the following lines: it is fundamental error (and an exception to the

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Barber contemporaneous objection rule) to convict a defendant of two violations of the same statute when the undisputed evidence establishes only one violation. The first problem with this rephrasing, however, is that it is a far cry from what the Court actually said, and if the Court meant *Troedel* to be so narrow, why didn't it say so? Beyond that problem lies the question of why we would allow only this narrow exception to *Barber*'s contemporaneous objection requirement. What is the principle that requires us to limit the doctrine of fundamental error here?

The limiting principle stated in *Troedel* is "a crime totally unsupported by evidence." Since *Troedel* did not purport to overrule *Barber* (but, presumably, only created an exception to it), it would appear that not all evidence sufficiency issues concern "a crime totally unsupported by evidence"; rather, there is at least one other category of evidence sufficiency issues. However, it is not clear what that "other category" might include; "the evidence was insufficient but the conviction was not 'totally unsupported by evidence'"? In other words, the conviction was supported by some evidence, just not enough to eliminate all reasonable doubt?

Assuming this is the distinction *Troedel* is trying to draw, and assuming we can determine when a conviction is *totally* unsupported by evidence[38], the question remains: why recognize fundamental error in the one case but not the other? Why is conviction of a crime *totally* unsupported by evidence so different (different enough to trigger the fundamental error doctrine) from conviction of a crime that is only *insufficiently* supported by evidence?

We will return to these questions after a discussion of the district court case law.[39] The Second District cases will be discussed first, because that court has considered this problem in some detail. However, the solution that the Second District has proposed fails to answer the questions raised above and creates problems of its own.

Second District Cases

As in the Supreme Court, the cases from the Second District seem to conflict on this issue. The cases recognizing fundamental error are *Dydek v. State*,[40] *Nelson v. State*,[41] and *Burrell v. State*.[42]

In *Dydek*, the defendant pled no contest to possessing paraphernalia. On appeal, the court held that the factual basis was insufficient to support the plea. The item at issue was a cigarette case containing a spoon, two pipes, a razor blade, and a small quantity of white powdery substance. Noting that the paraphernalia statute at that time prohibited only items "used to unlawfully administer any controlled substance", the court said

> "the evidence clearly indicates, and there is not even any speculation to the contrary, that the cigarette case in question was used only as a container in which to carry or store certain instruments (one or more of which may themselves have been properly classified as paraphernalia); there is absolutely no evidence that it could even possibly be used to administer a controlled substance."[43]

The court then held that "there was insufficient evidence here to establish a prima facie case", and thus the trial court erred in accepting the plea.[44] Finally, the Court stated as follows:

> although appellant did not raise this precise issue either in the trial court or on this appeal, an appellate court will always consider a fundamental error that is apparent on the face of the record. . . . *We can think of no error more fundamental than the conviction of a defendant in the absence of a prima facie showing of the essential elements of the crime charged*.[45]

In *Nelson*, the defendant was convicted of felony petit theft and resisting arrest without violence. The defendant ran when the police saw him standing on the street corner and, after he was chased and caught, the stolen items were found in his possession. The police had no information regarding the theft when they first saw the defendant. On appeal, he argued that the resisting conviction could not stand because the police were not engaged in any legal duty when he ran (*i.e.*, they had no reason to detain him and thus his running did not obstruct any investigation or other police duty). The court reversed the resisting conviction, as follows:

> Generally, a defendant must articulate the correct grounds in a motion for judgment of acquittal in order for an appellate court to review the issue. . . . This case, however, is *not the usual failure of proof case*. Instead, this is a situation where Nelson's conduct did not constitute the crime of resisting an officer. Even though this issue was not raised in the trial court, it would be *fundamental error not to correct on appeal a situation where Nelson stands convicted of a crime that never occurred*. . . .[46]

In *Burrell*, the defendant stole the victim's property, then took it to a flea market to sell. He was convicted by a jury of violating Florida Statutes Section 812.019(2) which outlaws "initiat[ing], organiz[ing, etc.] the theft of property and traffick[ing] in such stolen property. . . ."[47] Since the statute applied only to someone who "has no direct contact with the [stolen] property", and the state's evidence "proved direct contact with the property", the court reduced the conviction to one for a basic dealing in stolen property offense.[48] The court did so even though the defendant did not raise this issue at trial because:

> There is not a case in which the state's failure to prove the offense involves a technical matter that could have been resolved if the issue had been raised in a motion for acquittal. It is clear that the state could not have proven an essential element for a violation of Section 812.019(2) in this case because all of the evidence established that Mr. Burrell had "direct contact with the property" in which he trafficked.[49]

In contrast to these three cases are *Stanley v. State*,[50] and *Hornsby v. State*,[51] both of which held to the contemporaneous objection rule. In *Stanley*, the defendant was convicted of felony criminal mischief. On appeal, he argued that the state had failed to prove the requisite amount of damage (*i.e.*, $1,000.00 or more). Relying on *Nelson*, he argued "it was fundamental error because he stands convicted of a crime that never occurred."[52] Affirming, the court distinguished *Nelson* by stating: "The state merely failed to prove the amount of damage but did prove that damage

occurred to the building. Thus, *Stanley does not stand convicted of a crime that never occurred*. We accordingly affirm Stanley's conviction for criminal mischief."[53]

Finally, in *Hornsby*, the court affirmed a conviction for battery on a law enforcement officer and held that the defendant's motion for judgment of acquittal did not preserve any issue for appeal. The court's opinion did not indicate what facts the state proved, nor what grounds the defendant attempted to argue on appeal. The court asserted as follows:

> In a *typical failure of proof case*, such as this one, the defendant must articulate the legal grounds in a motion for judgment of acquittal for an appellate court to review the issue. . . . We observe that *this is not a situation where the defendant's conduct clearly did not constitute the crime for which he was convicted. If it were, it would be fundamental error*. . . .[54]
>
> Under these cases, fundamental error occurs in the following circumstances:
>
> 1) No prima facie showing of the essential elements of the crime charged;[55]
>
> 2) conviction of a crime that never occurred;[56]
>
> 3) conviction of an offense for which the state could not have proven an essential element;[57] and
>
> 4) the defendant's conduct clearly did not constitute the crime for which he was convicted.[58]

In contrast, as illustrated in *Hornsby*, fundamental error will not be recognized in a typical failure of proof case. This appears to mean, in accordance with *Burrell*, that the state's failure to prove the offense involves a technical matter that could have been resolved if the issue had been raised in a motion for acquittal.

There are several problems with the distinctions the court is trying to draw. First, what exactly *is* the perceived distinction? It may be helpful at this point to divide evidence sufficiency issues into three categories: positive element insufficiency, negative element insufficiency, and identity insufficiency.

"Positive element insufficiency" refers to a *Burrell*-like scenario: the state's evidence affirmatively proves that the defendant did not commit the crime of conviction (although he may have committed a different crime). "Negative element insufficiency" refers to a *Stanley*-type situation: there is no evidence in the record to establish an element of the crime of conviction, but the evidence does not affirmatively disprove that elements (as it did in *Burrell*). "Identity insufficiency" means there is no doubt that someone committed the crime of conviction and the only question is whether it was the defendant.

The statements in *Nelson*, *Burrell*, and *Hornsby* seem to lean toward a positive element insufficiency exception to the contemporaneous objection rule. Fundamental error will be found if the state's evidence affirmatively shows that the crime of conviction never occurred because the state not only did not, but could not, have proven an essential element.

Dydek seems to embrace negative element insufficiency as well because under *Dydek* it is fundamental error if there is "[no] prima facie showing of the essential elements of the crime charged."[59] Yet, *Burrell* says fundamental error will not be found if the evidentiary deficiency "could have been resolved had the issue been raised".[60] This in turn seems to either 1) reject the doctrine of fundamental error for negative element insufficiency (because the mere lack of evidence to establish an element does not necessarily mean the state could not have proven the element, had the issue been raised), or 2) require the appellate courts to subdivide negative element insufficiency issues into those that could have been resolved and those that could not have.

The problem here is that this requires the court to speculate on what the state could have proved if the issue had been raised. By definition, this issue only arises if the state's proof is lacking with regard to some element of the crime. Thus, on what basis is the court to conclude that the state could have proved that element, had the defendant raised the issue?

The court in *Stanley* seems to have adopted some type of "included offense" logic: Stanley does not stand convicted of a crime that never occurred because the state proved him guilty of the lesser included offense of misdemeanor criminal mischief, even though it did not prove a felony amount of damage.[61] Yet, if the damage amount is an element of the offense of felony criminal mischief[62], why does Stanley not stand convicted of a crime that never occurred[63], even though he did commit a necessary lesser included offense of that crime?

The only reason offered for the distinctions the court is attempting to draw is *Burrell*'s reference to "technical matter[s] that could have been resolved if the issue had been raised."[64] It is not clear what is meant by "technical matters"; nor is it clear how the court can decide whether the matter "could have been resolved." Presumably, this means that the state could have introduced evidence to cure the defect. Aside from the fact that courts must speculate on this, the "cure the defect" purpose for requiring a contemporaneous objection will not be maintained as long as Rule 3.380 of the Florida Rules of Criminal Procedure allows post-trial motions.

Further, if "cure the defect" is the basis for requiring a contemporaneous objection, how do we explain *Dydek*? In *Dydek*, the state could have cured the problem if the issue had been raised: the information could have been amended to name the items *found in* the cigarette case as the unlawful paraphernalia.[65] Why does the contemporaneous objection rule not apply here? In sum, it is not clear what distinction the court is trying to draw in these cases, and it appears that this distinction is based on the "cure the defect" purpose of the contemporaneous objection rule; a purpose that is rendered nugatory by Rule 3.380(c)

These cases all address issues of element insufficiency. There are no Second District cases addressing issues of identity insufficiency. With identity insufficiency, we are not dealing with "a crime that never occurred". On the other hand, it is hard to argue that identity is a "technical matter" and if the defendant did not commit the crime it would seem that "his conduct clearly did not constitute the crime for which he was convicted". Is identity insufficiency a matter of fundamental error? Can we assume an identity issue "could have been resolved" if raised at trial?

Presumably, the distinction the court is trying to draw here is the

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same one the Supreme Court was trying to draw in *Troedel*. While a crime totally unsupported by the evidence could be read as including both positive and negative element insufficiency, it is not clear if that phrase would include identity insufficiency. However, *Troedel* is no more successful than the Second District cases in answering the questions just raised.

The Other District Courts

The cases from the other district courts follow the same pattern. A leading case is the *en banc* decision of *Williams v. State*.[66] In that case, the defendant's accomplice shoplifted some goods from a store, then got into a scuffle with a security guard in the parking lot. On appeal, the court held the defendant's robbery conviction was fundamentally erroneous because the state did not prove that any force or violence was used in the taking of the property.[67]

The court also rejected the state's argument that the defendant should seek relief through a Rule 3.850 motion:

> The defendant in this case is entitled to immediate relief from a wrongful conviction which should not be made to depend on his ability to prove that his trial counsel was incompetent and ineffective. . . .If a defendant himself cannot by express agreement confer authority on a trial court to impose an illegal sentence that cannot be corrected on appeal [citation omitted], why should a defense counsel be able to confer, by oversight, ignorance, neglect, or insufficient argument, authority on a trial court to impose an illegal conviction that cannot be corrected on appeal?[68]
>
> The substance in this case is: Did a robbery occur? Did the defendant do it or did he aid the robber? The answer to both questions is "no". Elementary justice in criminal cases is for a defendant to be found guilty of crimes he committed and not guilty of crimes he did not commit. Regardless of the procedural technicalities that the criminal justice system imposes upon itself, that system has but one product — justice — and it is unjust for a defendant to be in prison for a crime that never occurred.
>
> We hold that . . . being *convicted of a crime that never occurred* is error of such fundamental nature as is correctable on appeal without an objection below and must be reversed "in the interest of justice." Alternatively, if necessary to do justice, we would treat this appeal as a petition for certiorari and quash the conviction (1) because it departs from the essential requirements of law [citation omitted] or (2) because the error here is so serious as to result in a miscarriage of justice [citation omitted], or we would treat the instant appeal as a petition for writ of habeas corpus and grant relief.[69]

Williams seems to conflict with *State v. Barber*[70] in two regards: 1) whether the "interest of justice" language of Rule 9.140(h) applies; and, 2) whether a Rule 3.850 motion (alleging ineffective assistance of counsel) is a sufficient alternative remedy. Of course, by the time of *Williams*, it had been established that double jeopardy principles barred a retrial on successful evidence sufficiency issues. Thus, there was no longer any "judicial economy" purpose served by the contemporaneous objection rule. Further *Williams*' recognition of the inadequacy of alternative relief under Rule 3.850 may have been influenced by its recognition of the practical effects of delay in the increasingly overloaded judicial system.

Fundamental error has been recognized in other district court cases as well. Two courts have agreed with the Second District's *Nelson* decision that it is fundamental error to convict a defendant of obstructing an officer without violence when the state produces no evidence that the officer was lawfully engaged in a legal duty. In *Harris v. State*,[71] the court stated that it is fundamental error to be "convict[ed] of a crime that did not take place." Similarly, in *T.M.M. v. State*,[72] the court stated that it is fundamental error to be convicted of "a crime that never occurred".[73]

As discussed immediately below, the First, Third, Fourth, and Fifth Districts are consistent with the Supreme Court and the Second District in rejecting a blanket fundamental error rule for evidence sufficiency issues. All those courts hold to the contemporaneous objection rule more often than not. As with the Supreme Court and the Second District, the other district courts have failed to delineate a coherent test for determining when the fundamental error doctrine applies and when it does not. The fundamental error tests stated by these courts, suffer from the same ambiguities discussed earlier: are the courts adopting a positive element insufficiency test, a negative element insufficiency test, or both? What about identity insufficiency? And, regardless of what test they are adopting, why is fundamental error not universally recognized in this context?

The case law that requires a contemporaneous objection provides no answers to these questions. In fact, there are numerous such cases which reject claims of fundamental error, in a variety of circumstances.[74] But in only two of those cases did the court discuss the reason for requiring a contemporaneous objection in this context. As it happens, both relied on the "cure the defect" logic.[75]

There is no point in discussing all these cases[76] in any detail, as the problems and unanswered questions discussed in the Supreme Court cases and the Second District cases are clearly found in these cases as well. In short, no Florida court has yet satisfactorily explained why a contemporaneous objection is required for evidence sufficiency issues, or why fundamental error is recognized in some circumstances but not others.

Conclusion

In light of Rule 3.380(c), there is no reason for requiring a contemporaneous objection for evidence sufficiency issues. Case law to the contrary is not well-reasoned and has been undermined by *State v. Stevens*,[77] and *Tibbs v. State*[78]. Florida courts should recognize that evidence sufficiency issues should always be handled as fundamental error.

Richard Sanders *works in the Appellate Division of the Tenth Circuit Public Defender's Office. His practice is limited to criminal appellate law.*

Endnotes

[1] *See* State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984).

[2] *Id*.

[3] Porter v. State, 356 So. 2d 1268, 1270-71 (Fla. 3d DCA 1978) (Hubbart, J., dissenting) (citation omitted).

[4] Williams v. State, 516 So. 2d 975, 976 (Fla. 5th DCA 1987) (en banc).

[5] State v. Rhoden, 448 So. 2d at 1016. Prior to the recent Criminal Appeal Reform Act, sentencing errors were considered fundamental if they were "apparent on the fact of the record". (See Chapter 96-248, Laws of Florida). Errors based on disputed factual matters still required a contemporaneous objection. *See* State v. Montague, 682 So. 2d 1085, 1088 (Fla. 1996). The Reform Act may have eliminated the concept of fundamental sentencing errors completely. *See* Maddox v. State, 23 Fla. L. Weekly D720 (Fla. 5th DCA, March 13, 1998). However, the doctrine of fundamental error is still recognized with respect to trial errors. *See* § 924.051(3), Fla. Stat. (1997).

[6] *See* State v. Lucas, 645 So. 2d 425 (Fla. 1994) (fundamental error in jury instructions): Gonzales v. State, 588 So. 2d 314 (Fla. 3d DCA 1991) (fundamental error in cross-examination of defendant and state's closing argument).

[7] Clark v. State, 363 So. 2d 331, 333 (Fla. 1978).

[8] Castor v. State, 365 So. 2d 701, 704 n.7 (Fla. 1978).

[9] Smith v. State, 521 So. 2d 106, 108 (Fla. 1988) (quoting Ray v. State, 403 So. 2d 956 (Fla. 1981).

[10] State v. Delva, 575 So. 2d 643, 645 (Fla. 1991).

[11] *In Re* Winship, 397 U.S. 358, 364 (1970).

[12] It is interesting to note that in the overwhelming majority of Florida cases that require a contemporaneous objection to preserve an evidence sufficiency issue the appellate court goes on to address the merits anyway and finds the evidence sufficient. *See infra* notes 26-75 and accompanying text for discussion.

[13] There is little reported case law on point. In *Sapio v. State*, 643 So. 2d 68 (Fla. 5th DCA 1994), the defendant filed a Rule 3.850 motion alleging his counsel was ineffective for failing to argue that relying on the evidence was insufficient because his conviction was based entirely on uncorroborated hearsay statements that were inconsistent with the trial testimony. The district court reversed the trial court's summary denial of the motion and remanded for an evidentiary hearing because the district court "believe[d] that, had the *Moore* argument been presented [at the original trial], a different result would have occurred . . . ." *Sapio*, 643 So. 2d at 69.

The author could find only one case from other jurisdictions addressing this issue. In *Holsclaw v. Smith*, 822 F. 2d 1041 (11th Cir. 1987), a federal habeas corpus action attacking an Alabama state conviction, habeas relief was granted on grounds of ineffective assistance of counsel. The court had no trouble concluding that "the failure of counsel to raise the [meritorious issue] of sufficiency of the evidence could not conceivably have been a strategic decision." *Id*. at 1047.

[14] *See Porter*, 356 So. 2d at 1271 (Hubbart, J., dissenting).

[15] Fla. R. Crim. P. 3.380 (emphasis added).

[16] State v. Stevens, 694 So. 2d 731 (Fla. 1997).

[17] 694 So. 2d 731 (Fla. 1997).

[18] *Id*. at 731.

[19] *Id*. at 732 (footnote omitted).

[20] *Id*.

[21] *See* § 924.07(1)(j), Fla. Stat. (1997).

[22] Fla. R. Crim. P. 3.380(b).

[23] Fla. R. App. P. 9.140(h).

[24] *See* State v. Barber, 301 So. 2d 7 (Fla. 1974).

[25] *See Williams*, 516 So. 2d at 978.

[26] 301. So. 2d 7 (Fla. 1974)

[27] *Id*. at 9.

[28] *See supra* note 23 and accompanying text.

[29] *Barber*, 301 So. 2d at 9.

[30] *See* Tibbs v. State, 397 So. 2d 1120 (Fla. 1981).

[31] Curiously, five months after *State v. Barber*, the Florida Supreme Court decided *Negron v. State*, 306 So. 2d 104 (Fla. 1974), overruled in part on other grounds by *Butterworth v. Fluellen*, 389 So. 2d 968 (Fla. 1980). In *Negron*, the court took jurisdiction to resolve a conflict in the district courts on a speedy trial issue. After resolving that conflict, the court went on to address "the claim of [the defendant] that there was *fundamental error* committed as to them in that they were convicted of grand larceny when the state's evidence did not support a conviction of grand larceny." *Negron*, 306 So. 2d at 107 (emphasis added). The court agreed with the defendants, asserting "we discovered from our review of the transcript that the evidence submitted to establish grand larceny falls short of the mark [because] there is no sufficient evidence of the [stolen] items' market value or retail value at the time of the theft." *Id*. at 107-08.

Negron did not cite *State v. Barber*. It is difficult to reconcile these two cases, they seem to flatly conflict. In any event, although *Negron* has often been cited as authority for "value of property" issues in later cases, it has never been cited as authority in any "fundamental error/evidence sufficiency" case. Indeed, the district courts have consistently followed *State v. Barber* and required a contemporaneous objection to preserve a "value of property" issue. *See* Evans v. State, 619 So. 2d 520 (Fla. 1st DCA 1993), Evans v. State, 452 So. 2d 1040 (Fla. 2d DCA 1984), Brown v. State, 434 So. 2d 50 (Fla. 3d DCA 1983), Santini v. State, 404 So. 2d 843 (Fla. 5th DCA 1981).

[32] 613 So. 2d 446 (Fla. 1993) (issue of whether charged murder was "independent act" of killer, for which defendant cannot be held responsible, requires contemporaneous objection). It is not clear why the court required an objection in *Archer*. *Archer* was a death penalty case and thus would seem to be within the ambit of Rule 9.140(h).

[33] 462 So. 2d 392 (Fla. 1984).

[34] *See id*. at 399.

[35] *Id*. (emphasis added); *accord* Vance v. State, 472 So. 2d 734, 735 (Fla. 1985) (stating that it is fundamental error to convict defendant of two counts of improper exhibition of a firearm because Florida Statutes Section 790.10 outlawed improper exhibitions "in the presence of one or more persons"; therefore, "exhibition of the firearm in the presence of two persons. . .violated the statute only one time. A second conviction is therefore totally unsupported by evidence"). The defendant in *Vance* was charged with two counts of aggravated assault and convicted of the two counts of improper exhibition as lesser excluded offenses. On direct appeal, the district court held that he waived the evidence sufficiency argument by requesting jury instructions on the improper exhibition lesser offense on both aggravated assault counts. The court held this was "invited error" and affirmed the dual convictions. *See Vance*, 452 So. 2d 994 (Fla. 3d DCA 1984). Obviously, the Supreme Court later rejected this argument.

[36] *Troedel*, 462 So. 2d at 398.

[37] *Barber*, 301 So. 2d at 9.

[38] Does "totally unsupported" mean there is no evidence to establish *any* of the elements of the crime of conviction? No evidence to establish *one* of the elements, although the other elements were established? No evidence to prove *the defendant* committed the crime, although it is clear that *someone* did? How do we weigh or consider circumstantial evidence in this context?

[39] A case worth noting briefly is *J.B. v. State*, 705 So. 2d 1376 (Fla. 1998). That case resolved a conflict in the district courts regarding whether it was fundamental error to allow a confession into evidence in the absence of independent evidence of the corpus delicti. The Supreme Court held it was not. However, the court analyzed the question as one of evidence admissibility, not one of evidence sufficiency. Clearly, with a confession the state has produced prima facie evidence of guilt; thus, *J.B.* sheds no light on the issue addressed in this article.

[40] 400 So. 2d 1255 (Fla. 2d DCA 1981).

[41] 543 So. 2d 1308 (Fla. 2d DCA 1989).

[42] 601 So. 2d 628 (Fla. 2d DCA 1992).

[43] *Dydek*, 400 So. 2d at 1257 (footnote omitted).

[44] *See id*.

[45] *Id*. (emphasis added) (citation omitted).

[46] *Nelson*, 543 So. 2d at 1309 (emphasis added) (citation omitted).

[47] § 812.019(2), Fla. Stat. (1989).

[48] Dealing in stolen property constitutes a violation of Section 812.019(1).

[49] *Burrell*, 601 So. 2d at 629 (emphasis added).

[50] 626 So. 2d 1004 (Fla. 2d DCA 1993).

[51] 680 So. 2d 598 (Fla. 2d DCA 1996).

[52] *Stanley*, 626 So. 2d at 1005.

[53] *Id*. (emphasis added).

[54] *Hornsby*, 680 So. 2d at 598-99 (emphasis added).

[55] *See Dydek*, 400 So. 2d at 1255.

[56] *See Nelson*, 543 So. 2d at 1308.

[57] *See Burrell*, 601 So. 2d at 628.

[58] *See Hornsby*, 680 So. 2d at 598.

[59] *Dydek*, 400 So. 2d at 1258.

[60] *Burrell*, 601 So. 2d at 629.

[61] *See Stanley*, 626 So. 2d at 1005.

[62] In the only case directly on point, the Fourth District held that "the amount of damage is an element of a felony criminal mischief charge." Meenaghan v. State, 601

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So. 2d 307 (Fla. 4th DCA 1992). In the analogous context of theft offenses, it is clear that the value of the property stolen is a necessary element of grand theft. *See* Negron v. State, 306 So. 2d 104 (Fla. 1974).

[63] Or, at least, one in which there was "[no] prima facie showing of the essential elements." *See Dydek*, 400 So. 2d at 1257.

[64] *Burrell*, 601 So. 2d at 629.

[65] *See Dydek*, 400 So. 2d at 1257.

[66] (Fla. 5th DCA 1987, en banc). 516 So. 2d 975.

[67] *See id*. at 977). When *Williams* was decided, *Royal v. State*, 490 So. 2d 52 (Fla. 1986) was the controlling authority. *Royal* held that, to constitute a robbery, the force used must precede or be contemporaneous with the taking of the property. *Royal* was overruled by statute in Chapter 87-315, Laws of Florida, currently codified at § 812.13, Fla. Stat. (1997) (force applied after taking of property constitutes robbery if force and taking are part of "a continuous series of acts or events").

[68] *Id* at 977-78 (citations omitted). Note the similarity of reasoning in this language and the Supreme Court's decision in *Vance*, *supra*, which rejected the notion of "invited error" in this context. *See supra* note 35 for discussion of the *Vance* decision.

[69] *Williams*, 516 So. 2d at 978 (citations omitted) (emphasis added). None of the citations omitted in this paragraph dealt with evidence sufficiency issues; rather, the cases cited are cited only as authority for the general principles stated in the opinion.

[70] State v. Barber, 301 So. 2d at 7.

[71] 647 So. 2d 206, 208 (Fla. 1st DCA 1994).

[72] 560 So. 2d 805, 807 (Fla. 4th DCA 1990).

[73] Other cases recognizing fundamental error include *Griffin v. State*, 705 So. 2d 572, 574 (Fla. 4th DCA 1998) (kidnapping conviction held to be fundamental error because confinement of victim was incidental to armed robbery did not take place), *Brown v. State*, 652 So. 2d 877, 881 (Fla. 5th DCA 1995) (racketeering conviction states fundamental error because it did not prove the required elements of "enterprise" and "pattern of racketeering activity), *Valdes v. State*, 621 So. 2d 585, 586 (Fla. 3d DCA 1993) (involving convictions for "violating Marine Fisheries Rules"), *O'Connor v. State*, 590 So. 2d 1018, 1019 (Fla. 5th DCA 1991) (involving narcotics conspiracy conviction), *Burke v. State*, 672 So. 2d 829 (Fla. 1st DCA 1995) (involving possession of burglary tools), *K.A.N. v. State*, 582 So. 2d 57 (Fla. 1st DCA 1991) (involving escape conviction). The *Griffin* court failed to note that it had come to the opposite conclusion in *Hogan v. State*, 427 So. 2d 702 (Fla. 4th DCA 1983), quashed in part on other grounds by 451 So. 2d 844 (Fla. 1984) (issue of whether state proved "confinement, abduction, or imprisonment apart from the restraint involved in the sexual battery itself" required contemporaneous objection). This, of course, only further illustrates the uncertainty and inconsistency in the existing case law on this issue.

[74] *See* Gibbs v. State, 693 So. 2d 65 (Fla. 4th DCA 1997) ("concealment" issue in carrying concealed fireman prosecution), Clark v. State, 635 So. 2d 68 (Fla. 1st DCA 1994) ("carrying firearm" issue in armed robbery prosecution), Campbell v. State, 553 So. 2d 184 (Fla. 1st DCA 1989) (consent issue in sexual battery prosecution), Hunter v. State, 364 So. 2d 15 (Fla. 1st DCA 1978) (issue of whether a "county correctional officer and/or jailor is . . . a 'law enforcement officer within the meaning of § 784.07, Fla. Stat."), G.W.B. v. State, 340 So. 2d 969, 970 (Fla. 1st DCA 1976) (argument that "the State failed to prove that the property was stolen property on the date it was received by [defendant] and failed to prove ownership of the property" in receiving stolen property prosecution), Pierre v. State, 597 So. 2d 853 (Fla. 3d DCA 1992) (defendant's age in capital sexual battery prosecution), Estrada v. State, 400 So. 2d 562 (Fla. 3d DCA 1981) (defendant's intent in aggravated assault prosecution), Reed v. State, 603 So. 2d 69 (Fla. 4th DCA 1992) (in burglary prosecution, issue of whether defendant intended to commit crime when he entered premises), Sanderson v. State, 390 So. 2d 744 (Fla. 4th DCA 1980) (victim's age in capital sexual battery prosecution), Hardwick v. State, 630 So. 2d 1212 (Fla. 5th DCA 1994) (aggravated battery conviction affirmed, as against defendant's argument that he "[only] intended to take the victim's purse and not to inflict injury"), Patterson v. State, 391 So. 2d 344 (Fla. 5th DCA 1980) (ownership of burglarized property).

[75] *See* Pinder v. State, 396 So. 2d 272 (Fla. 3d DCA 1981) (an aggravated assault prosecution where defendant claimed the evidence did not establish that he used a real firearm, rather than a toy pistol contemporaneous objection rule applied because of the real possibility that if the claim had been brought to the attention of the court and the prosecution, it might well have been obviated by the introduction of additional testimony), Johnson v. State, 478 So. 2d 885 (Fla. 3d DCA 1985) (contemporaneous objection required in capital sexual battery prosecution where victim's age was at issue).

[76] All of these cases addressed issues of element insufficiency. Two courts have addressed identity insufficiency issues. In *Daley v. State*, 374 So. 2d 59 (Fla. 3d DCA 1979), the court said the contemporaneous objection rule applied to identity challenges, then went on to assert that the evidence of identity was sufficient. In *Brumbley v. State*, 350 So. 2d 827 (Fla. 1st DCA 1977), the court also held that a contemporaneous objection was necessary to preserve an identity issue. Neither court discussed why it was imposing this requirement. It is worth noting that, when these two cases were decided, *State v. Barber* was the controlling authority and no cases had recognized any exception to its contemporaneous objection requirement; *Dydek* was the first such case and it came out several months after *Daley*.

[77] State v. Stevens, 694 So. 2d at 731.

[78] Tibbs v. State, 397 So. 2d at 731.

committee reports

Amicus Curiae

The *Amicus Curiae* Committee formally became a permanent Section committee at the Bar's Annual Meeting in June. The Committee will review cases referred by Bar membership for the Section's participation as *amicus curiae*; assess whether such cases present procedurally significant, but substantively neutral, appellate issues; recommend to the Executive Council the Section's participation in cases that meet this criteria; and brief cases that the Executive Council and Board of Governors approve for the Section's participation.

Even in its nascent stage of the past year, the Committee evaluated several appellate matters, including a constitutional proposal to add separate criminal appellate courts to Florida's court system. Committee member Tom Findley's excellent analysis drew the commendation of our Bar's president. The Committee is now seeking Section members willing to brief cases on a *pro bono* basis. The Committee is also continuing to seek appropriate cases for *amicus* review. Please submit cases as soon as possible, so that there is adequate time for evaluation and briefing. You may contact the Chair, John Crabtree, by phone at (352) 351-8000, or by e-mail at crabtreej@maccrab.com.

Appellate Rules Liaison

The Appellate Rules Committee has recommended a change to Rule 9.200 in order to include the docket sheets in the index to the record on appeal. The following revised rule has been recommended.

Rule 9.200. The Record

(a) Contents.

(1) Except as otherwise designated by the parties, the record shall consist of the original documents, exhibits, and transcript(s) of proceedings, if any, filed in the lower tribunal, except summonses, praecipes, subpoenas, returns, notices, depositions, other discovery, and physical evidence. The record shall also include a progress docket.

(d) Duties of the Clerk; Preparation and Transmission of Record.

(1) The clerk of the lower tribunal shall prepare the record as follows:

(A) The clerk of the lower tribunal shall not be required to verify and shall not charge for the incorporation of any transcript(s) into the record. The transcript of the trial shall be incorporated at the end of the record, and shall not be renumbered by the clerk. The progress docket shall be incorporated into the record immediately after the index.

(2) The clerk of the lower tribunal shall prepare a complete index to the record and shall attach a copy of the progress docket to the index.

The Appellate Rules Committee also voted to recommend a change to Rule 9.210 that would limit matters in reply to 15 pages when cross-appeals are involved. The amendment reads as follows:

(5) The initial and answer briefs shall not exceed 50 pages in length. Reply briefs shall not exceed 15 pages in length; provided that if a cross-appeal has been filed, the reply brief shall not exceed 50 pages, not more than 15 of which shall be devoted to argument replying to the answer portion of the appellee/cross-appellant's brief. Briefs on jurisdiction shall not exceed 10 pages. The table of contents and the citation of authorities shall be excluded from the computation. Longer briefs may be permitted by the court.

Finally, the Committee is considering a change to Rule 9.210 in order to reflect the current practice to include proportionally-spaced fonts in briefs. Currently, type must be at ten characters per inch, a measurement relevant only to typewritten-style fonts, which are now obsolete. The Committee referred this issue to the Subcommittee. The issue will be addressed at the September 4 meeting of the Appellate Rules Committee.

CLE

Appellate Section's "Flagship" Seminar

This year's seminar will be held on October 29, 1998, in Tampa. The Committee is excited about the excellent slate of speakers who have agreed to participate. The slate is comprised of appellate judges only, a total of nine judges and justices representing all five District Courts of Appeal and The Florida Supreme Court. The scheduled speakers are: First DCA—Judge Benton; Second DCA—Judge Fulmer, Judge Altenbernd, and Judge Northcutt; Third DCA—Judge Cope and Judge Fletcher; Fourth DCA—Judge Polen; Fifth DCA—Judge Antoon; and Florida Supreme Court—Justice Anstead. The working title of the seminar is "May it Please the Court: Hot Appellate Topics." In what will be a full day seminar, the topics will include such things as preservation of error, brief writing and oral argument tips, post-opinion review, appellate attorney's fees, the future of the PCA, the Criminal Reform Act, administrative appeals, ethics and professionalism in appellate courts, and an update on writs. After the live session in Tampa, the seminar will be shown at multiple locations throughout the State of Florida over the following few months.

Appellate Practice Certification Exam Review Course

This year's course was held on January 30, 1998, in Tampa. Lucinda Hofmann served as the Chair of the Steering Committee, and was assisted by Jennifer Carroll. The program was a great success and was very profitable for the Section. The Steering Committee for next year will be chaired by Jennifer Carroll. Although the date has not yet been determined, it is anticipated that it will be near the end of January, 1999.

Federal Appellate Seminar

The Federal Appellate Seminar was held on April 17 in Tampa. The speakers included a slate of Eleventh Circuit judges, court administrative personnel, and appellate practitioners. The topics ranged from procedural aspects of practice before the Eleventh Circuit to such substantive matters as preservation of error and standards of review, and also included a discussion of ethics and professionalism. As in the past, this seminar was co-sponsored by the Out-of-State Practitioners Section. Based upon the plan that was established last year, the federal appellate seminar will not be held in 1999 and will be held again in the year 2000.

Appellate Practice Workshop

The Committee received its final report prior to the holding of the first Appellate Practice Workshop. The workshop is scheduled for July 22-25, 1998, at Stetson University. Tom Hall is the chair of the Steering Committee, which includes Tracy Gunn, Deborah Sutton, Judge Webster, Raoul Cantero, and Professor Michael Finch. Jan Majewski is the Committee's contact from Stetson University. The program is all set, and materials have been distributed to the participants so that they can prepare for the program. This program is not being co-sponsored with The Florida Bar, which creates an opportunity for increased revenues for the Section.

Co-Sponsorships

As in the past, the Section is actively seeking out co-sponsorships with other Sections to take advantage of the opportunity to both get out the appellate message and to achieve the financial benefits for the Section which co-sponsorships can provide. One of the programs being pursued is a co-sponsored appellate seminar with the Family Law Section.

Sub-Committee on Alternative Seminars

The Committee received a report

continued...

from Steve Stark, the chairperson of this subcommittee. The aim of the subcommittee is to explore the possibility of alternative seminars which may be held by the Section to alternate with either or both the Federal Appellate Seminar and the Hot Topics Seminar, both of which are scheduled to be held every other year. The Committee discussed holding either one or two seminars which will cover, generally, how to set up and conduct an appellate practice and how to utilize appellate lawyers in your practice. The first concept would be aimed essentially at appellate lawyers and the second concept at both trial lawyers and appellate lawyers. A larger steering committee was set up, with Steve Stark as the chair, and Robert Glazier, Tom Elligett, Susan Fox, andAllison Hochmann serving as members. The subcommittee will report back in September at the General Meeting.

Committee Membership

The Committee is seeking three or four new members who are willing to play an assisting role with respect to one of our seminars for the 1998-99 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 General Meeting in September. The exact time and place will be announced soon.

Programs

The Programs Committee sponsored its top two annual events on June 18, 1998 at the Florida Bar Annual Meeting. From 4:00 to 5:30 p.m., we held our program, "A Discussion With The Florida Supreme Court" before a nice turn out of the judiciary and the Bar. The justices, as usual, were both informative and entertaining. In particular, the attendees learned about the Court's emphasis on presenting aspects of the legal system to school children throughout the State of Florida. They also learned about the heavy work load given to the Court and the long hours spent studying and evaluating the cases. We also came away with the strong impression that these justices are devoted, not only out of a sense of duty, but because they love what they are doing. The camaraderie among the justices is also noteworthy. The Programs Committee, as well as the audience, certainly appreciate the justices taking time every year to speak with us and answer our questions.

The Dessert Reception, which was held from 9:30 to 11:00 p.m., was a rousing success again this year. The desserts, as always, were spectacular. Due to the generosity of our sponsors, we were able to offer cordials to the guests again this year. The highlight of the Dessert Reception was the presentation of the Adkins Award, which was given this year to retiring Justice Grimes. The Programs Committee, as well as the entire Section, wishes to express appreciation to the sponsors of the Dessert Reception for making this event possible.

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