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Court Adopts Appellate Rules Changes

by Susan W. Fox

The Florida Supreme Court adopted changes to the Florida Rules of Appellate Procedure in an opinion issued October 12, 2000. The opinion, *In re Amendments to Florida Rules of Appellate Procedure*, 25 Fla. Law Weekly, S835 (Fla. Oct. 12, 2000), accepted most of the recommendations submitted in the four-year cycle report of the Appellate Court Rules Committee.[1] The rule changes are effective January 1, 2001.

This article will explain the revisions adopted by the court, beginning with the Committee's three proposals that were rejected or modified by the Court.

Typeface in Briefs and Petitions. The Court declined to adopt the committee's proposal to amend Rule 9.210 to allow 13-point typeface in appellate briefs and instead required that briefs be submitted in either Times New Roman 14-point font or Courier New 12-point font. Further, the court added, sua sponte, the requirement that counsel (or the party if unrepresented) "shall sign a certificate of compliance with the font standards required by this rule for computer-generated briefs." The certificate should immediately follow the certificate of service. The court stated it was taking this action "because the person who prepares such a brief is in the best position to know if the brief was prepared in accordance with this rule, [and] clerks of court should not be required to review each computer-generated brief for compliance other than noting the certificate of compliance." The court additionally made sua sponte parallel amendments to rule 9.100 regarding original appellate proceedings so that computer-generated petitions, responses, and replies filed in such proceedings are subject to the same font and certificate requirements as briefs.

Rendition of District Court of Appeal Orders. The Court rejected the Committee's proposal for amendment of the rendition rule, Rule 9.020(h), to add a new subsection as to motions for rehearing, clarification, or certification in the district court. Rendition of such orders shall continue to be governed by *St. Paul*

See "Appellate Rules Changes" page 9

Checklist for Briefs and Petitions Due After January 1, 2000

- ✔ Standard of Review section to be included in argument as to each issue
- ✔ Typeface: 14 point Times New Roman or 12 point Courier New
- ✔ Certificate of Typeface Compliance must follow Certificate of Service
- ✔ Headings in same size type as text or larger

INSIDE:

Chair's Message:

The First Thing We Do Is Call The Lawyers

by Benedict P. Kuehne, Chair

What a glorious time to be a Florida lawyer! Since the eventful November 7 presidential election, Florida — and especially its justice and legal systems — have been in the forefront of the public's attention. That has been a remarkably favorable development, because the public can have no doubt about the ability of Florida's courts to dispense justice and to resolve complex questions. And everywhere we turn, Florida's lawyers and judges, especially our appellate judges and lawyers, have participated at the highest levels, instilling confidence in our public institutions.

From my perspective, which fortunately has been from a prominent place in the middle of the fray, Florida has passed every test with the highest honors. Notwithstanding the mean streak evident in some members of our national leadership, who have directed unfair and misguided attacks at our Florida Supreme Court, I am firmly convinced that the Florida judiciary has solidified its reputation as a true, fair, impartial, and perceptive arbiter of justice. My appreciation and congratulations, on behalf of all Florida's appellate lawyers, go out to the justices of the Florida Supreme Court. Their willingness to consider the election law cases, and offer convincing guidance on an expedited basis, stands as a true confirmation that the Florida Supreme Court is entitled to our respect and admiration.

None of the intensely fascinating debate and high levels of litigation would have been possible without the involvement of an outstanding array of talented Florida lawyers, including appellate practitioners. From the early morning after the election, when **Kendall Coffey** and I were asked to spearhead Vice President Gore's Florida election challenge and strategy, I have worked with some of the most impressive lawyers practicing today. The level of commitment and participation has been inspiring, and our team's ability to generate convincing and persuasive documents on virtually a moment's notice have made traditional appellate deadlines seem almost casual. The opportunity to work collegially with **David Boies**, **Laurence Tribe**, **Teresa Roseborough**, **Lisa Brown**, **Greg Barnhart**, **Joel Perwin**, **Lance Block**, **Bruce Rogow**, **John Newton**, **Mitchell Berger**, **Joe Geller**, **Jack Corrigan**, **David Sullivan**, **Joe Sandler**, and **Peggy Fisher,** and many others, has been gratifying.

My observations are not directed only to members of my legal team, but extend to those working on the Republican teams as well. Led by **Barry Richard**, and including **Joe Klock**, **Mark Wallace**, **Marcos Jimenez**, and numerous others, the opposing counsel showed every bit as much diligence and interest in presenting a positive image of lawyers and the justice system.

The long-term benefits of the Florida election litigation, now that the presidency has been decided, will include renewed public confidence in the work of our courts. Who could deny the positive public impression and image of professionalism as the entire world watched the Florida Supreme Court oral argument? Let this be a lesson to the federal courts: inviting the public into courtrooms through cameras is actually a good thing.

The appellate function and the role of appellate lawyers have never been more visible. Buoyed by a near-universal approval of the importance of oral and written advocacy, we must take advantage of this unique opportunity to extol the virtues and benefits of appellate specialists and an independent judiciary. The voice of our Section will be louder and our message will be stronger by joining together to speak out positively on behalf of appellate advocacy. Let's all take advantage of this development, and let the profession and our communities know of our important role

Brief Thoughts

by Bonnie Kneeland Brown

Face Your Fears"

While channel-hopping late one evening, I chanced upon a TV show called "Face Your Fears," hosted by Jerry Springer. I watched with morbid fascination as Jerry bribed folks in the audience to face their worst fears. For $1,000 one woman allowed herself to be hoisted up to the 16th floor of a building on a pulley device. This was supposed to "cure" her fear of heights. A second contestant also accepted $1,000 to cure his fear of rodents. Fitted in a padded suit, he crawled on his hands and knees through a lengthy maze swarming with hundreds of rats.

The show started me thinking about my own personal fears: scorpions and computers (not necessarily in that order). Professionally, however, an appellate lawyer's greatest fear is "the question" at oral argument. This is the one question we dread most from the bench because it strikes at the weakest part of our client's case.

Sometimes, if necessary, we have addressed "the question" already in our brief. However, if the opposition did not raise the point, we may have been loathe to raise it ourselves. Facing our fears is nothing more than acknowledging that "the question" may very well be asked at oral argument anyway and having our best answer prepared. It may not "cure" the fear, but it will provide some padding as we traverse the legal maze known as oral argument.

Note: BRIEF THOUGHTS is a running column in The Record *and will comment -- briefly -- on various matters pertaining to appellate advocacy. Suggestions for topics for future columns are welcome and should be directed to Bonnie Brown (at Fowler White, Tampa), fax: 813/229-8313.*

Appellate Attorneys Shape History in Election Cases

by Siobhan Helene Shea, Assistant Editor

As the nation's eyes watched the historical events unfold over Florida's unique presidential election, members of the Appellate Practice Section of The Florida Bar represented the litigants in cases throughout the state which could determine the outcome. The United States Supreme Court heard arguments from Florida appellate attorneys on December 1, 2000 in *Palm Beach County Canvassing Board v. Harris*. After the Supreme Court of Florida issued its forty-two page decision in that case, it received three more cases as of press time. Clerk of the Fourth District Court of Appeal, Marilyn Beuttenmuller, remarked as of November 30, 2000, there were eight cases pending involving the elections. At least forty cases spread statewide in various stages of litigation.

Appellate practitioner Beverly Pohl, phoning in from Washington, D.C., where she and Bruce Rogow attended oral arguments, stated that their representation of the Palm Beach County Canvassing Board has kept them busy. Pohl and Rogow started out representing Theresa LePore because she had been been named individually, but wound up representing the entire canvassing board as suits kept springing up, as the conflict went up to the Supreme Court of Florida. "What the Supreme Court of Florida did in construing Florida's election code and applying principles of statutory construction was not creating new law, as urged by the Petitioners," stated Pohl, "but was 'ordinary judging'."

"The Sunday after the election we got a call from General Counsel for the Secretary of State [of Florida] saying these cases were springing up all over the state," commented Appellate Practice Section member Donna Blanton, a partner at the Tallahassee office of Steel Hector & Davis. Blanton and Joe Klock have been working full time with six other partners and seven associates representing the Secretary of State Katherine Harris and the Department of the State of Florida (at a "negotiated rate"). Klock presented oral arguments in the U.S. Supreme Court in *Palm Beach County Canvassing Board v. Harris*, along with attorney Ted Olson for Bush, opposed by Lawrence Tribe for Gore. The Secretary of the State of Florida, sided with Bush attorneys in arguing that the Supreme Court of Florida's decision conflicted with federal constitutional and election laws. Blanton and Klock's legal team also handled two cases in the Eleventh Circuit Court of Appeals. The two cases were expedited and set for oral argument for Tuesday, December 5, 2000. Both cases involve voter challenges to Florida Statutes on elections.

Cases — sometimes a dozen a day — have been springing up all over the state. But, notes Blanton, "We still don't have as many attorneys working on these cases as Bush and Gore do."

The Supreme Court of Florida required attorneys to file both jurisdictional and briefs on the merits within two days. The high stakes and expedited appellate process have kept even the large team at Steel Hector up many nights working.

"Tuesday we had briefs due in the Eleventh Circuit, U.S. Supreme Court and Florida Supreme Court and two trials in the Leon County cases," remarked Blanton.

"It's been grueling but fascinating . . . a once in a lifetime opportunity.

The expedited brief schedule is not unique for the Supreme Court of Florida. It's done routinely in death warrant cases," notes Tom Hall, Clerk of the Supreme Court of Florida. "Despite the fact that people have been working under such time constraints they've still filed things in a timely manner and have done high quality work on the election cases," says Hall.

Opposing Klock and Blanton in the Florida Supreme Court were Rogow and Pohl. Rogow may be the first Section member to have his oral argument carried live on four national television stations.

Section Chair Ben Kuehne worked seemingly around the clock representing the Florida Democratic Party as an observer in the recount of the Palm Beach County ballots. He was often visible on CNN sitting right behind Judge Charles Burton.

Down in Broward County, Andrew Meyers, Chief Appellate Counsel for Broward County, was burning the night oil. Broward County contends

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ELECTION CASES
from page 3

the manual recounts and election process are governed by Florida law. Along with appellate attorney Tamara Scrudder and several other attorneys, Meyers has been working nonstop on four appellate matters and five trials, with more cropping up daily. Meyers, who was coming right off the Florida citrus canker caseload stated "We file one brief and two come in." For now, the Las Vegas vacation getaway he planned with his wife is on hold. "It's been a great experience," says Meyers, "but after this I will never again complain about normal briefing schedules."

The work has also absorbed the full-time attentions of Gary Farmer of Gillespie, Goldman, Kronengold & Farmer. Florida Bar certified Farmer got involved when his mother-in-law, Beverly Rogers, called him the day after the elections, upset that she had mistakenly voted for Pat Buchanan. Farmer filed suit on behalf of Rogers and Ray Kaplan against the Palm Beach County Elections Commission, Theresa Le Pore, Al Gore and George Bush. Florida Statutes require joinder as an indispensable party of the victor of the election, necessitating that both candidates be joined. Rogers' case challenges the use of the famous "butterfly ballot" in Palm Beach County and is pending in the Supreme Court of Florida. Farmer, working on the same expedited Supreme Court briefing schedule commented, "Without a doubt, this has been the most exciting case of my life."

Farmer, who at press time was filing another new lawsuit in Leon County has spent several all-nighters and "hopes my children remember me after this." The Leon County case challenges the treatment of absentee voter ballots and alleges the Martin County Supervisor of Elections permitted Republican party members to remove absentee ballots from the office of elections, fill out the ballots and return them.

"I feel as though I'm doing a public service in that the purpose of our lawsuit is to ensure that every vote is counted and the process of electing our nation's president is fair."

Strengthening the Standard—The 17th Edition of *The Bluebook: A Uniform System of Citation*

by Erica Chein

Part II in a Two-Part Series

In Part I of this series, Dean Darby Dickerson, author of the Association of Legal Writing Directors Citation Manual wrote of AWLD's reasons for writing a citation manual and ALWD's criticisms of The Bluebook. *In Part II,* The Bluebook *editor responds and introduces the 17th Edition.*

In August of this year, the editors of the Columbia Law Review, the Harvard Law Review, the University of Pennsylvania Law Review, and the Yale Law Journal published the Seventeenth Edition of *The Bluebook: A Uniform System of Citation*. Relied upon by legal practitioners and academics now for nearly three-quarters of a century, *The Bluebook* provides detailed guidance on how to cite the major types of sources referenced in legal writing. The Seventeenth Edition upholds the standards that have helped to inform and shape law practice and scholarship, but also addresses in greater depth the citation of sources (in particular, online references) that have become increasingly important within the last several years. It also contains features designed for increased clarity and ease-of-use. Like most systems that strive to provide a universal standard for a diverse and evolving field of practice, *The Bluebook* has not been without its detractors. Its ability to endure, however, has been proven time and time again, and *The Bluebook*'s editors are committed to both preserving the continuity of its established conventions and being responsive to real changes in the legal landscape.

The first edition of what subsequently became *The Bluebook* was printed in 1926 by Erwin N. Griswold, who later served as Dean of Harvard Law School and Solicitor General of the United States.[1] From its origins as a modest 26-page pamphlet geared toward law review footnotes, *The Bluebook* pioneered its way to becoming the American standard for legal citation generally, accepted widely by courts and law schools alike. Recognition throughout the legal community of the need for uniformity in the citation of authorities fueled *The Bluebook*'s near universal adoption as the century progressed. Like a substantial number of states, Florida currently mandates the use of *Bluebook* rules for citations to sources other than local court opinions.[2]

In recent years, several groups have produced citation manuals presented as alternatives to *The Bluebook*. In the late '80s, the *University of Chicago Manual of Legal Citation* (the "Maroon Book") attempted to provide a greatly simplified approach to citation.[3] In 1999, the American Association of Law Libraries published the *Universal Citation Guide*,[4] which contains rules for citing cases, constitutions, statutes and regulations in medium- and vendor-neutral citation form. In April of this year, the *ALWD Citation Manual*[5] was published as a "restatement of citation,"[6] geared towards teaching. It is unlikely, however, that any of these alternatives will be able to rival *The Bluebook* for its comprehensiveness and authority. The strength and usefulness of a citation manual is in its ability to provide a single, uniform standard that will resolve doubts and provide certainty for the practitioners and scholars who use it. Although other manuals may provide additional guidance at the margins, the proliferation of multiple national citation standards will tend to result in confusion and uncertainty. Because of its history, its widespread acceptance, and its edi-

tors' commitment to maintaining its quality and integrity, *The Bluebook* stands in a unique position as the standard of choice.

The Seventeenth Edition incorporates a number of new and improved features, some of which are summarized in the chart below. A major addition is the inclusion of more comprehensive rules for the citation of electronic media and other nonprint sources, including World Wide Web pages, e-mail messages, and CD-ROM materials. Although *The Bluebook* retains its preference for the use and citation of traditional print authorities, it recognizes the usefulness of electronic sources in cases in which the information is not readily available from a traditional source.

The Seventeenth Edition includes a more definitive format for public domain citation of cases. In recent years, a number of jurisdictions have officially adopted medium-neutral formats, and *The Bluebook* provides a model for future adoptions. It also lists the public domain formats that have already been adopted in the jurisdictional pages of Table 1. For cases cited using a medium-neutral format, *The Bluebook* requires a parallel citation to the relevant regional reporter.

In recognition of practitioners' obligation to follow local court rules when citing local authorities, the Seventeenth Edition has omitted the explicit parallel citation rules of the previous edition's Table 1 in favor of a general admonition to adhere to local rules, such as Florida's Rule 9.800, in such situations.

Much of the criticism of the Sixteenth Edition of *The Bluebook* has been centered around that edition's modification of Rule 1.2, on the use of "*see*" and other introductory signals. After a process of careful evaluation, the editors decided to return to the previous and more universally accepted (Fifteenth Edition) rule, allowing the use of no signal when the cited authority directly states the writer's proposition, and reviving the use of "*contra*" to indicate authority that directly states the converse of the proposition.

The tables in the Seventeenth Edition have been updated and expanded. A citation format for U.S. patents has been added. Diagramed examples of formats have been made clearer by the insertion of marks to indicate spacing and divisions between constituent parts. Twenty-five pages longer than the Sixteenth Edition, the Seventeenth Edition retains its compact format, and is now available with a more durable, wire spiral binding. At $12.00 per copy,[7] *The Bluebook* remains affordable.

The Seventeenth Edition revision of *The Bluebook* is the result of a conscientious collaborative effort, coordinated by Mary Miles Prince of Vanderbilt University Law School, among the editors of the four law reviews, as well as numerous practitioners, judges, law librarians and scholars who provided input, criticism and encouragement. While grateful for its rich history and past success, *The Bluebook*'s editors are also firmly committed to ensuring that *The Bluebook* stands poised to meet the challenges of the next century of legal scholarship and practice.

Erica D. Chien *is an editor of the Harvard Law Review.* Suggestions and inquiries about *The Bluebook* may be directed to the editors at *bluebook@harvardlawreview. org.*

Endnotes:

[1] *See* Henry J. Friendly, *Erwin N. Griswold -- Some Fond Recollections*, 86 Harv. L. Rev. 1365, 1365 (1973).
[2] Fla. R. App. P. 9.800 (n).
[3] University of Chicago Manual of Legal Citation (University of Chicago Law Review & University of Chicago Legal Forum eds., 1989).
[4] Committee on Citation Formats, Am. Ass'n of Law Libraries, Universal Citation Guide (1999).
[5] Darby Dickerson, Ass'n of Legal Writing Directors, ALWD Citation Manual: A Professional System of Citation (2000).
[6] *Darby Dickerson, Professionalizing Legal Citation: The ALWD Citation Manual*, The Record: J. App. Prac. Sec. (App. Prac. & Advoc. Sec., Fla. Bar), Fall 2000, at 4.
[7] $12.00 is the price of *The Bluebook* when ordered directly from the Harvard Law Review Association, Gannett House, 1511 Massachusetts Avenue, Cambridge, MA 02138, shipping included.

See related charts, pages 6 & 7.

Appellate Practice Section Committee Chairs

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Please conmtact these Committee Chairs on any issue of concern to the Section.

The Bluebook: A Uniform System of Citation
Notable 17th Edition Changes and Additions

	16TH EDITION	17TH EDITION	COMMENTS
Introductory Signals (rule 1.2)	• Use [no signal] only to identify the source of a quotation or an authority referred to in the text. • Use *"But see"* when cited authority directly states the contrary of a proposition.	• Use [no signal] also when the cited authority directly states the proposition. • *Use "contra"* when cited authority directly states the contrary of a proposition.	The 17th Edition returns to the more widely used 15th Edition rule.
Case Names in Citations (rule 10.2.2)	• Abbreviate any word listed in **table T.6,** unless it is the **first** word of the name of a party. Southern Consol. R.R. v. Consolidated Transp. Co.	• Abbreviate any word listed in **table T.6.** S. Consol. R.R. v. Consol. Transp. Co.	The 17th Edition allows the first word of a party name to be abbreviated.
Public Domain or Medium Neutral Citation of Cases (rule 10.3)	• Provide the case name, the year of decision, the name of the court, and the sequential number of the decision, with pinpoint citations to paragraph numbers. • A parallel citation to the regional reporter may be given.	• Provide the case name, the year of decision, the state's two character postal code, the **table T.7** court abbreviation, and the sequential number of the decision, with pinpoint citations to paragraph numbers. A parallel citation to the regional reporter, if available, is required. Beck v. Beck, 1999 ME 110, 1 6, 733 A.2d 981, 983.	The 17th Edition provides a more definitive model format and requires a parallel citation to the applicable regional reporter, if available.
Patents	• No rule for patents.	Provide the patent number and the date the patent was issued. **(rule 14.9)** U.S. Patent No. 4,405,829 (issued Sept. 20, 1983).	The 17th Edition adds a rule for citing U.S. patents.
Authors of Books (rule 15.1.1)	• If a work has more than two authors, use the **first** author's name followed by "ET AL."	• If a work has more than two authors, use the first author's name followed by "ET AL." unless the inclusion of other authors is particularly relevant.	The 17th Edition allows for the listing of additional authors when appropriate.
Electronic Media	The 16th Edition provided limited guidance on electronic sources and	The 17th Edition includes a new, detailed **rule 18** on electronic media and other databases in **rule 17.3.** nonprint resources, with an emphasis on the Internet.	The 17th Edition gives much more guidance on Internet citation, and also includes rules for citation of CD-ROM and e-mail sources.

Abbreviated Citations to Other Court Documents (practitioners' note P.7)	If the citation serves as a clause, include commas before and after the parenthetical. The witness did not observe anything unusual on that day, (R. at 101 - 05), and received no phone call.	Do not include commas before and after the citation clause. The witness did not observe anything unusual on that day (R. at 101 - 05) and received no phone call.	The 17th Edition no longer requires such parenthetical clauses in court documents to be additionally set off by commas.
Case Citation in Documents Submitted to State Courts (table T.1)	The 16th Edition explicitly mandated parallel citation to the official and regional reporters, if available.	The 17th Edition states that practitioners should adhere to local court rules.	The 17th Edition recognizes practitioners' obligation to follow jurisdictional rules of citation.

A Practical Preliminary Analysis for Appeals at the District Court Level – Or, *Screen Now or Scream Later*[1]

by Patricia Kelly

Whether you represent an appellant or an appellee, you can increase your effectiveness by performing a preliminary analysis on your cases that mirrors the preliminary analysis the appellate court will perform.[3] If you represent an appellant, this preliminary analysis is a crucial step in deciding how – and whether – to proceed with an appeal. If you represent an appellee, your goal in this analysis is to find a way for the appellate court to dispose of the case without having to address the merits of the issues raised by the appellant. Even if you cannot find a way to foreclose consideration of the merits, this analysis may help you find a basis for the court to affirm notwithstanding any errors.

First, determine whether the appellate court has jurisdiction. Surprisingly, many practitioners never consider this issue. Essentially, this is a two-pronged inquiry: is the order appealable, and was the appeal timely?[4] If you represent an appellee and you conclude that the court does not have jurisdiction, you should immediately bring this to the court's attention by filing a motion to dismiss for lack of jurisdiction. If you represent a would-be appellant and you reach this conclusion, except for explaining to your client why you cannot file an appeal, your labor is at an end.

Also, although it is not often an issue, consider whether the appellant has standing to bring the appeal. To have standing, an appellant must have been a "party or privy" and "must show that he is or will be" harmed by the appealed order.[5] Standing may become an issue in multi-party cases, in cases where the appellant was not a party in the trial court, or in cases where the appellant has done something to waive the right to appeal.[6]

After you are satisfied that the court has jurisdiction and that the appellant has standing to appeal, check to see whether there is an adequate record of the proceedings in the trial court. A trial court's decisions arrive at the appellate court clothed in a presumption of correctness.[7] The appellant must demonstrate reversible error.[8] In many cases, the appellant cannot satisfy that burden without a transcript. For example, if there is no transcript of a hearing in which the trial court determined controlling issues of fact, the appellate court must affirm the ruling under review.[9]

Next, determine which errors were preserved. If an error was not properly preserved in the trial court, it cannot be argued on appeal unless it constitutes fundamental error.[10] Accordingly, you waste the court's time, your time, and your client's money if you argue issues that trial counsel did not preserve. To avoid this, and also to avoid embarrassing yourself, it is imperative that before proceeding with an appeal you determine which potential errors were properly preserved. If you represent an appellee, do not miss this opportunity to foreclose an opponent's argument by pointing out that trial counsel failed to preserve an error.

Discussion of the specifics of preserving error is beyond the scope of this article. Generally, however, "preservation" refers to the concept that a trial court must have received notice of an error and had an opportunity to correct it before an appellate court will reverse the trial

continued, next page

SCREEN NOW, SCEAM LATER
from preceding page

court.[11] As a result, trial counsel must bring errors to the trial court's attention with a timely, specific objection.[12] The objection must be reflected in the record, and the objecting party must obtain a ruling from the trial court.[13]

Similarly, an appellate court will not consider issues or arguments not raised in the trial court. Accordingly, an appellee can defeat arguments raised for the first time on appeal simply by pointing out that fact to the court. It is important to note, however, that this rule does not restrict what an appellee can argue. Appellees have more flexibility because Florida law requires appellate courts to uphold the trial court if it reaches a correct result, even if it did so for the wrong reason.[14] As a result, an appellee can argue for affirmance based on grounds not asserted in the trial court.

A related inquiry involves whether an error, assuming it was preserved, was invited or was later waived. An appellant cannot assert an error that was "invited." An "invited" error is one that the complaining party is responsible for or that she asked the trial court to make.[15] For example, a party cannot argue that the trial court improperly admitted evidence if the complaining party was the party that offered the evidence. Similarly, trial counsel can waive an objection. For example, counsel may object to testimony at one point, but if testimony of the same nature was admitted without objection either before or after that testimony, the objection is waived.[16] Counsel can also waive an objection by failing to secure a ruling from the trial court.[17]

The next step in the analysis is critical. For the purposes of this step, assume that the preserved errors are in fact errors, although at this point you may not have made that determination. An appellate court cannot reverse based on an error that is harmless.[18] One way to think about this aspect of the analysis is to think of the appellate court asking, "so what?" when you explain that the trial court has erred. If an appellant cannot explain to the appellate court why an error resulted in a "miscarriage of justice," she is going to lose the appeal. As the appellee, always tell the appellate court why a given error was harmless. There are many reasons that an error can be harmless. For example, improperly excluded evidence may be cumulative, the evidence in favor of the prevailing party may be overwhelming, or the jury or the trial court may never have reached the issue affected by the error.

Failure to make it past any of these hurdles may cost an appellant the appeal. On the other hand, if an appellant is able to leap these hurdles, the case is ready to be considered on the merits. Regardless of which side you represent, if you carefully perform this preliminary analysis in each of your cases, you will improve your efficiency, effectiveness, and, ultimately, your results.

***Patricia Kelly** is a board certified appellate specialist and sole practitioner who spent four years as a staff attorney at the Second District Court of Appeal. She is active in the Publications and CLE Committees of this section, and is a member of the Appellate Court Rules Committee.*

Endnotes:

[1] Thanks to Jack J. Aiello for the second half of the title.
[2] The analysis discussed in this article is aimed at appeals from circuit courts to the district courts of appeal.
[3] Final orders are appealable under rule 9.110, Florida Rules of Appellate Procedure. Rule 9.310 lists the types of non-final orders that can be appealed. To determine if an appeal is timely, you need to know the date the order was rendered and the date the appeal was filed. If your file does not contain this information, it is readily available from the court clerk's office. You also need to know if any post-trial motions were filed that would have tolled rendition.
[4] *See King v. Brown*, 55 So. 2d 187 (Fla. 1951).
[5] *See, e.g., Sheradsky v. Basadre*, 452 So. 2d 599 (Fla. 3d DCA 1984); *Barnett v. Barnett*, 705 So. 2d 63 (Fla. 4th DCA 1997); *Grant v. Wester*, 679 So. 2d 1301 (Fla. 1st DCA 1996).
[6] *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979).
[7] *Id.*
[8] *See In re Guardianship of Read*, 555 So. 2d 869 (Fla. 2d DCA 1989).
[9] *See, e.g., State v Anton*, 700 So. 2d 743 (Fla. 2d DCA 1997).
[10] *See, e.g., Hargrove v. CSX Transp., Inc.*, 631 So. 2d 345 (Fla. 2d DCA 1994).
[11] *See, e.g., Cowick v. Ledford*, 621 So. 2d 682 (Fla. 4th DCA 1993).
[12] *See Fleming v. Peoples First Fin. Sav. and Loan Ass'n*, 667 So. 2d 273 (Fla. 1st DCA 1995).
[13] *See Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999).
[14] *See Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475 (Fla. 1995).
[15] *See Allah v. State*, 471 So. 2d 121 (Fla. 3d DCA 1985).
[16] *See Newton v. South Fla Baptist Hosp.*, 614 So. 2d 1195 (Fla. 2nd DCA 1993).
[17] Section 59.041, Florida Statutes provides: **Harmless error; effect.–** No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

Moving?
Need to update your address?

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

State Civil Case Law Update

by Kelton Farris

The following are case summaries of decisions having an impact on appellate practice filed since June 2000. In keeping with tradition established by Keith Hope, the first cases concern appellate attorneys' fees.

Attorneys' fees assessed against appellate counsel for pursuit of frivolous appeal.
Visoly v. Security Pacific Corp., 25 Fla. L. Weekly D2003 (Fla. 3rd DCA Aug. 16, 2000). The Third DCA granted a motion for appellate attorneys, fees against the appellants and their lawyer pursuant to §57.105 of Florida Statutes and Florida Rule of Appellate Procedure 9.410. The Court found that the appellate attorney had filed a frivolous appeal which attempted to argue and relitigate matters concluded by judgments of the trial court and opinions of the District Court. The delaying tactics of the appellants and their attorneys had caused a bank to spend over $750,000 in legal fees to foreclose a mortgage during nine years of vexatious litigation.

The Court began its opinion by stating: "Nothing operates more certainly to demean the profession of practicing law, than does the notion that effective advocacy condones stretching the boundaries of professional ethics in the name of pursuing client interest." Just to be sure the attorney got the message, the Court directed the Clerk of the Court to provide a copy of the opinion to The Florida Bar.

Party that loses appeal prior to ultimately prevailing in litigation may be entitled to attorneys' fees incurred on appeal.
Aksomitas v. Maharaj, 25 Fla. L. Weekly D2080 (Fla. 4th DCA , Aug. 30, 2000). The Fourth DCA receded from previous opinions that required a party seeking prevailing party attorneys' fees for services rendered on appeal to win the appeal and ultimately prevail in the litigation. The Court noted that this approach is contrary to the public policy behind statutes providing for prevailing party attorneys' fees and arguably inconsistent with the Florida Supreme Court's decision in *Moritz v. Hoyt Enter, Inc.*, 604 So.2d 807(Fla. 1992).

Therefore, the Fourth DCA may allow attorneys' fees for time spent on unsuccessful appeals by a party that ultimately prevails on the significant issues. The Court stated that their normal procedure would be to grant motions for prevailing party attorneys' fees, contingent on the party ultimately prevailing.

Supreme Court resolves conflict regarding when relief may be granted based on improper, but unobjected to, closing argument.
Murphy v. International Robotic Sys., Inc., 25 Fla. L. Weekly S610 (Fla. Aug. 17, 2000). The Florida Supreme Court analyzed when improper closing arguments may be the basis for appellate relief in a civil case if no contemporaneous objection was made. The Court held that the issue must at least be presented to the trial court by way of a motion for new trial. The Court also held that abuse of discretion was the proper standard in reviewing a trial court's grant or denial of new trial based on unobjected to closing argument and articulated standards for what arguments are so improper as to require a new trial.

Improper comments during opening statement entitled plaintiff to new trial when plaintiff's counsel moved for mistrial after opening statements.
White v. Consolidated Freightways Corp, 25 Fla. L. Weekly D2327 (Fla. 1st DCA Sept. 25, 2000). In another case dealing with the contemporaneous objection rule, the First DCA ruled that a party did not waive objections to improper comments made in an opening statement when the party's attorney moved for mistrial after opening statements were concluded. The Court also noted that the attorney had not conceded that a curative instruction proposed by the trial court could remove the impression the improper statements left in the minds of the jury.

Argumentative restatement of case and facts stricken from answer brief.
Sabawi v. Carpentier, 25 Fla. L. Weekly D2168 (Fla. 5th DCA Sept. 8, 2000). The Fifth DCA struck an appellee's restatement of the case and facts as unduly argumentative. The appellee filed a restatement of the case that accused the appellant of "raising hyper-technical defenses," among other things, and was unsubstantiated by citations to the record. The Court noted that restatements of the case and facts are discouraged, except when necessary to specify areas of disagreement.

***Pro se* appeal dismissed after appellant failed to follow Rules of Appellate Procedure.**
Tompkins v. BellSouth Tele-comm., 25 Fla. L. Weekly D2175 (Fla. 1st DCA Sept. 1, 2000). A *pro se* appellant's appeal was dismissed after the appellant failed to deposit the estimated costs of preparing the record as required by Florida Rule of Appellate Procedure 9.180(f) or seek relief under Rule 9.180(g)(C)(3), despite being notified by the trial court of the procedure.

Words "with prejudice" not required for order dismissing all counts of amended complaint to be final adjudication.
Palm AFC Holdings, Inc. v. Minto Communities, Inc., 25 Fla. L. Weekly D2183 (Fla. 4th DCA Aug. 29, 2000). The Fourth DCA dismissed an appeal as untimely when it was filed more than thirty days after an order dismissing all counts of appellant's second amended complaint for failure to a cause of action. The order did not contain the words "with prejudice," but it did not grant leave to amend.

Appellant then filed a motion for leave to amend, which was granted. Appellant failed to amend and moved for entry of a final judgment. The trial court entered another order dismissing the complaint, this time with prejudice. Appellant filed a notice of appeal within 30 days of the second order dismissing the case.

The Fourth DCA found that the notice of appeal was not timely be-

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cause it was not filed within thirty days of the first order dismissing the case. The Court relied on decisions of the First and Third DCAs in finding that the substance of an order, not the inclusion of the words "with prejudice", determines whether an order of dismissal is an adjudication on the merits. The Court also found that the trial court was without jurisdiction to grant leave to amend or enter the second order dismissing the case.

Transcript of hearing attached as appendix to brief was not part of record on appeal.
Miller v. Miller, 25 Fla. L Weekly D1889 (Fla. 5th DCA Aug. 11, 2000). The 5th DCA would not consider an appellant's claim that a trial court failed to make explicit finding of fact when no transcript of the hearing was included in the record on appeal. The Court found that a transcript attached as an appendix to the appellee's brief was not part of the record.

Trial court directed by appellate court to enter final judgment pursuant to jury verdict could not then vacate judgment.
Atkin v Tittle & Tittle P.A., 25 Fla. L. Weekly D1856 (Fla. 3rd DCA Aug. 9, 2000). The Third DCA directed a trial court to enter a final judgment pursuant to a jury verdict. After the trial court entered the final judgment, it vacated the judgment and granted a motion for new trial. The Court found that the trial court lacked authority to deviate from its mandate by entertaining the motion for new trial.

Judge Polen invites appeal of whether one-judge circuit court appellate panels afford due process.
Metropolitan Property & Cas. Ins. Co. v. Cirincione, 25 Fla. L. Weekly D1484 (Fla. 4th DCA June 21, 2000). In a *per curiam* denial of a petition for writ of certiorari, Judge Polen wrote a concurring opinion noting that some judges in the district courts of Florida are concerned about one-judge circuit court appellate panels. He suggested that the issue could be "preserved by motion or objection raised *at the time the case is assigned*...". (emphasis in original).

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Fire & Marine Ins. Co. v. Indemnity Ins. Co. of North America, 675 So.2d 590 (Fla. 1996), which holds that the district court opinion is not be deemed rendered until all such motions have been resolved. However, the court indicated that such may not suspend the time for seeking further review.

Anders Briefs. The Court rejected the Committee's efforts to codify procedures for filing *Anders* briefs, but asked the Committee to continue working on the proposal and resubmit a new proposal.

> In rule 9.140 ("Appeal Proceedings in Criminal Cases"), we decline to adopt the committee's proposal to add a new subdivision (i) to set forth comprehensive rules regarding the filing of *Anders* briefs. In addition to setting forth existing procedures for filing *Anders* briefs, proposed subdivision (i) also creates new procedures for filing *Anders* memoranda (as opposed to briefs) in cases where the appellant has pled guilty or nolo contendere without reserving a right to appeal or raising any substantive issue. Additionally, . . . the portion of proposed subdivision (i) providing that "*Anders* briefs or memoranda may include arguments on the merits relating to minor sentencing errors" may conflict with this Court's recent decision construing the Criminal Appeals Reform Act in *Maddox v. State*, 760 So. 2d 89 (Fla. 2000). Another portion of proposed subdivision (i) may be improperly substantive in nature by requiring that "counsel who file *Anders* briefs or memoranda . . . shall not argue against the interests of their clients" and that such briefs or memoranda "shall reflect a thorough review of the record." We recognize the merit of codifying *Anders* procedures and commend the committee for its extensive efforts in this regard but, due to these and other possible problems with proposed subdivision (i), we decline to adopt it at this time. We instead request that the committee further study this issue with input from all the district courts of appeal and any other interested persons.

Committee Proposals Adopted

Repeal of Rule Allowing Non-Final Review of Orders On Liability. Perhaps the most substantive change in the current cycle of rule amendments is repeal of 9.130(a)(3)(C)(iv) allowing review of non-final orders determining liability. Since much has already been published on the reasons for this amendment and is available elsewhere,[2] this article will not explain the reasons in detail. Suffice it to say, this amendment corrects an anomaly in Florida's otherwise consistent philosophy of avoiding piecemeal appeals, and disallowing non-final appeals except as to urgent threshold issues like jurisdiction.

Appellate Venue. Challenges to appellate venue will now be covered by new rule 9.040(b)(2). Review of the order transferring venue as well as other reviewable non-final orders rendered before the change of venue order, or simultaneously with it, is by the appellate court that normally reviews orders from the transferor lower tribunal. As to orders after the time the venue order is rendered, review should be by the court that reviews orders from the transferee court with two exceptions: orders staying or vacating the transfer order, or orders dismissing the cause for failure to pay the transfer fees. This rule amendment modifies the

principles stated in *Cottingham v. State*, 672 So. 2d 28 (Fla. 1996) and *Vasilinda v. Lozano*, 631 So. 2d 1082 (Fla. 1994), which had made the time of paying the filing fees or of transfer of the file the critical time for passage of venue from one appellate court to the other.

Description of Orders that Postpone Rendition. The Court adopted the Committee's proposal to amend subdivision (h) ("Rendition (of an Order)") of rule 9.020 to replace the term "judgment notwithstanding the verdict" with "judgment to challenge the verdict," and to include provisions currently located in subdivision (i) ("Rendition (of an Order Based on Florida Family Law Rule of Procedure 12.492)"), which was stricken.

Exclusion of Notices of Hearing and Deposition from the Record. Rule 9.200 (1)(a) will now specify that "notices of hearing or of taking deposition" are omitted from the record, unless otherwise designated. Previously, the rule excluded "notices" generally. Apparently, some clerk's offices took a strict view of the rule that all "notices" be omitted from the record unless specifically designated by the parties. Some of these clerks would refuse to include notices of filing, notices of lis pendens, and many other types of substantive notices that are generally needed in the record on appeal. The revision is designed to avoid this problem while still keeping most of the unnecessary pieces of paper out of the record.

Case Progress Docket. Rule 9.200 (a)(1) will now require that a progress docket be included in the record on appeal. Rules 9.200 (d)(1)(A) and (d)(2) direct the clerk to attach a copy of the progress docket to the index to the record. The "case progress docket" is the computer generated list or index maintained by the circuit and county clerks of court identifying each document filed in the court file. The inclusion of this document should show at a glance whether or not a particular document was filed with the lower tribunal.

Standard of Review. Rule 9.210 was amended to add a requirement that the argument section of every brief shall contain "argument with regard to each issue including the applicable appellate standard of review." This section of the brief can be short, but should state whether review is de novo, based on lack of competent substantial evidence, or abuse of discretion, and provide a citation of authority for the standard.

Brief Binding. The following clarification as to the binding of briefs was adopted:

> (3) Briefs ~~should~~shall be securely bound in book form and fastened along the left side in a manner that will allow them to lie flat when opened~~. Alternatively, briefs may be~~ or be securely stapled in the upper left corner. ~~No other method of securing the brief is acceptable.~~
>
> Thus, briefs may be bound either along the left-hand side or by a staple in the upper left-hand corner. Briefs still must "lie flat when open". Many courts do prefer a simple staple in the upper left-hand corner.

Headings in Briefs. The following revision governs headings in briefs:

Headings ~~shall be in capital letters and, if printed,~~and subheadings shall be at least as large as the brief text and may be ~~in bold type not less than 11 points~~single spaced.

Parallel Citation of Florida Reports. The Uniform System of Citation in Rule 9.800 was amended to remove the requirement for parallel citation of the Florida Reporter. This requirement is obsolete.

Appendix to Briefs on Jurisdiction. The Supreme Court has limited the contents of the appendix to briefs on jurisdiction to "only" a conformed copy of the decision of the district court. The internal procedures of the court eliminate the need for filing copies of allegedly conflicting cases, and the court feels that the appendix is sometimes used to bring extraneous materials before the court.

Motions for Rehearing. Rule 9.330 was clarified, cleaned up and conformed to current practice with this amendment.

RULE 9.330. REHEARING; CLARIFICATION; CERTIFICATION

> (a) **Time for Filing; Contents; ~~Reply~~Response.** A motion for rehearing, clarification, or certification may be filed within 15 days of an order or within such other time set by the court. A motion for rehearing ~~or clarification~~ shall state with particularity the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding. A motion for clarification shall state with particularity the points of law or fact in the court's decision that in the opinion of the movant are in need of clarification. ~~The motion shall not re-argue the merits of the court's order.~~ A ~~reply~~response may be served within 10 days of service of the motion.

By omitting the sentence that prohibits rearguing the merits of the court's order, the Court clarified the permissible scope of motions for rehearing. Nevertheless, the essential purpose of a motion for rehearing remains the same. It should be utilized to bring to the attention of the court points of law or fact that it has overlooked or misapprehended in its decision, not to express mere disagreement with its resolution of the issues on appeal.

Appellate Jurisdiction of Circuit Court. Rule 9.030(c)(1)(B) was amended to reflect that appellate jurisdiction of circuit courts is prescribed by general law and not by Rule 9.130, as clarified in *Blore v. Fierro*, 636 So.2d 1329 (Fla. 1994). A companion amendment to Rule 9.130(a)(1) corrects the incorrect language of that rule.

Title Change: Rule 9.130 Applies to Specified Final Orders. The title to Rule 9.130 was amended to add "and Specified Final Orders" because the title was misleading: appeals of orders determining class certification, insurance coverage, and relief under rule 1.540 may be final orders, but are still appealable under this rule.

Appeals by Defendant in Criminal Cases. The Court adopted

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the committee's proposal to amend subdivision (b)(1)(B) of rule 9.140, which addresses appeals permitted by defendants, to provide that a defendant may appeal a final order withholding adjudication after a finding of guilt. Also adopted was the proposal to renumber subdivision (b)(1)(C) and to amend it to provide that a defendant may appeal orders denying relief under Florida Rule of Criminal Procedure 3.800(a) or 3.850.

Record on Computer Disk in Capital Cases. Rule 9.140(b)(6)(B) will now require court reporters to file the record in capital cases on computer disk.

Post-Conviction Appeals. Rule 9.141 was amended to create a new rule relating to review of collateral or post-conviction orders in criminal cases. Existing subdivisions (i) ("Appeals from Summary Denial of Motion for Post-Conviction Relief Under Florida Rule of Criminal Procedure 3.800(a) or 3.850") and (j) ("Petitions Seeking Belated Appeal or Alleging Ineffective Assistance of Appellate Counsel") were transferred to new rule 9.141. In adopting new rule 9.141 ("Review Proceedings in Collateral or Post-conviction Criminal Cases"), The Court "agree[d] with the committee's observation that "[r]ule 9.140 was becoming too lengthy, and the collateral/post-conviction area was one that should be given its own rule." Accordingly, the court adopted most of rule 9.141 as proposed by the committee. The Court expressed concern, however, that proposed subdivision (a) ("Death Penalty Cases") may cause confusion insofar as it provides that "[t]his rule does not apply to cases in which the death penalty was imposed." Therefore, the court changed this language to read that "[t]his rule does not apply to death penalty cases" in order to make clear that, once in effect, rule 9.141 will apply to cases in which the death sentence "was imposed" but then reduced to life imprisonment on direct appeal in the Supreme Court. *See McCray v. State*, 699 So. 2d 1366 (Fla. 1997) (recognizing that, where death sentence had been reduced to life imprisonment on direct appeal in the Supreme Court, predecessor rule 9.140(j)(3)(B) applied to petition alleging ineffective assistance of appellate counsel, but denying petition under doctrine of laches).

Stays Pending Review in Administrative Cases. Rule 9.190 added a new subsection (e) regarding stays pending review in administrative cases.

Printed Briefs. Rule 9.210(a)(1) deletes the provision that printed briefs should measure 6 x 9 inches, which has proved to be a constant source of confusion and misunderstanding among pro se litigants.

Page Limit on Reply Briefs in Cross Appeals. Rule 9.210(a)(5) would impose a 15 page limit on the argument portion of reply briefs in cases in which cross-appeals are taken.

Mailbox Rule. Rule 9.420(a) ("Filing; Service of Copies; Computation of Time"), was amended to add new subdivision (a)(2) to set forth the "mailbox rule" for inmate filings. The Court approved "in concept" the Committee's proposal, but amended the committee's proposed language to conform with the Court's recent opinion on the matter in *Thompson v. State*, 761 So. 2d 324 (Fla. 2000).

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Endnotes:

[1] In the Spring 2000 issue of *The Record*, the Committee's proposals were explained in detail.

[2] For full details concerning the reasons for repeal of this rule, see S. Fox, J. Eaton and D. Pakulla, "Should Non-final Orders Determining Liability Be Immediately Appealable", 74 Fla. Bar J. 18 (May 2000).

Appellate Rules— Four-Year-Cycle Amendments

RULE:	ACTION:
9.020(h)	Changes description of some post-trial motions, moves text of subdivision (i) into main body of subdivision (h) to retain consistency; deletes subdivision (i).
9.030(c)(1)(B)	Amends subdivision (c)(1)(B) to reflect that appellate jurisdiction of circuit courts is prescribed by general law and not by rule 9.130, as clarified in *Blore v. Fierro*, 636 So. 2d 1329 (Fla. 1994).
9.040(b)	Determines which appellate court may review non-final orders after the trial court has granted a change of venue to a circuit court located within another district. Changes and clarifies the rules announced in *Vasilinda v. Lozano*, 631 So. 2d 1082 (Fla. 1994), and *Cottingham v. State*, 672 So. 2d 28 (Fla. 1996).
9.100(1)	Adds subsection applying same printing and typeface requirements for briefs to petitions, responses, and replies.
9.120(d)	Amends rule to limit the appendix accompanying a brief to a copy of the opinion, to prevent the inclusion of excessive materials.
9.130	Amends rule title to include "specified final orders."

9.130(a)(1) [accompanies amendment to 9.030(c)(1)(B)]	Amends subdivision (a)(1) to reflect that appellate jurisdiction of circuit courts is prescribed by general law and not by this rule, as clarified in *Blore v. Fierro*, 636 So. 2d 1329 (Fla. 1994).
9.130(a)(3)(C)(iv)	Repeals provision that allows appeal of non-final orders that determine liability in favor of a party seeking affirmative relief; renumbers subsequent subdivisions.
9.130(a)(5)	Amends rule to provide review for judgments under rule 7.190.
9.130(a)(7)	Deletes subdivision (a)(7) because it is superseded by proposed rule 9.040(b)(2).
9.140(b)(1)	Adds new subdivision (b)(1)(B) to reflect the holding of *State v. Schultz*, 770 So. 2d 247 (Fla. 1998); renumbers subsequent subdivisions; modifies renumbered subdivision (b)(1)(D) to reflect long-established practice.
9.140(b)(6)(B)	Requires court reporters to file transcripts on computer disks in the appellate record in capital cases.
9.140(b)(6)(E)	Deletes the last sentence of this rule because it refers to subdivision (j) which no longer exists. This sentence now is contained in new rule 9.141(a).
9.140(i)–(j)	Deletes subdivisions (i) and (j) and transfers them to proposed new rule 9.141.
9.141	Creates new rule relating to review of collateral or post conviction orders in criminal cases. Incorporates the old 9.140(i) and (j) as amended. Rule 9.141(b) requires the clerk to tell court reporter to prepare transcript in nonsummary rule 3.850 appeals by pro se indigent appellants if no designations are filed; broadens rule to include state appeals; specifies that a court can grant "other appropriate relief" as well as an evidentiary hearing in appeals of summary denial of motions for post-conviction relief.
9.190(c)(6)	Editorial change to correct reference from rule 9.200(a)(2) to rule 9.200(a)(3).
9.190(e)	Adds a new section (e) regarding stays pending review.
9.200(a)(1)	Limits "notices" to be excluded from record on appeal to notices of hearing or deposition.
9.200(a)(1), (d)(1)(A), and (d)(2)	Adds requirement that clerk include a case progress docket in the record and attach a case progress docket to the index.
9.210(a)(1)	Deletes requirement that, if printed, briefs should measure 6 by 9 inches.
9.210(a)(2)	Requires that text in briefs be 12 point Courier New or Times New Roman 14 type, and a certificate of compliance to appear immediately after certificate of service.
9.210(a)(3)	Changes requirements for headings in briefs to conform to current practice, by deleting requirement that headings be in capital letters, and requiring headings to be in type no smaller than text; editorial change to clarify that briefs shall be bound along the left side or stapled in the upper left corner.
9.210(a)(5)	Imposes 15-page limit on argument portion of reply briefs in cases in which cross-appeals are taken.
9.210(b)(5)	Requires statement of the standard of appellate review in the initial brief.
9.330(a)	Clarifies the permissible scope of motions for rehearing and clarification. Codifies decisional law's prohibition against raising issues that have not been raised previously in the proceeding.
9.420(a)	Reorganizes subdivision (a) into subdivisions (a)(1) and (a)(2). Adopts mailbox rule based on Fed. R. App. P. 25(a)(2)(C) for pro se inmate filings.
9.800(a)	Removes requirement for parallel cite to Florida Reporter; renumbers subsequent subdivisions.
9.800(i)	Amends citation style for Florida Standard Jury Instructions (Criminal).

Eleventh Circuit Sets Most Restrictive Standards Yet for Appeal Under Rule 23(f): Interlocatory Appeal of Class Action Certification

by Dinita L. James

After seven years of study, Federal Rule of Civil Procedure 23 was amended in a single respect, effective December 1, 1998. Interlocutory appeals became available with the addition of Rule 23(f):

> A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

At loggerheads over the appropriate reforms of class action procedure, the Advisory Committee on Civil Rules delegated to the circuit courts of appeals the job of determining how best to regulate class action practice. Prior to the amendment class certification decisions rarely reached the appellate courts. The overwhelming majority of cases certified as class actions resolve before trial. And prior to Rule 23(f), interlocutory appeals were permitted only if the district court endorsed an interlocutory appeal under 28 U.S.C. ‘ 1292(b) or if the appellate court found the extremely restrictive mandamus review standard met.

By amending Rule 23 to permit interlocutory appeals, the Advisory Committee hoped the appellate courts would resolve some of the most thorny issues of class action practice in the concrete settings of actual cases. The Advisory Committee's thinking was that having a better developed appellate jurisprudence on class action practice would provide enlightenment on appropriate rulemaking initiatives for Rule 23.

The courts of appeals are becoming increasingly reluctant to accept the Advisory Committee's delegation. The Eleventh Circuit on August 11, 2000 decided *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000), and became the third circuit court of appeals to articulate the standards for accepting Rule 23(f) interlocutory review. Although the most miserly circuit yet in defining the universe of cases warranting immediate appellate consideration under Rule 23(f), in another respect, the Eleventh Circuit in *Carter v. West Publishing Co.*, 225 F.3d 1258 (11th Cir. 2000), recently demonstrated a willingness to go beyond the bare Rule 23 requirements to reach other aspects of a case once Rule 23(f) review is granted.

This article discusses the background developed in the First and Seventh Circuits on the standards for granting Rule 23(f) review. Then the article examines the Eleventh Circuit cases setting the standards for interlocutory review under the new rule and applying (expressly or implicitly) those standards. Finally, the article discusses how the circuit courts have ironed out the procedural wrinkles of Rule 23(f) review in the cases decided thus far.

I. Seventh Circuit First Articulates Standards for Rule 23(f) Appeals

The Seventh Circuit was the first out of the block to analyze the scope and procedural implications of Rule 23(f) review, in four decisions since its effective date. The Seventh Circuit opinions in *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999), and two others with significance to appellate practitioners that are discussed below and in Part IV, are authored by Judge Frank Easterbrook. Judge Easterbrook is quite familiar with the course of debate over the seven years that amendments to Rule 23 were under consideration. He served during that time on the Judicial Conference of the United States Standing Committee on Rules of Practice and Procedure.

Blair was decided on June 22, 1999, and Judge Easterbrook noted that it was “the first application filed in this circuit (and, so far as we can tell, the nation) under the new rule.” *Blair* observes that the Committee Note to Rule 23(f) gives “unfettered discretion” to the court of appeals when considering whether to permit an appeal, “akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari.” 181 F.3d at 833.

Judge Easterbrook crafts three non-exhaustive categories of cases in which interlocutory appeals may be granted. The three categories are tied to the reasons Rule 23(f) came into being.

Category 1: Cases in which the denial of class status sounds the **death knell** of the litigation, because the representative plaintiff's claim is too small to justify the expense of litigation. *Blair* emphasizes that this consideration requires a real-world look at the case. If the suit is being prosecuted by a law firm with both a portfolio of litigation in which the firm's attorneys act as champions for the class and the resources to pursue the matter to judgment and then appeal the class certification decision, then no death knell has sounded. *Id.* at 834. *Blair* itself was no death knell case. Indeed, at the time *Blair* was decided, a companion case, briefed in tandem with *Blair*, already had proceeded to summary judgment below and was before the Seventh Circuit on an appeal on the merits that also sought to revive the class.

Category 2: Cases that present a **bet-the-company** risk, the mirror image of the death knell situation. “When the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial, an appeal under Rule 23(f) is in order.” *Id.*

Category 3: Cases that present

the court with an opportunity to **resolve a fundamental unresolved question of class action law**. Judge Easterbrook noted that the high rate of settlement or other early resolution of class actions often "overtakes procedural matters, [leaving] some fundamental issues about class actions poorly developed." *Id.* at 835. He further observed that in electing to wait on other proposals to amend Rule 23, the Advisory and Standing Committees went forward with Rule 23(f) "anticipating that appeals [] would resolve some questions and illuminate others."

In the first two categories, *Blair* counsels accepting the appeal only if it appears that the petitioner has a solid argument in opposition to the ruling at issue, taking into account the discretion accorded the district court in implementing Rule 23. *Id.* at 834, 835. In the third category, however, "it is less important to show that the district judge's decision is shaky." *Id.* at 835.

The *Blair* court finds that the case before it falls within the third category, because it concerns the relationship of multiple overlapping class actions. The court below had certified a class of Illinois residents who claimed that Equifax's check verification procedures violated the Fair Debt Collection Practices Act. Equifax faced several such suits, and settled with a competing set of plaintiffs on very favorable terms that included no individual relief for class members but a provision that their compensatory or statutory damages claims passed through the litigation yet could not be asserted elsewhere in any class action. (Judge Easterbrook observed wryly that the settlement terms "(natch)" included fees for the settling plaintiffs' lawyers. *Id.* at 836.)

Equifax asked the district court in *Blair* to decertify the class on the basis of the settlement in the competing action, which had yet to receive court approval. The district court denied the request. Equifax's Rule 23(f) petition asserted that the court below was bound to honor the other settlement and decertify the class to avoid the possibility of inconsistent judgments. "That neither side can point to any precedent in support of its position implies that this is one of the issues that has evaded appellate resolution, and the issue is important enough to justify review now." *Id.* at 838. The *Blair* court was able quickly to resolve the question presented. Because the competing settlement was not a final judgment, nothing prevented the district court in *Blair* from proceeding ahead. The first case to reach judgment would control the other, and approval of the other settlement was not a foregone conclusion. *Id.*

(Indeed, after Judge Easterbrook's opinion, only the boldest district court judge would approve that settlement. While professing to have "resisted all temptation to peek at its merits," the *Blair* panel observed that "[w]e have never heard of a class action being settled on terms that amounted to: 'For $7,500 plus attorneys fees, the class is disestablished.'" *Id.* at 839. The panel then designated the competing settlement a "related case" under Seventh Circuit operating procedures that ensure any appeal will come before the same panel.)

A panel of the Seventh Circuit, again with Judge Easterbrook writing the opinion, applied its Category 3 to accept and resolve a petition for leave to appeal in *Jefferson v. Ingersoll International, Inc.*, 195 F.3d 894 (7th Cir. 1999). The district court had certified a "pattern and practice" discrimination case as a class action under Rule 23(b)(2) because the plaintiffs sought equitable relief for the class. The district court did not address the applicability of Rule 23(b)(3), even though the class also sought substantial money damages. Pattern and practice employment discrimination suits routinely were certified as 23(b)(2) class actions before the Civil Rights Act of 1991, because compensatory and punitive damages were not then available. After the 1991 Act, however, those remedies became available, and the defendant contended the district court had to consider the applicability of Rule 23(b)(3).

The *Jefferson* court found this to be the type of situation described by *Blair*'s third category: "the legal question is important, unresolved, and has managed to escape resolution by appeals from final judgments." *Id.* at 897. The *Jefferson* court also found the briefing on the petition itself sufficient to resolve the appeal. "We have seen enough to know that the district court must confront rather than dodge the fundamental legal question" *Id.* Judge Easterbrook's opinion finds *Ortiz v. Fibreboard Corp*, 119 S. Ct. 2295 (1999), to be the controlling authority, which the Seventh Circuit panel reads as saying "in no uncertain terms that class members' right to notice and an opportunity to opt out should be preserved whenever possible." *Id.*

Jefferson vacated the certification and remanded for the district court to consider "whether the money damages sought by the plaintiff class are more than incidental," citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). If the damages are merely incidental, then the district court must confront the question the Supreme Court ducked in *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117, 121 (1994), and that every other federal court has been ducking since: "whether Rule 23(b)(2) ever may be used to certify a no-notice, no-opt-out class when compensatory or punitive damages are in issue." *Jefferson*, 195 F.3d at 897.

II. First Circuit Adopts *Blair* With Gloss on Category 3

No other Circuit provided guidance on the standards applicable to Rule 23(f) until the First Circuit decided *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. March 31, 2000). *Waste Management* follows the analytical model of *Blair*, using the purposes of Rule 23(f) to shape the categories of appeals that may be permitted. "We regard the Seventh Circuit's taxonomy as structurally sound." *Id.* at 294.

The First Circuit adds a few glosses to *Blair*'s analysis. The *Waste Management* court emphasizes that the "likelihood that a party will be forced to throw in the towel" should factor in to Category 3, as well as being the rationale for Categories 1 and 2. Thus, if an end-of-case appeal promises to provide an adequate remedy, the interlocutory appeal should not be accepted, even if the legal question presented is fundamental to class action practice and thus far has escaped judicial review. *Id.*

Seeking to even further limit Cat-

continued, next page

egory 3, the First Circuit states that it should "be restricted to those instances in which an appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case." *Id*. at 294. The First Circuit clearly wanted to stem the tide of petitions flowing to it, announcing an intention to err on the side of "allowing the district court the opportunity to fine-tune its class certification order" rather than "opening the door too widely to interlocutory appellate review." *Id*.

The First Circuit also emphasized, however, that its discretion was not limited by the *Blair* taxonomy.

> While we hope that these general comments will be helpful to parties deciding whether to pursue applications under Rule 23(f), we do not foreclose the possibility that special circumstances may lead us either to deny leave to appeal in cases that seem superficially to fit into one of these three pigeonholes, or conversely, to grant leave to appeal in cases that do not match any of the three described categories.

Id. To illustrate the point, it first found that the *Waste Management* case did not fit within any of the three *Blair* categories. The class was certified, so only Categories 2 and 3 were potentially applicable. The case did not meet Category 2 because the damages claimed C breach of warranty in 119 transactions with an average value in excess of $16 million C would be merely "unpleasant" but not potentially "ruinous" to a "behemoth" and "massive" corporation like Waste Management. *Id*. The lack of bet-the-company pressure to settle also weighed in the analysis of the third category. *Id*. Viewing the law as reasonably well-settled, despite a stray district court case or two, the court found Category 3 inapplicable as well. *Id*.

Nevertheless, the court accepted the petition for review, because the parties already had briefed the merits "with exquisite care" at the direction of court. *Id*. Because an opinion could, "at little cost, clarify some imprecision in the case law" and give guidance to the parties and the lower court, the First Circuit found this to be a suitable special circumstance for the exercise of its discretion to accept review outside the *Blair* categories. *Id*. at 295. The court affirmed the class certification order.

III. Eleventh Circuit Rejects Categorical Approach to Rule 23(f)

The Eleventh Circuit, like its sister circuit in *Blair*, uses the Committee Note to Rule 23(f) as the starting point for its analysis in *Prado-Steiman*. After reviewing *Blair* and *Waste Management* in detail, the Eleventh Circuit finds both to be "cogent explications of the Rule 23(f) inquiry. We think it important, however, to emphasize some additional considerations that may weigh against frequent interlocutory appellate review of class certification decisions." *Prado-Steiman*, 221 F.3d at 1273.

The first such consideration for the Eleventh Circuit is its own workload. Citing Federal Judicial Center statistics, the court noted there were 1,742 active federal cases with class action activity in 1998, and 221 of them were in the Eleventh Circuit. The numbers are growing dramatically, with only 816 federal cases with class action activity in 1994, 114 of them in the Eleventh Circuit. *Id*. "Given these numbers, and the large volume of ordinary final judgments that by law must be considered by the courts of appeals, routinely granting interlocutory appellate review of class certification decisions is simply not practicable." *Id*.

The Eleventh Circuit also found "powerful case management concerns" weighing against routine Rule 23(f) review in the inherently conditional nature of class certification decisions. Throughout all phases of the litigation, "district courts should be encouraged rather than discouraged from reassessing whether the prerequisites of Rule 23 exist and whether a class action is the most efficacious way to resolve the dispute." *Id*. at 1273-74. Appellate courts thus should usually let class action litigation unfold in the district court without interference.

The Eleventh Circuit finds *Blair*'s Category 3 to be an easy route to routine review, because "we imagine it relatively easy for a litigant to identify some question of law implicated by the class certification decision and in good faith characterize that question as novel or unsettled." Instead, "something more is necessary C something that creates a compelling need for resolution of the legal issue sooner rather than later." *Id*. at 1274.

Eschewing bright-line rules or rigid categories, the Eleventh Circuit claimed for itself the full extent of the "highly discretionary" authority granted by Rule 23, and warned that such petitions would not be accepted as a matter of course. *Id*. at 1276-77. The court identified five "guideposts" that it would use to determine whether to grant Rule 23(f) review, none of which is conclusive. "[O]rdinarily, each relevant factor should be balanced against the others, taking into account any unique facts and circumstances." *Id*. at 1276. The guideposts are:

• Whether the class certification ruling is the **death knell** to the litigation, for either plaintiff or defendant. This factor combines *Blair*'s Category 1 and 2. *Id*. at 1274.

• Whether the petitioner has demonstrated that the class certification ruling would be **inevitably reversed**, if it reached the appellate court. *Id*. at 1274-75. The court was careful to distinguish this factor from the mandamus standard, noting that it should be regarded as a Asliding scale@: AThe stronger the showing of an abuse of discretion, the more this factor weighs in favor of interlocutory review. *Id*. at 1275 n.10.

• Whether immediate appeal would permit resolution of an issue of larger **public importance**. If the case involves a government entity or if the unsettled issue is arising simultaneously in several cases or relates specifically to class certification mechanics, then immediate review is more appropriate. *Id*. at 1275.

• Whether immediate review is appropriate because of the **nature or status** of the litigation before the district court. This factor can cut both ways. Thus, the court will consider whether discovery has progressed sufficiently to permit an adequate

factual record for appellate review, but also whether the case has progressed to the point that dispositive or joinder motions pending below could dramatically change the class certification calculus. *Id.* at 1276.

• Whether the likelihood of **future events** make immediate appellate review more or less appropriate. Relevant to this guidepost would be whether settlement negotiations are under way or a bankruptcy filing is imminent, as well as whether the district court has indicated an intention itself to revisit the class certification decision. *Id.*

Although purporting to have taken its guideposts into account when it granted the Rule 23(f) petition back on May 12, 1999 C before the Seventh Circuit issued the *Blair* decision C the *Prado- Steiman* court acknowledged that the case before it "may not raise the kind of issues that ordinarily might warrant granting a Rule 23(f) petition." *Id.* at 1277. The case sought declaratory and injunctive relief for developmentally disabled individuals who had been denied home Medicaid services, but not money damages. Both plaintiffs and the state official defendants conceded that a class should be certified, but disagreed on whether there should be one class or two subclasses.

Guideposts pointing against immediate appeal thus included the death knell, inevitable reversal, nature and status, and future events ones. The certification did not raise the stakes so that the defendants faced irresistible pressure to settle. The subclassing issue was not a profound error of law. The factual record was not sufficiently developed for the appellate court to resolve the standing issues raised in the appeal. Additional party plaintiffs had already been added and if they were made class representatives, the standing analysis would necessarily change. *See id.* at 1277- 78.

The Eleventh Circuit found the case to have "tremendous importance to thousands of developmentally-disabled persons in the State of Florida, many of whom have a critical need for prompt delivery of the services and benefits they claim to have been denied by the State." *Id.* at 1978. Given the public importance and the fact that the merits had been briefed and argued, the Eleventh Circuit proceeded to examine the certification and subclassing issues but intimated that it would not accept such a petition for interlocutory review if it were presented anew today.

At the time *Prado-Steiman* was decided, the Eleventh Circuit had granted at least three other Rule 23(f) petitions and had issued rulings in two of them without making any comment on the standards for granting review. The *Prado-Steiman* court attempted to explain where the two fit into its Rule 23(f) analytical framework.

In *Pickett v. Iowa Beef Processors*, 209 F.3d 1276 (11th Cir. April 20, 2000), the district court had certified a class of cattle producers who had brought claims against a meat packer for violation of the Packers and Stockyard Act. The gravamen of the class claim was that the defendant unlawfully gave preferential treatment to some producers over others. Yet the certified class encompassed all producers, those benefitted as well as those harmed. The court reversed the certification order because the plaintiffs could not possibly provide adequate representation to class members whose interests were in stark conflict. In *Prado-Steiman*, the court appeared to invoke the inevitability of reversal factor as the key to granting review in the *Pickett* case. 221 F.3d 1275 n.9.

Likewise in *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. May 11, 2000), the inevitable reversal factor appeared to control the Rule 23(f) analysis. The *Rutstein* case came to the court with a recommendation that an interlocutory appeal "may materially advance the ultimate termination of the litigation." *Israel v. Avis Rent-A-Car Systems, Inc.*, 185 F.R.D. 372 (S.D. Fla. 1999), *rev'd*, *Rutstein*, 211 F.3d 1228. A Jewish individual and a Jewish-owned bookstore sued Avis under 42 U.S.C.' 1981, claiming they were being denied the benefits of a corporate car-rental account on the basis of their religion and ethnicity. The trial court certified the class under Rule 23(b)(3), perceiving a difference between the case before it and *Jackson v. Motel 6*, 130 F.3d 999 (11th Cir. 1997).

In *Jackson*, the Eleventh Circuit had found that the predominance requirement for certification under Rule 23(b)(3) could not be met because liability to each class member would have to be shown by evidence that he or she was refused rental of an available room or rented a substandard room while a better room was reserved for white customers, and that such treatment was part of a policy or practice of race discrimination enforced by Motel 6. In the *Rutstein* case, however, the plaintiffs had offered proof of the existence of a AYeshiva Policy@ of discrimination against Jewish customers, which emanated from Avis= corporate headquarters. The district court found that to be a crucial distinction between *Rutstein* and *Jackson*. "To paraphrase *Jackson*, most if not all of plaintiffs' claims will stand or fall on the question whether Avis has adopted and applied such a centralized policy and practice of ethnic and religious discrimination, and not on the resolution of highly case-specific factual issues . . . ." *Israel*, 185 F.R.D. at 385-86. Nevertheless, in recommending an interlocutory appeal, the district court acknowledged that "its interpretation of *Jackson* could well be incorrect." *Id.* at 388.

In *Rutstein*, the Eleventh Circuit reversed the class certification order, finding that *Jackson* clearly controlled and that these plaintiffs could not show predominance because of the necessity of proving individual intent to injure each plaintiff in a non-employment discrimination case. The *Prado-Steiman* court characterized *Rutstein* as a Rule 23(f) petition granted when the district court "overlooks directly controlling precedent." *Prado-Steiman*, 221 F.3d at 1275.

The third case in which the Eleventh Circuit granted a Rule 23(f) petition is an employment discrimination class action certified under Rule 23(b)(3), again based on a perceived factual distinction relevant to the predominance inquiry between that case and *Jackson*. *Carter v. West Publishing Co.*, 225 F.3d 1258 (11th Cir. Sept. 7, 2000), does not mention *Prado-Steiman* or explain its rationale for granting Rule 23(f) review. *Carter* is important to appellate practitioners, however, because it brings standing issues within the scope of interlocutory review under Rule 23(f). Relying on Title VII cases, the court finds that standing is part of

continued, next page

the class certification analysis and subject to review under Rule 23(f). The court reversed the class certification after finding that neither plaintiff had standing to assert Title VII claims, both having failed to file a timely EEOC charge to satisfy the administrative prerequisites to suit. *Carter* thus necessarily must be another application of the inevitability of reversal factor.

IV. Procedural Implications of Rule 23(f) Appeals

Blair gave Judge Easterbrook of the Seventh Circuit the opportunity to be the first to weigh in on two procedural matters relating to Rule 23(f) C stays and the effect of a motion for reconsideration on the 10-day time limit.

In dicta that nevertheless is likely to be influential, Judge Easterbrook noted that courts have been stingy in certifying interlocutory appeals under 28 U.S.C. ' 1292(b) because the procedure interrupts the progress of the case and prolongs its disposition. That concern carries less weight for interlocutory appeals under Rule 23(f), because a petition for leave to appeal does not stop the litigation. The *Blair* court offered the view that district and appellate courts considering a request for a stay while a Rule 23(f) petition is heard should be influenced by their tentative view on whether "the probability of error in the class certification decision is high enough that the costs of pressing ahead in the district court exceed the costs of waiting." *Blair*, 181 F.3d at 835. The *Blair* court analogized the Rule 23(f) stay standard to those applicable to preliminary injunctions and stays of administrative orders. As evidence that stays under Rule 23(f) will not unduly retard the litigation, the court noted that neither *Blair* or its companion case was stayed, and the companion had proceeded to judgment.

The *Blair* court was similarly favorable toward Rule 23(f) appeals in deciding the effect of a motion for reconsideration of the class certification decision. The district court certified the class in *Blair* on February 25, 1999; Equifax moved for decertification on March 8; the certification order was reaffirmed on March 11; and Equifax petitioned for leave to appeal on March 22. The court found that Federal Rule of Appellate Procedure 4(a)(4), which only applies to judgments, merely restated a preexisting rule of practice in the federal courts that a motion for reconsideration of any appealable order tolls the time for appeal, provided that the motion is made within the time for appeal. Thus, *Blair* held that a motion for reconsideration of an order granting or denying class certification defers the time for appeal until the district court disposes of the motion. Because Equifax took each step in time, the case was within the court's jurisdiction to accept.

The Seventh Circuit's next pronouncement on Rule 23(f) also related to the 10-day timing provision. In *Gary v. Sheahan*, 188 F.3d 891 (7th Cir. 1999), the class was certified on April 10, 1997, but the defendant had sought decertification in August 1998, and the court had denied the motion on March 31, 1999. The defendant petitioned for leave to appeal within 10 days of the March 1999 order. On the authority of *Blair*, Judge Easterbrook, writing for the panel, held that the motion to decertify was a motion for reconsideration and, because it was not filed within 10 days of the original order, it did not extend the time to seek an appeal. In dicta, the court noted a "solitary exception": "if in response to a belated motion for reconsideration the judge materially alters the decision, then the party aggrieved by the decision may appeal within the normal time." *Id.* at 893.

Chief Judge Richard Posner used the occasion of a petition for leave to appeal under 28 U.S.C. ' 1292(b) to chime in on proper procedures under Rule 23(f) in *Richardson Electronics, Ltd., v. Panache Broadcasting of Pennsylvania, Inc.*, 202 F.3d 957 (7th Cir. 2000). The antitrust class action had been certified on May 13, 1999. Two months later, the defendants sought certification of the order under 28 U.S.C. ' 1292(b), which has no precise time limit. The district court granted the motion, and the defendants timely took their ' 1292(b) petition to the Seventh Circuit. Judge Posner announced a rule of practice in that circuit: "district judges should not, and we shall not, authorize appeal under 28 U.S.C. ' 1292(b) when appeal might lie under Rule 23(f)." *Id.* at 959. Setting this practice allowed the court to avoid any conflict between the strict time limits of Rule 23(f) and the more lenient principle that requests under ' 1292(b) must not be inexcusably dilatory

V. Conclusion

Based on the rulings thus far, it appears that Rule 23(f) review will be carefully limited to avoid increasing the federal appellate workload. Rule 23(f) petitions will be granted only in those few cases in which the appellate court has an opportunity quickly and cleanly to resolve an issue of class action jurisprudence. *Blair* Categories 1 and 2 or *Prado-Steiman*'s death knell factor rarely will come into play. After all, most class plaintiffs today do have experienced and entrepreneurial class counsel acting as their champions and bankers, and few cases truly carry bet-the-company risks for most large corporate defendants. Unless the case presents a profound error of law or tremendous public importance, Rule 23(f) petitions are likely to be a waste of the client's money.

The appellate courts also are not going to stretch their limited jurisdiction. Thus, the 10-day time limit must be strictly heeded. A motion for reconsideration can buy some time, but practitioners must recognize that the clock starts running when the first order granting or denying certification is entered. Although the law permits reconsideration of a class certification order at any time prior to judgment, the window of opportunity under Rule 23(f) is the only possible basis for interlocutory appeals, and parties should not expect petitions for mandamus or for review under ' 1292(b) to be granted if they miss the 10-day deadline.

Rule 23(f) will permit the courts of appeals finally to resolve some of the cutting-edge issues in modern class action litigation, the uncertainties of which often cause parties to settle rather than litigate to judgment. In most class action cases, however, appeal after final judgment likely will remain the only available route to challenge an adverse grant or denial of class certification. As a result, significant class action reform likely will await Judicial Conference rule-making or an act of Congress.

Highlights of Executive Council Meeting

Held on September 14, 2000, Tampa Airport Marriott

TREASURER'S REPORT:

A memorandum from The Florida Bar's Budget Committee proposes that Sections should pay the same rate charged to other Bar programs for printing, mailing, graphic art, meeting department support, and advertisements in the Bar publications, instead of the previous limit of ½ of Section dues (modified to a maximum of $12.50 per member in 1994), for these expenses. Had this proposal been in effect last year it would have cost the Section $6,146. At the close of the last fiscal year, we added approximately $9,000 to our balance. Therefore, had the proposal been in effect last year, we would have had a net revenue of approximately $3,000.

The Chair will try to convince Bar leaders to look for other funding options.

SPECIAL PRESENTATION: SOLICITOR GENERAL TOM WARNER:

Tom Warner represents the State of Florida as Solicitor general in significant constitutional law matters and issues in which the state has an interest. In addition, he is a professor at Florida State University. Mr. Warner noted that if it sounds like he knows what he is talking about, "I actually *did* stay at a Holiday Inn Express last night."

Warner urged Section members to let him know of cases that might benefit from an appearance by the Solicitor General. He said that there may be cases where the State has an indirect interest (an important public policy issue) and would back up a private litigant. More commonly, Warner's office intervenes in cases involving city or a county government, but his role is not limited to those matters. Warner's e-mail address is: tom warner@oag.state.fl.us; this is the best way to communicate with him, he said.

Raoul Cantero suggested that we do an article for *The Record* regarding the role of the solicitor general and his availability as a resource. *[Ed. Note: The article will appear in the Spring 2001 issue of The Record.]*

REPORT ON STETSON WORKSHOP:

Tom Hall reported that the most recent workshop was very successful, with 30 attendees, the most ever. He reported that the turnout was better due to targeting of mail-outs to the right person at law firms; 19% of the attendees this year were from firms of 50 or more attorneys. In the past, that number was 3-4%. In the critiques the participants were asked to complete, 100% of participants called the program "excellent."

The Stetson Workshop will be held again in 2001, assuming the faculty is willing, but then be held in odd-numbered years in the future, beginning in 2003.

DEVELOPMENT OF SECTION OPERATIONS MANUAL:

Hala Sandridge reported that the idea of the *Operations Manual* is to put in writing various functions to be performed in governance and administration of the Appellate Section. She said that she will send an e-mail request to the others who agreed to participate seeking a sketch of how their committee or office is run.

PROPOSED RULE CONCERNING THREE-JUDGE PANELS IN CIRCUIT COURT:

There was a discussion concerning the Section's position as to whether circuit court appeals should be handled by 3-judge panels. The Section previously filed an Amicus Curiae brief on the issue, and the issue has been referred by the Supreme Court to the Rules of Judicial Administration. Steve Stark moved that the Section recommend to the Rules of Judicial Administration Committee that there be a 3-judge panel in all circuit appeals.

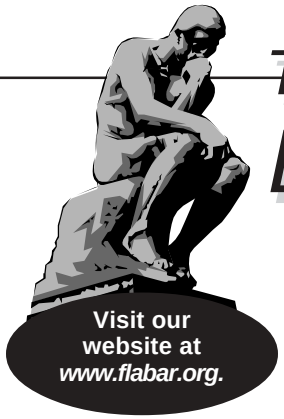
Judge Polen said that some circuit judges have indicated that they cannot provide a 3-judge panel and do not have time for the additional responsibilities. One example is the 17th Circuit. Judge Polen asked whether we want to consider input from such judges before taking a position. Susan Fox noted that in Hillsborough, they expected to receive fewer appeals after three-judge panels were implemented. She suggested that if the panels issue written opinions establishing the law in the circuit, the litigants may not need to appeal so much. Tony Musto discussed the problem that exists in smaller counties and opined that maybe it would be better to leave things as they are in a small county. Still, Tony Musto generally supported a 3-judge panel where possible. Steve Stark offered that a 1-judge panel was not fair to a litigant who has only one chance for review. Judge Sharp pointed out that in administrative cases, the District Court of Appeal is not a major part of the appellate process because the standard for further review is so narrow. Therefore, full and fair review in circuit court is needed. Zoning cases in (for example) St. John's County, where there are only two judges, are handled by 1-judge "panels." Ben Kuehne summed up by saying that the Council is in favor of multiple-judge panels. Thereupon, the motion was amended to move that the Section support multiple-judge panels where a circuit court is acting in its review capacity, recognizing the need for further analysis of issues regarding specific counties. That motion unanimously carried.

LISTSERVE: SECTION E-MAIL COMMUNICATION TECHNOLOGY:

Ben Kuehne suggested communicating via egroups.com. He noted that an introductory e-mail was being sent out. He said this is available at no cost to us. Banner advertising funds the site but the promise is that there is "no spamming."

NEXT MEETING:

The next meeting of the Executive Council is scheduled for Thursday, January 18, 2001 at the Miami Hyatt Downtown. All members are welcome to attend.



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Rule 9.141(c): Belated Criminal Appeals and Ineffective Assistance of Appellate Counsel

by Richard J. Saunders

This article discusses the provisions of Florida Rule of Appellate Procedure[1] governing requests for belated appeals and claims of ineffective assistance of appellate counsel in criminal cases.[2]

I. Belated Appeals

The procedural rules for belated appeals are contained in rule 9.141(c)(1)-(5), effective January 1, 2001. If a belated appeal is incorrectly sought through an improper procedure, for example, in a rule 3.850 motion, an appeal from the denial of that motion may be treated as a belated appeal under rule 9.141(c).[3]

Rule 9.100 controls the processing of a valid petition for belated appeal.[4] To establish a preliminary basis for relief, the petitioner need only make the necessary allegations and may include, but is not required to provide supporting documentation.[5] The specific acts justifying belated appeal must be sworn to be petitioner or petitioner's counsel. If the court finds a preliminary basis for relief, and requires a response, the state must "specifically dispute [the] petitioner's allegations[,] if not by affidavit, at least by specific allegations."[6] The state is not "required to come forward with evidence to refute petitioner's sworn petition[; rather], it is sufficient for the state to set forth a good faith basis for its opposition. . . "[7] If the state does not contest the right to the belated appeal, it will be granted.[8] If the state disputes the facts, the appellate court may appoint a commissioner (usually the original trial judge) to hear evidence and make a report and recommendation.[9]

If a belated appeal is granted, the order granting it shall be filed in the lower tribunal and treated as the notice of appeal.[10] The appellate court will then relinquish jurisdiction to the trial court for the appointment of appellate counsel, if required.[11]

The merits of a belated appeal are determined by reference to the law as it exists when the appeal is decided, rather than the law as it was when the appeal should have been taken.[12]

When a belated appeal is granted from a resentencing that occurred after the initial sentence was reversed pursuant to a state appeal, the petitioner cannot raise issues in the belated appeal that could have been raised in the original appeal.[13]

Requests for belated appeals fall into two categories: "exceptional circumstances" cases and "ineffective assistance of counsel" cases.

A. Exceptional Circumstances Cases

"Exceptional circumstances" are those that "render[] the ordinary appellate process unavailable."[14] The most common circumstance is the failure to properly notify the petitioner (generally proceeding pro se) that a final order had been rendered and that he has the right -- and a limited time -- to appeal.

These cases generally arise in the postconviction context. Orders denying motions for postconviction relief must include a statement that the petitioner has the right to appeal within 30 days of the rendition of the order; the clerk must promptly serve on the petitioner a copy of any such order, noting the date of service by a certificate of service.[15] The failure to fulfill these requirements is grounds for a belated appeal[16]; "the ultimate burden is on the state to see that [the petitioner] receives all rights accorded him. . . "[17]

Exceptional circumstances have also been found when the petitioner proves: she did not receive a copy of the order until it was too late to file an appeal,[18] she timely delivered her notice of appeal to the prison authorities but they failed to forward it to the clerk in time,[19] the clerk's certificate of service shows that the order was sent to the petitioner's old institution after she transferred from there,[20] and the clerk fails to properly docket a timely filed notice of appeal.[21]

Exceptional circumstances have also been found when a pro se defendant tells the trial court he wants to appeal and the court appoints the public defender, but the public defender fails to get notice of the appointment until it is too late to file the notice of appeal; the appellate court said that, although technically the defendant (as "trial counsel") was responsible for filing the notice, he reasonably believed that the trial court's appointment of the public defender relieved him of any further responsibility for perfecting the appeal.[22] A belated appeal has also been allowed where the trial proceedings were "fundamentally and thoroughly flawed [with respect to the] most basic constitutional guarantees of due process and right to counsel."[23]

The petitioner's lack of legal knowledge or access to a law library is not an exceptional circumstance.[24] However, if the petitioner, "an unknowledgeable layman," is relying on an inmate law clerk and that clerk is suddenly transferred (along with all the petitioner's legal papers, which the petitioner does not get back until it is too late), a belated appeal will be allowed.[25]

Although there are no reported decisions directly addressing the issue, one district court has indicated that the request for a belated appeal need not necessarily be filed within 30 days of the time the petitioner discovers that his appeal time has expired.[26] Nor need it be shown that the petitioner attempted to file a notice of appeal within 30 days of his untimely discovery that a final order had been entered.[27]

B. Ineffective Assistance of Counsel Cases

Ineffective assistance occurs if counsel fails to file a timely requested notice of appeal,[28] or misadvises his client that he has no right to appeal.[29] Such failures are ineffective assistance per se. The petitioner need not allege or prove any prejudice other than the loss of the right to appeal;

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the petitioner need not prove that the appeal had any merit,[30] even if he pled guilty or no contest without reserving the right to appeal a dispositive issue.[31]

Ineffective assistance may also occur if counsel fails to consult with the client regarding the possibility of an appeal. "[W]hen there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing," counsel must discuss the possibility with him, even in plea cases.[32] To show prejudice for such a failure on counsel's part, the petitioner need not prove that he had viable grounds for appeal; however, he must show that "there is a reasonable probability that, but for counsel's deficient failure to consult with him ..., he would have timely appealed."[33]

The petition should state whether the petitioner timely asked counsel to file an appeal.[34] The timely request for an appeal will be considered valid if the petitioner reasonably believed he was directing the request to the proper attorney.[35] A timely request for appeal need not be proven if the petitioner was not advised (either by his trial counsel or the court) that his appeal must be filed within a certain time.[36]

Trial counsel must honor a timely request to file a notice of appeal; counsel cannot condition the filing on the prepayment of costs or fees.[37] Counsel's obligation is not fulfilled by advising his client of the right to appeal and providing the client with forms and instructions on how to file the notice pro se, even if counsel feels it is a mistake to take the appeal.[38] Belated appeal will also be allowed if counsel improperly dismisses,[39] or fails to perfect, a timely filed appeal. This latter situation occurs when appellate counsel either: 1) fails to both file an initial brief and respond to an order to show cause, thus resulting in dismissal,[40] or 2) fails to insure that a proper determination of indigency is made and the appeal is dismissed for failure to pay appellate costs.[41] The granting of a belated appeal in such cases results in the reinstatement of the dismissed appeal and a relinquishment of jurisdiction to the trial court for appointment of new appellate counsel, if required.[42]

It is not clear whether a belated appeal can be granted for ineffective assistance in appeals from the denial of a post-conviction motion. Some older cases allow it, on the ground that, although a defendant is not entitled to appointed trial counsel in such proceedings, if counsel is appointed, counsel cannot be ineffective.[43] However, in *Diaz v. State*,[44] the Second District held that, under the Florida Supreme Court's decision in *Lambrix v. State*,[45] belated appeals cannot be granted because defendants are not entitled to appointed counsel in post-conviction proceedings and thus no ineffectiveness claim will be permitted.[46] *Lambrix* rejected a claim of ineffective assistance of collateral counsel, but it is not clear whether that claim was based on the failure to raise an issue in a valid appeal, or on the failure to appeal at all.[47] Shortly after *Diaz* came out, the Florida Supreme Court held in *Steele v. Kehoe*[48] that, as a matter of due process, a belated 3.850 motion will be allowed if the defendant retained counsel to file the motion but counsel filed it untimely. This caused the Second District to reconsider *Diaz* and certify the question of whether a trial attorney error will authorize a belated appeal from the denial of a post-conviction motion.[49]

These cases did not consider the possibility that trial counsel's failure to file a requested appeal might be an "exceptional circumstance." Certainly, if the petitioner reasonably relied on counsel -- particularly appointed counsel, who is as much a state employee as a trial judge or court clerk -- to file the appeal, it seems unfair to deny him a belated appeal. Two recent cases seem to have accepted this rationale in granting belated appeals.[50]

II. Ineffective Assistance of Appellate Counsel

A. Procedure

The same basic procedural rules apply to claims of ineffective assistance of appellate counsel. The two-year time limit runs from the day the conviction becomes final on direct review.[51] To avoid the two-year time limit, the petitioner must "allege[] under oath, with a specific factual basis, that [he] was affirmatively mislead about the results of the appeal by counsel."[52] A claim of ineffective assistance of trial counsel under rule 3.850 may be simultaneously filed with a claim of ineffective assistance of appellate counsel under rule 9.141(c) on an "either/or" basis, *e.g.*, if trial counsel failed to preserve the issue, she was ineffective but, if she did preserve the issue, then appellate counsel was ineffective for failing to raise it.[53]

B. Substantive Principles

Defendants are constitutionally entitled to effective representation by counsel during their "first appeal as of right."[54] To prevail on a claim of ineffective assistance of appellate counsel, the petitioner "must show, first, that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or

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deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome. . . "[55] The focus is on "whether the result of the proceeding was fundamentally unfair or unreliable," rather that on "mere outcome determination."[56] These rules apply to both appointed and retained counsel.[57]

A claim of ineffective assistance cannot be used "as a means of circumventing the rule that [post-conviction] proceedings do not provide a second or substitute appeal."[58]

Counsel is not required to brief every nonfrivolous issue he can find, even if the client requests it; counsel may exercise his professional judgment and "winnow out weaker arguments to focus on and select the most promising issues. . . "[59] "In reviewing counsel's decision to omit an issue on appeal, [the courts'] scrutiny must be highly deferential, and counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[60] However, if counsel "fails to present significant and obvious issues on appeal, his conduct falls below the standard of objective reasonableness,"[61] particularly if counsel "pursu[es] issues that were clearly and significantly weaker."[62] Counsel cannot "fail to raise a meritorious issue which is a fundamental and intrinsic part of his client's case. . . "[63] Thus, "omitting a 'dead-bang winner,' even though counsel may have presented strong but unsuccessful claims," constitutes ineffectiveness; a "dead-bang winner" is "an issue which is obvious from the trial record and ... probably would have resulted in reversal. . . "[64] Ineffectiveness may also be found if counsel fails to raise an issue that was identical to the issue that was successfully raised by the petitioner's co-appellants.[65]

Although the failure to preserve an issue may excuse the failure to raise it on appeal, appellate counsel may be ineffective for failing to raise an unpreserved issue if the issue "rises to the level of a due process violation, constitutional violation, or another matter of fundamental error [because] those ... cannot be waived by failure to object."[66]

The effectiveness of counsel's performance is measured by the law as it existed during the time of the original appeal.[67] The "distorting effects of hindsight" must be avoided; counsel's performance should be judged "from counsel's perspective at the time."[68] An ineffectiveness claim "cannot be based upon the failure of counsel to assert a theory of law which was not at the time of the appeal fully articulated or established,"[69] or on "[t]he failure to raise a claim that would have been rejected at the time of the appeal. . . "[70] Counsel is not required to predict or anticipate changes in the law.[71]

However, counsel must keep abreast of developments in the law, even as the appeal is pending.[72] Counsel must be aware of trends and conflicts in decisions that will soon be resolved by a higher court.[73] Counsel must also inform the client of changes in the law that might affect his appeal, particularly when those changes might affect the decision of whether to pursue the appeal.[74]

Since a defendant "ha[s] no constitutional right to counsel to pursue discretionary review by the Florida Supreme Court, ... he [is] not deprived of effective assistance of counsel by his counsel's failure to appeal to the Florida Supreme Court."[75] However, ineffectiveness might result from counsel's failure "to raise an issue in an appeal as of right [if] it deprives the defendant of the opportunity to raise the matter in a later discretionary appeal."[76] "[The] omission of a meritorious claim cannot be excused simply because an intermediate appellate court would have rejected it"; where "there is a reasonable probability that [the] claim would have been successful in the [highest court]," or where "the highest court's ruling was easily predictable," it is ineffectiveness to fail to pursue the claim.[77]

If the state appeals or seeks discretionary review to a higher court, it is ineffectiveness to fail to advise the client of that fact and to do nothing to protect the client's interests.[78]

The proper standard for the prejudice prong of the ineffectiveness standard concerns the question of whether the petitioner would have prevailed in the appeal, not whether she would have ultimately obtained a better result in the retrial following a successful appeal.[79] Nor is it necessary to prove the petitioner would have prevailed in the direct appeal if the omitted issue had been raised. Although, in some cases, courts have granted a new trial after finding ineffective assistance of appellate counsel,[80] in other cases the remedy was a new direct appeal.[81] The distinction here is whether the appellate court can determine whether the omitted issue would have been successful based on the record before it; if not, a new appeal is ordered. For example, new appeals were granted where: appellate counsel was found ineffective for "inadequacy of research and briefing of the appeal and the gross ineffectiveness of oral argument;"[82] as a result of a conflict of interest because counsel represented co-appellants[83]; and where counsel failed to file a proper *Anders*[84] brief.[85]

Since the great majority of ineffective assistance claims are unsuccessful, there will be no attempt here to discuss them all. The remainder of this article will summarize those claims that have succeeded.

1. Unpreserved Trial Errors

The failure to raise an issue that

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10:30 a.m.	Committee Meetings • CLE Committee • Publications Committee
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6:00 p.m.	Reception

is fundamental and reversible error constitutes ineffective assistance. This includes the following issues: constitutionally defective jury instructions on reasonable doubt;[86] fundamentally erroneous instructions regarding the elements of the charged offense;[87] the trial judge's absence during a readback of testimony during jury deliberations,[88] conviction of a non-existent offense;[89] the sufficiency of the evidence to support the conviction;[90] egregiously improper remarks in the state's closing argument;[91] the state's improper withholding of exculpatory *Brady*[92] material;[93] ineffectiveness of trial counsel that is as apparent on the face of the record;[94] and a conflict of interest on the part of trial counsel.[95]

2. Preserved Trial Errors

Ineffectiveness claims have been successfully based on the failure to raise properly preserved issues of: racially discriminatory selection of the jury pool;[96] the trial court's failure to inquire into the defendant's competence;[97] the trial court's denial of a motion for continuance;[98] the improper denial of the defendant's right to confront the state's witnesses face-to-face;[99] the duplicity of the charging document;[100] the improper admission of evidence of uncharged crimes[101]; the improper admission of an out-of-court identification taken in violation of the defendant's right to counsel;[102] improper comments on the defendant's constitutional right to remain silent;[103] the improper admission of evidence that had not been provided in discovery;[104] the trial court's allowing the jury to separate overnight during deliberations in a capital case;[105] and the sufficiency of the evidence to support the conviction.[106] There are also several cases that have found ineffectiveness in the failure to raise jury instruction issues, including: the use of the short form excusable homicide instruction when excusable homicide was the defense;[107] the failure to reinstruct on the justifiable use of force when the jury requested reinstruction on the elements of unlawful homicide and the defense was that the use of force was justified;[108] inadequate instructions on lesser included offenses;[109] and the giving of an erroneous entrapment instruction.[110]

3. Improper Harmless Error Argument

The Fourth District has recently held that appellate counsel may be ineffective for failing to argue the proper harmless error standard on appeal.[111] The court said "it is ... indispensable to effective appellate representation that appellate counsel have a firm understanding of harmless error analysis."[112] The court then analyzed the original appellate issues using the proper harmless error standard and concluded that the defendant's convictions should be reversed. Presumably, similar logic could be used to find ineffectiveness in other appellate procedural matters, such as arguing the wrong standard of appellate review (*e.g.*, "abuse of discretion" versus "de novo review"); assuming a given issue requires a contemporaneous objection when it really is fundamental error; or failing to properly argue that an issue was properly preserved.

4. Sentencing Errors

The cases finding ineffectiveness in sentencing issues generally do not note whether the issue was preserved. The failure to raise the following sentencing issues has been held to be ineffective: an habitual offender sentence that improperly exceeded the applicable sentencing guidelines;[113] an improper habitual offender sentence for a non-qualifying offense;[114] the use of sentencing guidelines rules that took effect after the commission of the crime and increased the guidelines sentence;[115] a guidelines departure sentence that is unsupported by written reasons;[116] a departure sentence based on facially invalid reasons;[117] the improper imposition of consecutive minimum mandatory sentences that exceeded the guidelines;[118] a sentence above the statutory maximum;[119] the improper imposition of consecutive minimum mandatory habitual offender sentences for offenses committed during a single episode;[120] a fundamental double jeopardy argument regarding defendant's being sentenced as both prison releasee reoffender and violent career criminal on same charge;[121] a sentence imposed under a statute that was invalid due to a state constitutional single subject violation;[122] and an ex post facto violation in the trial court's retention of jurisdiction over the sentence.[123]

5. Double Jeopardy Issues

Several cases have held it is ineffective assistance to fail to raise an unpreserved double jeopardy issue regarding the propriety on multiple convictions on the same facts. Three cases have held it is ineffective to fail to attack the legitimacy of a separate conviction for possession of a firearm during the commission of a felony when that firearm possession also enhanced the degree of another offense of conviction.[124] Ineffectiveness has also been found when counsel failed to challenge a separate conviction for aggravated battery when that same aggravated battery also

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enhanced the degree of a burglary conviction.[125]

Endnotes:

[1] Effective January 1, 2001, Rule 9.141(c) replaces former rule 9.140(j). Rule 9.141(c) "is a slightly reorganized and clarified version of former rule 9.140(j). No substantive changes were intended." Fla. R. App. P. 9.141, Comm. Notes.

[2] These issues can also be raised in a federal habeas corpus petition; however, generally they must first be raised in state court before federal relief may be sought. *See generally* Liebman and Hertz, *Federal Habeas Corpus Practice and Procedure*, ch. 23 (2d ed. 1994). This article is concerned only with state court proceedings under Rule 9.140(j).

Some federal cases will be noted as authority on substantive issues. Although the author is not aware of any cases expressly discussing the question, it seems to be assumed that the principles regarding ineffective assistance of counsel are the same under both the state and federal constitutions. Thus, although the lower federal court cases cited in this article are not binding authority in Florida courts, they may have some persuasive value. Of course, the federal cases that concern convictions in federal courts or courts of other states measure counsel's effectiveness by the substantive law of the applicable jurisdiction; that law may differ from Florida law, which in turn may undermine the precedential value of these cases in Florida.

[3] *Sury v. State*, 750 So. 2d 152 (Fla. 1st DCA 2000); *Dubois v. State*, 705 So. 2d 713 (Fla. 1st DCA 1998); *Gibbs v. State*, 695 So. 2d 949 (Fla. 4th DCA 1997); *see also* Art. V, Sec. 2, Fla. Const. and Fla. R. App. Proc. 9.040(b) and (c). However, there may be some limits on the availability of this procedure, particularly if it appears the petitioner is abusing the procedure. *Russell v. State*, 740 So. 2d 567 (Fla. 1st DCA 1999). Further, such claims cannot be raised for the first time in a motion for rehearing in an appeal affirming the denial of a 3.850 motion. *Carter v. State*, 713 So. 2d 1103 (Fla. 4th DCA 1998).

[4] Fla. R. App. Proc. 9.141(c)(1).

[5] *Denson v. State*, 710 So. 2d 144, 145 (Fla. 5th DCA 1998); *accord*, *Schubert v. State*, 737 So. 2d 1102 (Fla. 1st DCA 1998).

[6] *Denson v. State*, 710 So. 2d 144, 145 (Fla. 5th DCA 1998).

[7] *Schubert v. State*, 737 So. 2d 1102, 1102, n1 (Fla. 1st DCA 1998); *accord*, *Wessels v. State*, 737 So. 2d 1103 (Fla. 1st DCA 1998).

[8] *Ghent v. State*, 746 So. 2d 1246, 1246 (Fla. 1st DCA 1999); *Davis v. State*, 735 So. 2d 617 (Fla. 1st DCA 1999).

[9] Fla. R. App. Proc. 9.140(j), Committee Notes; *Swain v. Moore*, 744 So. 2d 592, 593, n.1 (Fla. 2d DCA 1999); *Leath v. State*, 694 So. 2d 855 (Fla. 4th DCA 1997).

[10] Fla. R. App. Proc. 9.141(c)(5)(D).

[11] *Ellis v. State*, 730 So. 2d 767 (Fla. 5th DCA 1999).

[12] *Gilbert v. State*, 667 So. 2d 969 (Fla. 4th DCA 1996)(collecting cases).

[13] *Warren v. State*, 709 So. 2d 138 (Fla. 4th DCA 1998).

[14] *Rumph v. State*, 746 So. 2d 1249, 1250 (Fla. 1st DCA 1999).

[15] Fla. R. Crim. Proc. 3.850(g).

[16] *Jones v. State*, 642 So. 2d 121 (Fla. 5th DCA 1994); *Button v. State*, 641 So. 2d 106 (Fla. 2d DCA 1994); *Farngiamore v. State*, 633 So. 2d 118 (Fla. 5th DCA 1994); *Pippin v. State*, 616 So. 2d 1182 (Fla. 1st DCA 1993); *Lewis v. State*, 606 So. 2d 767 (Fla. 4th DCA 1993); *Everett v. Singletary*, 603 So. 2d 117 (Fla. 4th DCA 1992).

[17] *Jenkins v. State*, 603 So. 2d 641, 642 (Fla. 5th DCA 1992).

[18] *Funchess v. State*, 25 Fla. L. Weekly D1613 (Fla. 1st DCA July 6, 2000); *Maxwell v. State*, 25 Fla. L. Weekly D2257 (Fla. 1st DCA Sept. 21, 2000); *Gardner v. State*, 757 So. 2d 1245 (Fla. 1st DCA 2000); *Battles v. State*, 739 So. 2d 740 (Fla. 1st DCA 1999); *Washington v. State*, 701 So. 2d 1233 (Fla. 4th DCA 1997); *Ferrell v. Music*, 484 So. 2d 595, 595 (Fla. 4th DCA 1985).

[19] *Jones v. Moore*, 750 So. 2d 727, 727 (Fla. 1st DCA 2000); *Rozar v. State*, 701 So. 2d 1201, 1202 (Fla. 5th DCA 1997). This is the "mailbox rule": For incarcerated petitioners, the crucial date for timely filing purposes is the date the document was delivered to prison authorities for mailing. *Id.* Under this rule, it is presumed that the petitioner gave his documents to the prison authorities on the date shown in the certificate of service; it is the state's burden to prove otherwise. *Thompson v. State*, 761 So. 2d 324 (Fla. 2000).

[20] *Jenkins v. State*, 603 So. 2d 641 (Fla. 5th DCA 1992).

[21] *Latimore v. State*, 696 So. 2d 1290 (Fla. 4th DCA 1997).

[22] *Bouchette v. State*, 711 So. 2d 134 (Fla. 5th DCA 1998).

[23] *Moment v. State*, 645 So. 2d 502, 503 (Fla. 4th DCA 1994).

[24] *Davis v. State*, 716 So. 2d 273 (Fla. 4th DCA 1998).

[25] *Davis v. Singletary*, 716 So. 2d 273, 273 (Fla. 4th DCA 1998).

[26] *Pippin v. State*, 616 So. 2d 1182 (Fla. 1st DCA 1993).

[27] *Washington v. Singletary*, 701 So. 2d 1233 (Fla. 2d DCA 1997).

[28] *Roe v. Flores-Ortega*, 120 S. Ct. 1029 (2000).

[29] *Walker v. State*, 742 So. 2d 342 (Fla. 3d DCA 1999).

[30] *Roe*, 120 S. Ct. at 1035.

[31] *State v. Trowell*, 739 So. 2d 37 (Fla. 1999). However, there are only a limited number of issues that can be raised in an appeal from a plea when no dispositive issues are preserved. *Robinson v. State*, 373 So. 2d 898 (Fla. 1979).

[32] *Roe*, 120 S. Ct. at 1035-36.

[33] *Id.* at 1036.

[34] *Nazworth v. State*, 715 So. 2d 1061 (Fla. 5th DCA 1998); *Of. Leath v. State*, 694 So. 2d 855 (Fla. 4th DCA 1997).

[35] *Pentecost v. State*, 637 So. 2d 985 (Fla. 1st DCA 1994).

[36] *Walker v. State*, 742 So. 2d 342 (Fla. 3d DCA 1999); *Moment v. State*, 645 So. 2d 502 (Fla. 4th DCA 1994); *Button v. State*, 641 So. 2d 106 (Fla. 2d DCA 1994); *Pippin v. State*, 616 So. 2d 1182 (Fla. 1st DCA 1993); *Lewis v. State*, 606 So. 2d 767 (Fla. 4th DCA 1993); Fla. R. App. Proc. 9.141(c)(4)(A)(i).

[37] *Thames v. State*, 549 So. 2d 1198 (Fla. 1st DCA 1989); *see also* Fla. R. App. Proc. 9.140(b)(5).

[38] *Turner v. State*, 588 So. 2d 1042 (Fla. 5th DCA 1991).

[39] *Ojeda v. Moore*, 25 Fla. L. Weekly D1123, 1124 (Fla. 3d DCA May 10, 2000); *Demola v. Singletary*, 742 So. 2d 865 (Fla. 3d DCA 1999); *Smith v. Singletary*, 694 So. 2d 158 (Fla. 4th DCA 1997).

[40] *Burnside v. State*, 720 So. 2d 269 (Fla. 5th DCA 1998); *O'Riorden v. State*, 611 So. 2d 623 (Fla. 4th DCA 1993).

[41] *Wyatt v. State*, 697 So. 2d 1289 (Fla. 5th DCA 1997).

[42] *Burnside v. State*, 720 So. 2d 269 (Fla. 5th DCA 1998); *O'Riorden v. State*, 611 So. 2d 623 (Fla. 4th DCA 1993).

[43] *Phillips v. State*, 701 So. 2d 117 (Fla. 4th DCA 1997); *Jones v. State*, 642 So. 2d 121 (Fla. 5th DCA 1994); *McLeod v. State*, 586 So. 2d 1351 (Fla. 5th DCA 1991).

[44] 724 So. 2d 595 (Fla. 2d DCA 1998).

[45] 698 So. 2d 247 (Fla. 1996).

[46] The court certified the question to the Florida Supreme Court, but the pro se defendant failed to take it up.

[47] The opinion in *Lambrix* is ambiguous. The Court said Lambrix' claim was that "collateral counsel[] fail[ed] to appeal the denial of his request to represent himself. . . " 698 So. 2d at 248. The attorneys involved have advised the author that in fact the claim was based on counsel's failure to raise the issue in a valid appeal. If true, this would mean that *Lambrix* did not specifically address the issue of allowing belated appeals in post-conviction proceedings; rather, *Lambrix* only addressed the issue of whether substantive claims of ineffective assistance of post-conviction appellate counsel will be recognized.

[48] 747 So. 2d 931 (Fla. 1999).

[49] *Rogers v. State*, 752 So. 2d 657 (Fla. 2d DCA 2000), *review granted*, No. SC00-258 (Fla. March 28, 2000); *Demaria v. State*, 24 Fla. Law Weekly D2470 (Fla. 2d DCA Oct. 27, 1999), *review granted*, No. SC97120 (Fla. April 10, 2000); *Williams v. State*, 24 Fla. L. Weekly D1927 (Fla. 2d DCA Aug. 20, 1999), *review granted*, No. 96,546 (Fla. Dec. 21, 1999).

[50] *Baker v. State*, 25 Fla. L. Weekly D1816 (Fla. 4th DCA Aug. 2, 2000); *Page v. State*, 25 Fla. L. Weekly D1355 (Fla. 1st DCA June 1, 2000); *Christie v. Moore*, 25 Fla. L. Weekly D1350 (Fla. 1st DCA June 1, 2000).

[51] Fla. R. App. Proc. 9.141(c)(4)(B). Defendants whose convictions were final before January 1, 1997 had until January 1, 1999 to file their petitions. Fla. R. App. Proc. 9.141(c)(4)(C).

[52] Fla. R. App. Proc. 9.141(c)(4)(B); *McCray v. State*, 699 So. 2d 1366, 1368 (Fla. 1997). This requirement does not apply to petitions for belated appeal. *Patterson v. State*, 736 So. 2d 1270 (Fla. 4th DCA 1999).

[53] *Baber v. State*, 696 So. 2d 490 (Fla. 4th DCA 1997); *Francois v. Klein*, 431 So. 2d 165 (Fla. 1983).

[54] *Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

[55] *Johnson v. Wainwright*, 463 So. 2d 207, 211 (Fla. 1985).

[56] *Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993).

[57] *State v. Meyer*, 430 So. 2d 440 (Fla. 1983).

[58] *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987).

[59] *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983).

[60] *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

[61] *Hollenback v. U.S.*, 987 F.2d 1272, 1275 (7th Cir. 1993).

[62] *Mayo v. Henderson*, 13 F.3rd 528, 533 (2nd Cir. 1994).

[63] *Smith v. Wainwright*, 484 So. 2d 31 (Fla. 4th DCA 1986).

[64] *Banks v. Reynolds*, 54 F.3d 1508, 1515 (8th

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Cir. 1995).
[65] *Hudson v. State*, 730 So. 2d 320 (Fla. 1st DCA 1999).
[66] *Meyer v. Singletary*, 610 So. 2d 1329, 1331 (Fla. 4th DCA 1993); *Lombard v. Lynaugh*, 868 F.2d 1475, 1482-83 (5th Cir. 1989).
[67] *Sanders v. Singletary*, 707 So. 2d 364 (Fla. 1st DCA 1998); *Graham v. State*, 603 So. 2d 28 (Fla. 1st DCA 1992).
[68] *Strickland v. Washington*, 466 U.S. 668, 689 (1984).
[69] *Alvord v. State*, 396 So. 2d 184, 191 (Fla. 1981).
[70] *Henderson v. Singletary*, 617 So. 2d 313, 317 (Fla. 1993); *Sanders v. Singletary*, 707 So. 2d 364 (Fla. 1st DCA 1998).
[71] *Sistrunk v. Vaughn*, 96 F.3d 666 (3d Cir. 1996)(collecting cases).
[72] *Stokes v. State*, 685 So. 2d 1368 (Fla. 2d DCA 1996); *Washington v. State*, 649 So. 2d 348 (Fla. 5th DCA 1995).
[73] *Dixon v. Singletary*, 672 So. 2d 602, 603 (Fla. 3d DCA 1996); *see also Gervasoni v. State*, 25 Fla. L. Weekly D2292 (Fla. 5th DCA Sept. 22, 2000); *Steverson v. Singletary*, 24 Fla. L. Weekly D975, *opinion withdrawn*, 741 So. 2d 1161 (Fla. 2d DCA 1999); *Smith v. State*, 762 So. 2d 969, 973 (Fla. 4th DCA 2000)(Stevenson, J., concurring specially); *but cf. Wigfals v. Singletary*, 624 So. 2d 320 (Fla. 2d DCA 1993); *Jones v. Singletary*, 621 So. 2d 760, 761 (Fla. 3d DCA 1993).
[74] *Lewandowski v. Makel*, 949 F.2d 884 (6th Cir. 1991).
[75] *Nerey v. State*, 634 So. 2d 206, 207 (Fla. 3d DCA 1994).
[76] *Freeman v. Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992).
[77] *Mayo v. Henderson*, 13 F.3d 528, 534-35 (2d Cir. 1994).
[78] *Baxter v. Letts*, 592 So. 2d 1089 (Fla. 1992); *Blankenship v. Johnson*, 118 F.3d 312 (5th Cir. 1997); *see also State v. White*, 742 So. 2d 374 (Fla. 2d DCA 1999).
[79] *Matire v. Wainwright*, 811 F.2d 1430, 1439, n.8 (11th Cir. 1987)(collecting cases).
[80] *See, e.g., Johnson v. Wainwright*, 498 So. 2d 938 (Fla. 1986).
[81] *See, e.g., Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985).
[82] *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985).
[83] *Barclay v. Wainwright*, 444 So. 2d 956 (Fla. 1984).
[84] *Anders v. California*, 386 U.S. 738 (1967).
[85] *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1997); *Lombard v. Lynaugh*, 868 F.2d 1475 (5th Cir. 1989); *Grubbs v. Singletary*, 900 F. Supp. 425 (M.D. Fla. 1995).
[86]. *Lowe v. State*, 681 So. 2d 916 (Fla. 4th DCA 1996); *Brown v. U.S.*, 167 F.3d 109 (2d Cir. 1999).
[87] *Davis v. State*, 749 So. 2d 1291 (Fla. 3d DCA 2000).
[88] *Ferrer v. Manning*, 682 So. 2d 659 (Fla. 3d DCA 1996).
[89] *Ford v. Singletary*, 689 So. 2d 392 (Fla. 3d DCA 1997); *Stokes v. State*, 685 So. 2d 1368 (Fla. 2d DCA 1996).
[90] *Lowman v. Moore*, 744 So. 2d 1210 (Fla. 2d DCA 1999); *Carpenter v. Mohr*, 163 F.3d 938 (6th Cir. 1998).
[91] *Robison v. Maynard*, 829 F.2d 1501 (10th Cir. 1987).
[92] *Brady v. Maryland*, 373 U.S. 83 (1963).
[93] *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995).
[94] *Grubbs v. Singletary*, 900 F. Supp. 425 (M.D. Fla. 1995).
[95] *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995).
[96] *Mitchell v. State*, 567 So. 2d 1037 (Fla. 4th DCA 1990).
[97] *Daniel v. Thigpen*, 742 F. Supp. 1535 (M.D. Ala. 1990).
[98] *Williams v. State*, 25 Fla. L. Weekly D1346 (Fla. 2d DCA June 2, 2000).
[99] *Disinger v. State*, 574 So. 2d 268 (Fla. 5th DCA 1991); *Clemmons v. Delo*, 124 F.3d 944 (8th Cir. 1997).
[100] *Grady v. Artuz*, 931 F. Supp. 1048 (S.D.N.Y.1996).
[101] *Jackson v. Dugger*, 580 So. 2d 161 (Fla. 4th DCA 1991).
[102] *Smith v. Wainwright*, 484 So. 2d 31 (Fla. 4th DCA 1986).
[103] *Freeman v. Lane*, 962 F.2d 1252 (7th Cir. 1992); *Matire v. Wainwright*, 811 F.2d 1430 (11th Cir. 1987).
[104] *Mayo v. Henderson*, 13 F.3d 528 (2d Cir. 1994).
[105] *Johnson v. Wainwright*, 498 So. 2d 938 (Fla. 1986).
[106] *Hudson v. State*, 730 So. 2d 320 (Fla. 1st DCA 1999).
[107] *Spaziano v. State*, 522 So. 2d 525 (Fla. 2d DCA 1988).
[108] *Howard v. Moore*, 730 So. 2d 800 (Fla. 4th DCA 1999).
[109] *Daniel v. Thigpen*, 742 F. Supp. 1535 (M.D. Ala. 1990).
[110] *Guerra-Villafane v. Singletary*, 729 So. 2d 972 (Fla. 3rd DCA 1999).
[111] *Smith v. State*, 762 So. 2d 969 (Fla. 4th DCA 2000).
[112] *Id.* at 971.
[113] *Gervasoni v. State*, 25 Fla. L. Weekly D2292 (Fla. 5th DCA Sept. 22, 2000).
[114] *Thomas v. Singletary*, 751 So. 2d 66 (Fla. 2d DCA 1999).
[115] *Dixon v. Singletary*, 672 So. 2d 602 (Fla. 3rd DCA 1996).
[116] *Hernandez v. State*, 501 So. 2d 163 (Fla. 3d DCA 1987).
[117] *Johnson v. Singletary*, 708 So. 2d 321 (Fla. 3d DCA 1998); *Ambrose v. State*, 626 So. 2d 254 (Fla. 5th DCA 1993).
[118] *Wilner v. Singletary*, 647 So. 2d 187 (Fla. 2d DCA 1994).
[119] *Tosco v. State*, 686 So. 2d 787 (Fla. 3rd DCA 1997).
[120] *Washington v. State*, 649 So. 2d 348 (Fla. 5th DCA 1995).
[121] *Thomas v. State*, 745 So. 2d 1119 (Fla. 5th DCA 1999).
[122] *Barnes v. State*, 25 Fla. L. Weekly D1043 (Fla. 2d DCA Apr. 28, 2000).
[123] *Ragan v. Dugger*, 544 So. 2d 1052 (Fla. 1st DCA 1989).
[124] *Perry v. Singletary*, 697 So. 2d 1323 (Fla. 3d DCA 1997); *Dixon v. Singletary*, 672 So. 2d 602 (Fla. 3d DCA 1996); *Monzon v. Singletary*, 619 So. 2d 527 (Fla. 3d DCA 1993). In *Cleveland v. State*, 587 So. 2d 1145 (Fla. 1991), the Court held this type of "double enhancement" was a double jeopardy violation.
[125] *Whatley v. State*, 679 So. 2d 1269 (Fla. 2d DCA 1996).

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