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The Record

JOURNAL OF THE APPELLATE PRACTICE AND ADVOCACY SECTION

Volume VIII, No. 2 THE FLORIDA BAR Winter 1999

Chair's Message

HOFMANN

Despite the very active hurricane season, the Appellate Practice Section had a busy and productive Fall. On October 14th our CLE Committee premiered a brand new CLE seminar entitled "What Do You Mean I Didn't Preserve the Issue?" The new seminar, co-sponsored with the Trial Lawyers Section, was very well attended and featured an outstanding faculty of judges and Section practitioners. We also co-sponsored the Regional Moot Court Competition with Nova Southeastern University Law School — another success, thanks to many of you who volunteered to be judges and brief graders, to several of our state's judges, who presided over the final arguments, and to a great host law school. The Moot Court Competition committee did an outstanding job scheduling judges and raising sponsorship funds.

But the BIG NEWS I would like to share with Section members is that we now have, thanks to a very dedicated Website committee, an Appellate Practice Section Website! Please check it out at ***http://www.flabarappellate.org***. You will find "bare bones" information now, but much more will be posted by The Florida Bar Midyear Meeting, including information about our Year 2000 CLE and other programs and publications as well as information about appellate certification. We welcome your comments. Feel free to email me at: *Lhofmann@hklaw.com* or any of the Section's Website Committee members: Sam Lewis at *slewis@comflaw.com*, Steve Stark at *sstark@fowler-white.com*, or Susan Trevarthan at *SLT@boca.burke-weaver-prell.com*, with your suggestions.

Appellate Mediation: Mandatory Programs in the First and Fourth DCAs

by Colleen Crandall

What incentive does an appellee have to mediate on appeal, having already won at trial? In other words, why even have mandatory mediation on appeal? These questions instinctively come to mind whenever appellate mediation is discussed. The purpose of this article is to discuss the incentives to mediate on appeal and explore Florida's appellate mediation programs in First and Fourth DCA's. The discussion of the incentives to mediate on appeal is derived from a compilation of articles written by various nationwide experts.

I. Incentives to Mediate on Appeal[1]

1. Global resolution of litigation issues. The ability to resolve issues related to matters still pending in the trial court often provides an incentive for the appellee to compromise on appeal. The avoidance of the cost of an appeal, as well as further litigation in the trial court, can provide the necessary cumulative incentive to compromise. Appellate mediation, arguably, then serves the dual purpose of being a case management tool for the trial court, as well as the appellate court.

2. Avoidance of cost of appeal. An obvious incentive to mediate occurs

continued, next page

INSIDE:

where there is no basis for an award of appellate attorney fees to the appellee. In this circumstance, appellee may be willing to compromise to avoid the costs and aggravation of an appeal.

3. Professional assessment of probabilities of success on appeal. Although the mediator's role is not to prognosticate an outcome on appeal, the mediator, by posing very probative questions and eliciting dialogue, can enlighten a client as to the realities of an appeal. By doing so, many appellate mediators believe that even cases that do not settle at mediation often proceed with greater client satisfaction. The mediation process makes the client more fully aware of the realities of the appeal and facilitates greater acceptance of the risks associated with the appeal.

4. Protecting a highly favorable lower court opinion. Appellee sometimes will settle an appeal because some findings are so highly favorable, and determinative of future proceedings, that compromise will be made to preserve intact the important findings. For example, in a final dissolution which inequitably divides the marital estate and awards rotating custody, the Appellee may concede some property rights to settle the appeal and preserve the award of rotating custody.

5. Ongoing litigation disrupts business. The cost of business disruption and precious executive time provides an incentive to compromise on appeal.

6. Early identification by appellee of an error of law. More times than not new lawyers come to view the facts and law at the initiation of appellate proceedings. Without mediation, the detection/concession by appellee's counsel of an error of law may come later and at greater expense.

7. Tax benefits. In some cases, tax benefits associated with structuring payments, as opposed to a judgment, provides the necessary incentive.

8. Cross-appeals. If a cross-appeal has been filed, cross-appellant has the above incentives to settle and may additionally be motivated to compromise on the main appeal for concessions concerning the cross-appeal.

Attorney Donna Gebhart, the mediator responsible for much of the success of the First DCA's program, had this compelling statement regarding appellate mediation:

> Appellate mediation is effective even where pre-trial efforts were unavailing because **the standard of review on appeal and the resultant limitations on the scope of the appellate court's review have a significant impact on the posture of the parties**. Many of the parties seem to expect that the appellate court is going to re-try their cases on the merits.....Except in those very rare instances when the applicable standard of review is *de novo* or *plenary*, that simply is not the case. One of the most important functions of the appellate mediator is to focus the parties and their counsel on the standard of review applicable to their case.

With these, among other incentives to settle, the First DCA, and more recently the Fourth DCA, instituted mandatory mediation programs.

II. Florida Appellate Mediation Programs

The remainder of this article discusses the appellate mediation programs instituted at the First and Fourth DCA. The article examines the objectives of the programs, introduces the reader to the mediators charged with implementing these goals, and explains the basic mechanics of each program. Because the First and Fourth DCA have some fundamental differences each is discussed individually. In conclusion, some tips for effective mediating, by those who have years of experience, are offered.

Beginning with the global objective of appellate mediation, perhaps no better description exists than that stated by former Chief Justice Kogan: "We encourage the district courts to continue to explore and develop alternative and creative means to efficiently and fairly hear the cases brought before them. Such efforts have enabled the district courts to address increases in the judicial workload without the continued addition of new appellate judges."[2] While case management may be the broader objective, the individual objectives of the DCAs are best described by their respective administrative orders implementing each program. Though these orders differ in some procedural aspects, both provide appellate mediators at no charge to the parties, and depend upon the chief mediation officers to screen for cases that may be appropriate for appellate mediation. [3]

III. The First DCA Appellate Mediation Program

A. Purpose and History of the Program

The First DCA's appellate mediation program has been operating successfully since its inception on July 1, 1996. The stated objective is to assist the parties and their counsel in negotiating a mutually satisfactory compromise of their dispute as early in the process as possible in order to save both the parties and the courts time and money.[4] Administrative Order 96-3[5], establishing the program, states that the court may direct parties or attorneys to appear to consider settlement, simplification of issues and other matters which may aid the parties or the court in disposing of the case. To advance this end, the court, judge or conference officer may enter an order: (1) reciting the action taken at the conference including any agreements; (2) limiting the issues to those not disposed of; or (3) setting forth the procedure and time limits for conducting mediation in light of the particular circumstances of the case. The order controls subsequent appellate proceedings, unless modified by the court to prevent manifest injustice.[6]

B. The Mediators

Donna Gebhart serves as the Chief Appellate Mediator Officer for the First DCA. She graduated from University of Miami Law School in 1978. Certified as a civil, family, federal, and insurance mediator, she left practice with the Federal Public Defender's Office in 1985 to create a federal litigation and appellate practice.

In 1992, she converted her prac-

tice to alternative dispute resolution. For the next seven years, she exclusively handled mediation and arbitration matters, primarily of complex federal cases. Her legal experience, prior to working with the Federal Public Defender's Office, includes guardianships, mechanic's lien and construction law, contract litigation, federal and family law appeals, and administrative cases.[7]

A former skeptic of the appellate mediation process credits Ms. Gebhart with having resolved all but one of his numerous appeals in the First DCA.[8] According to Ms. Gebhart, resistence to the process was great in the beginning. The program has, however, succeeded, and another mediator has recently been added.

This past November Attorney Joseph G. Hern became the second Appellate Mediation Officer for the First DCA. Upon graduation from Stetson Law School, in 1982, he clerked for Judge Blatt of the Commonwealth of Pennsylvania before gaining civil litigation and appellate experience with Wendel, Chritton & Parks of Lakeland, Florida. Graduating sixth in his law school class, he was hired by the Florida Bar several years ago to help prepare and grade bar examinations. He brings to the mediation process his experience

step approach to the entire process, and is invaluable for navigating through the First DCA mediation process. The form does require both parties to indicate whether they believe the case is amenable to mediation, and to explain why or why not. The answer, to this question only, need not be served on the opposing counsel. Though helpful, the answer is not determinative of whether the case will proceed to mediation.

This file is then kept private from any proceedings on appeal. The judges or court personnel at the First DCA are not even privy to knowing if a case has been part of the mediation process. The mediation program in both courts does not toll the time for any appellate deadlines, though motions for extensions of deadlines can always be filed with the appellate court.

Based upon the preliminary information supplied, the Chief Mediator Officer for the First DCA, chooses the cases which will proceed to mediation. Once chosen for mediation, a notice of mediation conference is sent to attorneys for both sides. The First DCA, with a sophisticated phone system, schedules all parties and attorneys beyond a seventy mile radius to appear by phone, unless the parties agree otherwise.

The notice, recently revised, indi-

counsel. Documents and or exhibits provided to the mediator in advance and marked confidential will be considered by the mediatior without being disclosed to the opposing party.

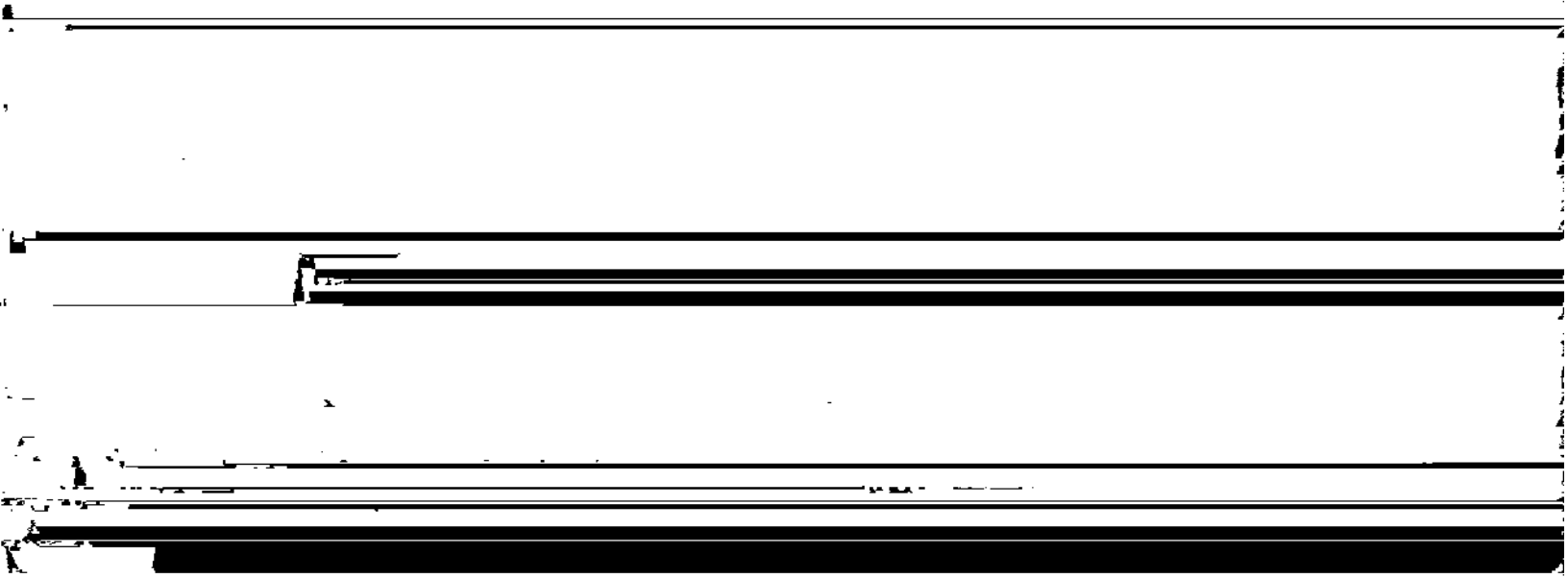
Isolated as one of the most significant factors in successful mediation, the First DCA requires the participation of the client with the "final decision-making authority," either in person or by phone. The attorney who attends the conference must also have authority to respond to any proposals.

Mediators from both the First and Fourth DCA agree that appellate counsel, at the very early stages in which mediation occurs, are not always the most familiar or effective lawyer for purposes of mediation. Accordingly, the First DCA requests the attorneys to identify who they believe to be most conducive to effective mediation, always allowing for additional counsel to be "on call."

IV. The Fourth DCA Appellate Mediation Program

A. Purpose and History of Program

Though the program officially began November 1, 1998, cases began being mediated around January, 1999. The program is still in seminal



superseded prior aspects of the appellate mediation process. Much of what is known of the Fourth DCA's program is contained in the September 17, 1999 order, and is, therefore, set out *verbatim* in subpart C of this Section.

Fourth DCA Judge Matthew Stevenson chairs the court's mediation committee. In 1998, he explained: "All final civil appeals are eligible for selection to participate in mediation. Mediation is essentially a non-binding process of alternative dispute resolution in which a trained neutral person, the mediator, facilitates discussions between parties in an effort to explore the options to resolve a dispute." [9] The Court is presently exploring the viability of mediating non-final orders as well. In the interim, parties to a non-final order may request mediation, and the program will accommodate them.

Mediation takes place in an office building next door to the Fourth DCA, or in the Broward mediation office, wholly separate from the Fourth DCA. The separate facilities are designed to maintain confidentiality. The recent September 17, 1999 Administrative Order created a system whereby the Fourth DCA judges, like the First DCA judges, remain unaware of whether a case is being, or has been, mediated. This has been achieved by the clerk's office sending out, along with the Acknowledgment of Appeal, a contrasting shade of "Mediator's Request for Information" form with "Notice of Mediation Procedures." Though not all appeals receive this request for information, non-final parties can request mediation by agreement, and the program will be responsive.

The "Notice of Mediation Procedures" requires all documents pertaining to Mediation to be submitted directly to the mediation office in West Palm Beach, permitting the mediation process to continue autonomously from the appellate proceedings. Appellant has twenty days, and appellee thirty days, from the Acknowledgment of Notice of Appeal, to mail all of the information requested to the mediation office. Failure to respond to the request for information may result in sanctions.

B. The Mediators

Alan Kahn and John Thabes are the mediators chosen by the judges of the Fourth DCA to spearhead the new appellate mediation program. For seven years, Alan Kahn directed and fully managed the Alternative Dispute Resolution Office for the Fifteenth Judicial Circuit of Palm Beach County. He supervised twelve staff members and nearly 1000 private mediators, adopting budgeting and control procedures. Appointed to the Florida Supreme Court Committee on Mediation/Arbitration by Justice Barkett, he later vice-chaired the committee. A graduate of New York University in 1954, his early years of private practice entailed acting as general counsel to ABKCO Industries, Inc, representing The Beatles, The Music Catalogues of The Rolling Stones and various recording and motion picture ventures. Highly dedicated to alternative dispute resolution, and well liked and recommended by judges and attorneys alike, Alan has lectured extensively on the mediation process and authored "The Unified Family/Juvenile Court Plan."

John Thabes is a former President of the Academy of Florida Trial Lawyers and a director on the board for nearly ten years. He served on the Board of Governors for the American Trial Lawyers Association for eight years, and chaired the Broward County Mediation Committee. A graduate of William Mitchell College of Law in 1957, he became certified ten years ago as a mediator. Before assuming his position with the Fourth DCA, he served for thirty-seven years, including as managing partner in the Fort Lauderdale firm of Saunders, Curits, Geinestra & Gore. Known for his patience, persistence and knowledge of complex litigation, some of his students at Nova University, where he is an adjunct professor, may take credit for perfecting at least the first of these traits.

C. Mechanics of Appellate Mediation Process

The Fourth DCA's September 17, 1999 Administrative Order, establishes the essential guidelines for mediating Fourth DCA appeals, and states:

> Pursuant to the affirmative vote of a majority of the judges of this court and the approval of the Florida Supreme Court by Administrative Order dated October 7, 1998, the court hereby establishes the following procedures for implementation of appellate mediation in civil cases effective November 1, 1998.
>
> 1. The court has created its APPELLATE MEDIATION OFFICE as a separate adjunct to the court and hereby authorizes the mediators employed in said office to administer the court's mediation program as set forth herein.
>
> 2. The mediators employed by the court may direct the parties and attorneys for the parties to appear before them for mediation, simplification of issues, and such other matters as may aid the parties or the court in disposition of the case.
>
> 3. The selection and setting of a case for mediation conference does not toll the time for compliance with any of the time frames set forth in the Florida Rules of Appellate Procedure. The Court may, upon motion and for good cause shown, stay or extend the time for preparation of the record, or the filing of briefs. The incurring of costs for the preparation of the record or the filing of briefs shall not alone constitute good cause.
>
> 4. The attorneys for the parties and, if not represented, the parties, are required to submit preliminary mediation information forms and mediation summaries as directed by the Appellate Mediation Office.
>
> 5. Once selected for mediation, participation is mandatory. Mediation services will be provided free of charge by a court mediation officer. With the consent of all parties, mediation may be conducted by a private mediator selected by the parties and at the cost of the parties.
>
> 6. Mediation sessions may be conducted in person at the court mediation office, or by telephone conference, at the discretion of the mediation officer.
>
> 7. Failure of an attorney or designated party to appear for a duly scheduled mediation conference, without good cause, may result in the imposition of sanctions by the court.
>
> 8. All appellate mediation sessions

shall be confidential in a manner consistent with Chapter 44, Florida Statues.

9. All Notices with respect to mediation, issued by the Mediation Office, shall have the full force and authority of an order of this court, and sanctions may be imposed by the court for the violation thereof.

10. Based on any agreements reached at the mediation conference the court may enter an appropriate order which will control all subsequent proceedings, unless modified by the court to prevent manifest injustice.

11. This Administrative Order supercedes the prior Administrative Order dated May 12, 1999.

Mr. Thabes and Mr. Kahn screen all final civil appeals (and non-final appeals if requested[10]), choosing which cases must proceed on a mediation track simultaneous with the appellate track.[11] Unlike the First DCA, the Fourth DCA does not automatically exclude pro se or dependency cases.

Both mediation programs strive to mediate as early as possible. There have been instances, however, in which mediation has occurred even after oral argument. Appellate mediation, in fact, can take place any time before the appellate court rules on the appeal. Accordingly, there are instances in which a brief has been filed before mediation, both courts require the briefs must be submitted to the mediators.[12]

V. Conclusion

All successful mediation requires compromise. The mediation of appeals endeavors to probe more deeply the cost/benefit analysis. It permits the parties and their attorneys to further explore potential, and sometimes latent benefits to settlement, and ponder the cost and benefit assignable to compromise. To this end, experienced mediators offer the following tips, and encourage all attorneys to give the process a fair chance:

1. To facilitate mediation, be thorough in your statement of the case summaries. The mediators do not have much more to go on. Identify ahead of time the primary issues *and* the relevant standards of review. Examine issues and potential resolution from a global standpoint, identifying not just issues already decided by the trial court, but resolution of those yet to be determined.[13]
2. Discuss ahead of time the above process, issue identification, and standards of review with the client. The decision making client must participate in mediation, and should understand the process to appropriately participate.
3. Provide the mediators with any and all support materials: *Mediators do not have access to the record on appeal.* Though opposing party receives a copy of the mediation summary, some supporting materials may be submitted confidentially. Contact the mediation office in charge for the appropriate method of submitting confidential materials.
4. Prepare ahead of time present valuations, and attorney's time and court costs. Estimating these figures ahead of time, facilitates the resolution process, and helps identify realistic compromises.
5. Select the most appropriate attorney for participation. Once again, author and Chief Mediation Officer, Donna Gebhart suggests that the attorney with the client relationship and upon whose judgment the client relies should be the participating attorney for mediation. This could be trial counsel, or appellate counsel, and occasionally both participate. More frequently, however, the trial counsel confers with appellate counsel, ascertains issues and standards of reviews, and then trial counsel participates in mediation.
6. With a window of opportunity, consider requesting mediation in your non-final appeals in the Fourth DCA. Global resolution of issues, as well as expedited relief, may encourage settlement.

Finally, one's approach to this process can make all the difference in the result. So, remember, as one author so aptly stated: Real Lawyers Do Settle![14]

***Colleen Crandall** is an AV rated, sole practitioner in Boca Raton, Florida, who has written materials for the Appellate Certification Review Course, clerked for the Indiana Supreme Court, and the Florida Fourth DCA, and has served on the Appellate Rules Committee since 1994. She is licensed to practice in Illinois, Indiana, and Florida. An original version of this article was published in the newsletter for the family law section of The Florida Bar.*

Endnotes:

[1] *See* Thomas F. Ball, III, *Settling Cases on Appeal: An Option to Consider*, 11 W. Va. L. Rev.14 (1997), and David Aemmer, *Appellate Mediation in the Tenth Circuit*, 26 Colo. Law 25 (1997).

[2] *See In Re Certification of the Need for Additional Judges*, 707 So. 2d 327 (Fla. 1998).

[3] Although the state provides these mediators' services at no cost to the parties, both DCAs permit the parties, upon consent, to hire their own mediator.

[4] Interview with Attorney Donna Riselli Gebhart, Chief Mediation Officer, First District Court of Appeal (March, 1999).

[5] Chapter 44, of the Florida Statutes (1998),authorizes appellate mediation and general administrative orders adopted by the Supreme Court of Florida and the individual DCAs govern procedural operation.

[6] Administrative Order 96-3, (Fla. 1st DCA 1996).

[7] The telephone number for the First DCA mediation office is (850) 413-7913; fax number (850) 410-3231.

[8] Interview with Attorney Elliot Kula, West Palm Beach, Florida (March 1999). *See* Pierre L. Bacheller, *Mediation Skeptic Now Supports Rule 54*, 22 Mont. L. Rev. 8, (Aug.1997). In fact, attorney resistance to settlement is one of the most common cited reasons for unsuccessful mediation. Lawyers get concerned "that even to broach settlement implies weakness in their case or, otherwise, themselves." Shiela Prell Sonenshine, *Real Lawyers Settle: A Successful Post-Trial Settlement Program in the California Court of Appeal*, 26 Loy. L.A. L. Rev. 101, (1993). *See also*, Ball, *supra* note1.

[9] *See* Matthew Stevenson, (Chair, Fourth DCA Mediation Committee), *The Record: Journal of Appellate Practice and Advocacy Section*, Vol. VII, No.2 at 7 (Dec. 1998).

[10] Minutes of South Palm Beach County Appellate Practice Committee Meeting (February, 1999).

[11] The Fourth DCA mediators have also requested that the parties notify the mediators when the case, though unresolved in mediation, is settled before the appellate court rules

[12] In addition, the Fourth DCA mediators would like to make any parties on appeal, whose cases are pending after the program went into effect, aware that they can request mediation up until the time of an appellate ruling. To contact them, call: (561) 640-6880 and fax (561)640-6882.

[13] Many of these factors are taken from the First DCA booklet, *The Role of the Lawyer in Appellate Mediation*, authored by Chief Mediation Officer Donna Gebhart. This booklet is the subject matter for an entire article, and is highly recommended for anyone serious about mediating in the Florida appellate courts.

[14] *See* Sonenshine, *supra* note 7.

Calculating Briefing Schedules in the United States Court of Appeals for the Eleventh Circuit: *New Local Rules effective April 1, 1999*

by Linda Collins Hertz

I. Caution: Those Cards and Letters Ain't Coming No More!

The Eleventh Circuit is on a mission to decrease the time between the filing of a notice of appeal and the date the case is fully briefed and submitted to the court for disposition. Appellate litigants in the Eleventh Circuit need to be familiar with the changes made to the court's local rules to effect its goal of expediting the briefing time. The following is what you need to know and look out for:

• If the appeal will require no additional transcripts beyond those already in the district court's record (such as in an appeal from a summary judgment ruling), then pursuant to 11th Cir. R. 31-1(a), the appellant's brief is due to be filed *40 days from* the date the record is "deemed completed" under 11th Cir. R. 12-1, i.e., *the date the appeal is docketed in the Eleventh Circuit and assigned a number*. Or, if the appellant has ordered a transcript, the record is "deemed completed" on *the date the court reporter files the transcript in the district court clerk's office*. There is no provision for any mandatory or prompt notice to the parties of a definite briefing schedule, which was customary in the past.

• The upshot of these new rules is uncertainty for the appellant. Although the clerk of the Eleventh Circuit will send out a letter advising the parties that "the brief has been docketed," these letters are not being sent promptly and the clerk will *not* be sending out the usual "40-day letter" advising the parties of a definite briefing schedule. However, in the transition, some clerks are doing it anyway. These changes put the entire burden on the appellant to calculate when its brief is due to be filed. If the appellant fails to figure it out, the clerk is authorized to grant requests for only "moderate extensions of time" to file a brief. Typically, the clerk is granting only 14 day extensions. If additional time is requested, the motion is sent to a circuit judge for ruling. Often the ruling is not made until after the time for filing the brief has passed (making the brief out of time in any event).

• Be aware of this expedited scheduling, and do not sit back and wait for the clerk to lead you by the hand. In a recent case, the clerk sent out a docketing letter 25 days after the docketing date. This gave the appellant only 15 days to file the brief. In another case, the docketing letter was sent 15 days after docketing, thus giving 25 days for filing the brief.

As you can see, this new procedure severely compresses and restricts the time for filing the appellant's brief. It is up to each lawyer who files a notice of appeal to advise the court reporter to give immediate notice to the lawyer when the transcript is filed with the district clerk. Additionally, the lawyer should monitor the district court clerk's docket entries to ascertain when the notice of appeal and a copy of the docket sheet are forwarded to the appellate court clerk.

Pertinent Eleventh Circuit Local Rules are set out below:

11th Cir. R. 31-1 *Briefs – Time for Serving and Filing.*

(a) *Briefing Schedule.* Except as otherwise provided herein, the appellant shall serve and file a brief within 40 days after the date on which the record is deemed filed as provided by 11th Cir. R. 12-1. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee. (Note: Most pending motions do not toll the time for filing a brief, nor does the issuance of a jurisdictional question toll the time. See subsections (d) and (e) of this rule.)

11th Cir. R. 12-1 *Filing the Record.*

In an appeal from a district court in which a transcript is ordered, the record is deemed completed and filed on the date the court reporter files the transcript with the district court. In an appeal from a district court in which there was no hearing below (including an appeal from summary judgment), or all necessary transcripts are already on file, or a transcript is not ordered, the record is deemed completed and filed on the date the appeal is docketed in the court of appeals pursuant to Fed. R. App. P. 12(a). The provisions of this rule also apply to the review of a Tax Court decision. *See* 11th Cir. R. 31-1 for the time for serving and filing briefs.

Pertinent Eleventh Circuit Internal Operating Procedures ("I.O.P.") (i.e., rules that the circuit clerks must follow) are set out below:

***I.O.P.* Following Federal Rule of Appellate Procedure 12 and 11th Cir. R. 12-1:**

1. *Docketing an Appeal.*

Appeals are immediately docketed upon receipt of the notice of appeal and the district court docket entries. A general docket number is assigned and all counsel and pro se parties are so advised. Failure to pay the docket fee does not prevent the appeal from being docketed but is grounds for dismissal of the appeal by the clerk under authority of 11th Cir. R. 42-1.

***I.O.P.* Following Federal Rule of Appellate Procedure 31 and 11th Cir. R. 31-1:**

1. *Briefing Schedule.*

The clerk's office will send counsel and pro se parties a letter confirming the due date for filing appellant's brief consistent with the provisions of 11th Cir. R. 12-1 and 11th Cir. R. 31-1, but delay in or failure to receive such a letter does not affect the obli-

gation of counsel and pro se parties to file the brief within the time permitted by 11th Cir. R. 31-1. The clerk's office will also advise counsel and pro se parties of the rules and procedures governing the form of briefs.

2. Motions for Extension of Time to File Brief.
The clerk is authorized to grant requests for moderate extensions of time to file briefs.

3. Record References in Briefs:
The Eleventh Circuit clerk typically includes with its notice of docketing an attachment that provides instructions for making proper record references in the briefs. It requires reference to the docket entries by docket entry number and volume of the record as prepared by the district court clerk. That attachment now contains a new section that takes into consideration the fact that the record may not have been filed by the time the appellant's brief is due to be filed. It states: "If volume numbers have not yet been assigned to transcripts by the court, record references to transcripts should be to the document number and page number. For example, Doc 83 – Pg 65 indicates Document Number 83 (a transcript), Page 65."

II. Caution: You're Not My Type, and Besides, You Talk Too Much

One more word of caution under the new rules: Federal Rule of Appellate Procedure 32(a)(7) requires that a principal brief that exceeds 30 pages or a reply brief that exceeds 15 pages must contain a certificate of compliance to show that the principal brief contains no more than 14,000 words (if 14-point proportionately spaced type face is used) or no more than 1,300 lines (if 12-point monospaced type face is used), and the reply brief may contain no more than one-half of the type volume allowed in the principal briefs.

One final note: The Supreme Court of Florida has adopted the Eleventh Circuit's type face rule in an administrative order issued July 13, 1998.

Ms. Hertz is an associate in the appellate practice group in the Miami office of Holland & Knight, LLP

Lawyers Gain Valuable Insight About Florida's Appellate Courts at Annual Appellate Advocacy Workshop

by Ilene L. Pabian

I recently attended the 1999 Appellate Advocacy Workshop in St. Petersburg, Florida, co-sponsored by the Appellate Practice and Advocacy Section and Stetson University College of Law. This three-day intensive skills CLE program was outstanding. The esteemed faculty included current and former appellate judges, appellate practitioners, and law professors. The twenty-two attendees had varying levels of appellate experience — ranging from seasoned appellate practitioners to attorneys only generally versed in appellate law. Regardless of the individual experience levels, we each learned useful appellate advocacy techniques and gained valuable insight into the inner workings of Florida's appellate courts.

We were given an appellate record for a model case and asked to prepare and submit an initial brief, using only specified authorities, one month before the seminar. These briefs were then reviewed and critiqued by two faculty members, who later gave us individual feedback and helpful suggestions for effective brief writing. During small breakout sessions, groups of two faculty members and four to five attendees used the model case as the foundation for several written and oral advocacy exercises.

The seminar also featured panel discussions on an overview of appellate brief writing and ethics and professionalism in appellate practice, as well as various individual and group presentations on preparing for oral argument, handling rebuttal, preserving error, transferring the case, preparing the record, and rehearing. One of the seminar's many highlights was Judge Klein's and Judge Altenbernd's comical satire on "How NOT to Do Oral Arguments," which included, among other things, a laptop computer singing "La Macarena" and a ringing cellular phone. Many of us also enjoyed the open forums, during which the judges shared their individual and respective court's preferences on rebuttal, use of appendices, motion practice, replies to motions for rehearing, requests for oral argument, and many other matters of interest to appellate practitioners.

The seminar culminated with the presentation of oral arguments before panels of appellate judges, who then gave us individual performance reviews and analyses. The program also included breakfast and lunch each day with the faculty members as well as a lovely reception in the Stetson Law Library.

I urge any practitioner who is interested in improving his or her appellate advocacy skills to take advantage of this unique opportunity and attend the 3rd Annual Appellate Advocacy Workshop next summer.

Ms. Pabian is an associate in the appellate practice group in the Miami office of Holland & Knight LLP.

State Civil Case Law Update

by Keith Hope

The following case summaries are issues you don't see every day, and thus, may be of some use to you lovers of the law. And, in keeping with tradition and for no other reason, I lead with a case about appellate attorneys' fees!

Florida Supreme Court

When seeking review of a trial court order awarding appellate attorneys' fees, do not tarry.

Bell v. U.S. B. Acquisition Co., Inc. 24 Fla. L. Weekly S220 (Fla. May 20, 1999).

The trial court refused to apply a contingency risk multiplier to the award of trial and appellate attorney's fees because the award was predicated solely upon a contract. The seller appealed the court's decision pursuant to Fla. R. App. P. 9400 which provides for appellate review of the trial court's assessment of appellate attorney's fees. The *Bell* court reversed holding that a contingency risk multiplier may be applied if the evidence supported the need for a multiplier.

The Court also held that the five day mailing rule found in Fla. R. App. 9.420(d) only applies when a party is required to do an act within a certain time period after being *served* with a document. Thus, the Court held that since a motion for review of an appellate attorney fee award under Rule 9.400 must be filed within 30 days after rendition of the trial court's order, the five day mailing rule does not apply.

A nonfinal order becomes not subject to immediate interlocutory appeal because of an amendment to a rule of civil procedure. *Thomas v. Silvers*, 24 Fla. L. Weekly S492 (Fla. Oct. 21, 1999).

The Court "remains vigilant in guarding the policy underlying rule 9.130 restricting piecemeal review of nonfinal orders." Resolving a conflict among the district courts, the Supreme Court held that an order denying a motion to dismiss based on untimely service under Fla.R.Civ.P. 1.070(j), as recently amended, is not subject to interlocutory appeal under Rule 9.130(a)(3)(C)(i).

Prior to the amendment of the civil rule, the Court had held that a trial court *must* dismiss a case when service is not effected with 120 days and plaintiff does not establish good cause for the delay. *See Morales v. Sperry Rand Corp.*, 601 So. 2d 538 (Fla. 1992). The Court noted that *Morales* was no longer viable in light of the amendment of Rule 1.070(j). The Court noted that the amendment effectively "broadens a trial court's discretion to permit an extension of time for service of process absent a showing of good cause" because "the trial court retains the discretion to (1) extend the period for service, (2) dismiss the action without prejudice, or (3) drop that defendant as a party." Thus, a dismissal order for untimely service does not determine "jurisdiction of the person" and may not be immediately appealed under rule 9.130.

District Courts of Appeal

Failure to file your brief on time is not necessarily fatal: "The punishment must fit the crime."

Irvin v. Williams, 24 Fla. L. Weekly D194 (Fla. 1st DCA May 14, 1999).

Recurrent nightmares for appellate practitioners include the consequences of late filings of notices of appeal and briefs. While the former is most always fatal, the latter is not. In this case, the circuit court dismissed an appeal from the county court on the grounds that the appellant's brief was filed two and half weeks late. On certiorari, the district court quashed the circuit court's order because there was no indication that such a severe sanction was warranted.

The petitioners' original attorney below had been suspended from practice and they hired a new attorney shortly before their initial brief was due.The new attorney filed a motion for extension to time explaining his recent retainment, that he had been ill, and that the other side had been contacted about the request for extension but had not responded. The District Court held that sanctions imposed under rule 9.410 "must be commensurate with the violation. Dismissal is an extreme sanction and, as such, it is reserved for the most flagrant violations of the appellate rules."

By way of illustration, the Court cited cases holding dismissals to be proper where, for instance, counsel failed to file the brief, failed to seek an extension and failed to explain his conduct in response to court order. Another case cited involved a situation where counsel had failed to timely prosecute his client's appeals despite reprimands and imposition of monetary sanctions. In this case, the Court held that good cause had been shown for the request for extension and that it was the first such request. Moreover, the Court held that there was no evidence that the delay was prejudicial or that it interfered with the orderly progress of the appeal, and the dismissal order failed to explain why such a severe sanction was necessary. Therefore, the Court held that the dismissal was a departure from the essential requirements of law.

Sit down: You have no standing. *Stas v. Posada*, 24 Fla. L. Weekly D2023 (Fla. 3d DCA Sept. 1, 1999)(*On Motion To Dismiss*).

In this case, two would-be appellants were dismissed for lack of standing to appeal. One appellant had no ownership interest in the property awarded to the plaintiff/appellee. The Court held such appellant was not affected by the judgment below, had no interest at stake, and thus, was precluded from seeking review. The second appellant was neither a party below nor made any effort to intervene at the trial level. Thus, he too lacked standing to appeal.

Among the cases cited by the Court, two had slightly different holdings concerning whether you must seek to intervene in the trial court action to be able to appeal. *Compare Marino v. Ortiz*, 484 U.S. 301 ((1988)(under federal rules,

nonparties aggrieved by a judgment should seek intervention for purposes of appeal, in the trial court, *prior* to filing a notice of appeal); *Wags Transp. Sys., Inc. v. City of Miami Beach*, 88 So. 2d 751 (Fla. 1956)(holding that nonparties may intervene in an action for appellate purposes after judgment has been entered where justice so requires).

Appellate Costs: If you win the appeal, you should get your appellate costs even if you may ultimately lose on remand.

Lucas v. Barnett Bank of Lee County, 24 Fla. L. Weekly D976 (Fla. 2d DCA April 14, 1999)(*On Motion for Review of Appellate Costs Order*).

The appellants challenged a judgment modifying a mortgage, partial release of security agreement, and certificate of title. The Bank had previously foreclosed on the mortgage, and purchased the subject property at foreclosure sale. The Bank then instituted the action below to reform erroneous legal descriptions in the documents and obtained summary judgment. On appeal, the Court reversed because the trial court lacked authority to correct the legal description without first canceling the certificate of title and setting aside the original foreclosure judgement. The Court's holding was without prejudice to the Bank's right to attempt to reform the mortgage and foreclose on the reformed mortgage.

Thereafter, the appellants moved to tax appellate costs in the trial court under Rule 9.400(a). The trial court granted the motion but denied the appellants' request to reduce the award to an enforceable judgment pending the determination of prevailing party status at the conclusion of the proceedings on remand. The appellate court reversed holding that the appellants prevailed on the significant issue in the appeal--the propriety of the judgment correcting the legal description. Therefore, the Appellants were entitled to a judgment for their appellate costs before the conclusion of the proceedings on remand.

Expansion of Rule 9.130 is not always a bad idea.

Amerada Hess Corp. v. Nat'l Railroad Passenger Corp., 24 Fla. L. Weekly D1980 (Fla. 4th DCA Aug. 25, 1999).

This action arose out of a train-truck collision. In a bifurcated trial, the jury found the appellant to be 100% at fault, and appellant sought review under Rule 9.130(a)(3)(C)(iv) which permits non-final appeals in cases which determine "the issue of liability in favor of a party seeking affirmative relief." One of the issues appellant raised concerned the propriety of the trial court's directed verdict in favor of the railroad on negligence.

The Court held that it had no authority to review the issue under Rule.9.130(a)(3)(C)(iv), as written. The Court noted that since "the purpose of permitting review of verdicts on liability in bifurcated trials is to 'promote judicial economy,' . . ., our supreme court may wish to consider expanding our scope of review so that we can review these verdicts as if they were final judgments." The Court affirmed on the issues properly before it and noted that if it had the authority to review the directed verdict on negligence it would affirm.

The Court does not need friends in this case.

Rathkamp v. Department of Community Affairs, 24 Fla. L. Weekly D1149 (Fla. 3d DCA May 12, 1999)(*On Motion To Appear As Amicus Curiae*).

The Pacific Legal Foundation filed a motion to appear as amicus curiae which was denied. The Court fully endorsed and adopted the principles stated in Chief Judge Posner's opinion in *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062 (7th Cir. 1997). While the Court did not list nor comment on such principles, here they are for your edification: An amicus brief should be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. *Id.* at 1063.

Apples and oranges: Keep your rules straight, especially concerning rehearing.

Hoenstine v. State Farm Fire & Cas. Co., 24 Fla. L. Weekly D2224 (Fla. 5th DCA Sept. 24, 1999)(*On Motion For Reh'g*).

The appellee *twice* moved for rehearing of the Court's order granting appellants' motion for appellate attorneys' fees. Both motions were filed more than 15 days after the Court's order and were thus untimely under Rule 9.330(a). Appellee's reliance on Rule 9.400(c), and cases construing same, was misplaced since the latter rule provides a 30 day period only to seek review of a *trial court's* order awarding appellate attorneys' fees–not from a district court's order.

Keith Hope is Of Counsel to Hanzman, Criden, Chaykin & Ponce, P.A., in Miami.

COMMITTEE REPORTS

Appellate Certification Liaison Committee

The Committee has met and shared various ideas as to how to better inform the Bar about Appellate Practice Certification. Among the plans of the Committee is the placement of the informational pamphlet, "Become Board Certified in Appellate Practice" in the various appellate courts of the state. The Committee is working with Jack Shaw, Court Liaison Committee, to try to accomplish this goal. Other ideas include providing additional information to Section members in *The Record.*

The CLE Committee and Family Law Section are Co-Sponsoring a seminar entitled "Who Says Family Law Isn't Appealing?" The seminar will be presented n Miami on December 2,1999 and in Tampa on December 3, 1999. There will also be several other video presentations throughout the state. The seminar will include a presentation specific to family law appellate topics such as preserving the record, orders subject to review, the record and appendix, certiorari and extraordinary writs, motion practice and an interactive panel discussion.

Membership Committee

The membership of the Appellate Practice Section is currently 1,054. The Membership Committee has fourteen members, and we welcome any members of the Section to join this committee. We have been establishing goals for the Committee for the next three years and are trying to expand the responsibilities of the Committee.

Membership in the Section has been hovering around the 1000 mark for the past several years. We have set a goal of increasing membership by several hundred members in the next three years. We ask all Section members to help the Committee reach this goal.

The Committee is also in the process of preparing a survey for all members. The survey will elicit suggestions, complaints and determine whether the members are satisfied with the Section. The survey will be included in the Spring issue of *The Record*. Please take a moment to complete and return the survey. The responses should be received in time to allow the Executive Committee to review them at the April, 2000 retreat.

Programs Committee

JUNE 1999 EVENTS

The Committee raised $4,740.00 for the June 1999 dessert reception. The amount spent on the dessert reception was $2,067.63. The discussion with the Florida Supreme Court was attended by all the Justices. Following the discussion, the Justices discussed the need to expand the audience to younger attorneys.

FUTURE EVENTS

The Committee is planning for next year's events and, in connection with greater advertising and fund raising, is assembling a master mailing list of appellate practitioners. The mailing list will also be utilized to assist the moot court committee in fund raising.

Greater advertising is being planned for next year's annual meeting events. This will include individual letters to the committee and Section chairs whose groups have conflicting time slots with the Supreme Court panel discussion. In the letters, we will request that those groups let their members out 15-20 minutes before the end of the panel discussion so that we can "pack" the room by the end of the discussion. Large, bold advertisements and/or articles are planned for the Spring and Summer issues of *The Record*. Additionally, the advertisements will be placed in *The Florida Bar Journal* and *Florida Bar News* in connection with the major advertisements for the Annual Meeting.

- Individual invitations to the dessert reception will be sent to all appellate judges and spouses.
- The Committee is developing a time line and procedure outline manual establishing deadlines for all matters associated with planning the committee's events.
- The Committee is also brainstorming to develop another program for the mid-year meeting in Miami. The Committee is currently contemplating having a cocktail reception for committee members and appellate judges at the Miami meeting.

Publications Committee

The Publications Committee last met by telephone conference on July 15, 1999. The Committee addressed its three major publications: *The Record, The Guide,* and articles in *The Florida Bar Journal.*

(1) The Record

Kim Staffa-Mello is again the editor of *The Record*. Susan Fox is the associate editor, and Brendan Lee is an assistant editor of *The Record*. The Committee decided to change the name of the quarterly volumes to reflect the time of year (rather than the month of the year) in which *The Record* is published, i.e., Fall, Winter, Spring, and Summer.

The Committee noted a publication lapse of prior volumes and discussed methods to ensure the timely issuance of future volumes. The Fall issue was sent and received by our members prior to the Fall general meeting. The Winter issue, which should be received by our members prior to the January general meeting, should also be timely. The Committee discussed the need for additional articles and assigned tasks to obtain such articles from our members.

(2) *The Guide*

This year, Tracy Gunn is the editor of *The Guide*. *The Guide* was not published in 1999. Thus, the Committee's goal is to publish a copy of *The Guide* in November of 1999. This edition of *The Guide* will be the "*1999/2000 Guide.*" To ensure timeliness of the *1999/2000 Guide*, specific dates were set for all of the tasks involved in publishing it. In addition to the series on the District Courts of Appeal, this Guide will add biographies of the Florida Supreme Court Justices and an "Inside the Eleventh Circuit" article. The *1999/2000 Guide* will not contain the Rules of Appellate Procedure. We have received several new advertisers for *The Guide*.

(3) *The Florida Bar Journal*

Jackie Shapiro has once again agreed to edit the articles submitted for publication in *The Florida Bar Journal*. Our Section has been allocated five slots. Joel Eaton submitted an article on Rule 9.130, which the Committee decided to publish only if there is a counterpoint article responding to Mr. Eaton's criticisms of that Rule. The Committee is currently seeking an author for this counterpoint article. Additionally, Tracy Gunn, Ty Cone, and Harvey Sepler have either submitted or agreed to submit articles for publication in future issues of *The Florida Bar Journal*.

Preservation of Error Seminar a Great Success

by Bonita Kneeland Brown

On October 14, 1999, in Tampa, Florida, the Appellate Practice and Advocacy and Trial Lawyers Sections of the Florida Bar, in conjunction with the Florida Bar CLE Committee, presented the program "What Do You Mean I Didn't Preserve The Issue?" What Every Trial Lawyer Needs To Know About Preservation of Error and Appeals. The seminar was well attended and well received by a room filled with approximately 50% appellate lawyers and 50% trial lawyers (by show of hands). Some of the topics included in the seminar were jury selection, working with appellate lawyers at the trial level, jury instructions, motions, evidentiary issues, and ethics.

Those who did not attend missed a talented group of speakers. However, it is not too late to order the lecture materials, which are excellent. Both the course book and audio tapes are available through The Florida Bar by calling (850) 561-5831.

Many thanks to Jack Aiello, CLE Chair, and his steering committee for this excellent contribution to our professional education. The steering committee for this seminar consisted of Robert Glazier and Steve Stark (Co-Chairs), along with Tom Elligett, Susan Fox, Allison Hockman and Steve Wisotsky. We are also grateful to the following lecturers: Judges Nellie Khouzam, Gerald B. Cope, Jr., Jeffrey E. Streitfeld, Larry Klein, Carolyn Fulmer, Chris W. Altenbernd, and Allen R. Schwartz, along with Tom Elligett and Cody Davis, Tampa attorneys.

Ms. Brown is a shareholder at Fowler, White and is a member of the Executive Council of The Appellate Practice and Advocacy Section.

Share this form with a colleague!

APPELLATE PRACTICE & ADVOCACY SECTION
MEMBERSHIP APPLICATION

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

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

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

Make Plans Now for the Spring Retreat!

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Events: **(Please check those events you are interested in attending. The $75.00 Registration Fee includes participation in any or all events listed below, including meals.**

Hotel: **The group rate for the hotel is $119.00 per night (single or double). Hotel reservations may be made by calling 561/225-3700. Be sure to tell them you are with The Appellate Practice Section of The Florida Bar.)**

FRIDAY, APRIL 28, 2000

- ❑ **CLE — Ethics and Professionalism in Appellate Practice** (2:00 - 5:00 p.m.)
  (If you indicate interest in the CLE, you will receive registration materials closer to the time of the event.)
- ❑ **Reception** (6:00 - 7:00 p.m.)
- ❑ **Dinner — Judge Philip J. Padovano of the First District Court of Appeal, Keynote Speaker**
  *(___ Please indicate the number of guests you will be bringing to dinner. Dinner tickets for guests are $30.00.)

SATURDAY, APRIL 29, 2000

- ❑ **Long Range Planning and Goal Setting** (8:30 - 3:30 p.m.)
  — Includes working breakfast and lunch
- ❑ **Committee Chairs Workshop** (3:30 - 4:30 p.m.)
  Evening on your own

SUNDAY, APRIL 30, 2000

- ❑ Executive Council Planning Meeting and Breakfast (8:30 - 10:30 a.m.)

Please return this form with a check payable to:

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*** * * Deadline is March 24, 2000. * * ***

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