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The Record

JOURNAL OF THE APPELLATE PRACTICE SECTION

www.flabarappellate.org

Volume IX, No. 1 **THE FLORIDA BAR** **Fall 2000**

Dispute Brewing Over Single Judge Circuit Court Appeals

by Robert S. Glazier

Florida has a unified court system. Cases are for the most part governed by standardized rules throughout the state. For example, the most important aspects of appellate procedure in the DCAs and Supreme Court are established in the Florida Constitution and the Rules of Appellate Procedure. But there is no such uniformity among circuit courts sitting in their appellate capacity. The procedures in these courts vary in fundamental ways from circuit to circuit. The most obvious variation is in the number of judges who decide circuit court appeals. In some circuits appeals are decided by three judges, and in other circuits appeals are decided by a sole judge.

Importance of circuit court appeals

Circuit courts sitting in their appellate capacity have a significant role in creating Florida's law. These courts handle the bulk of personal injury protection (PIP) appeals. They also serve as the courts of appeal for municipal zoning decisions, which can involve many millions of dollars. Furthermore, circuit court appellate decisions are for the most part not subject to review by any higher appellate court, due to the sharply limited scope of district court review of circuit court appellate decisions.

No rules

Despite the importance of circuit court appeals, "[t]he most basic issues concerning the composition, organization, powers and decision-making of these appellate courts have yet to be addressed, much less decided." *Samborn v. State*, 666 So.2d 937, 939 (Fla. 5th DCA 1995). There are no uniform rules governing circuit court appeals.

Indeed, there are not even uniform guidelines on which rules will govern circuit court appeals. In some circuits, basic circuit court appellate procedures are established by local rules adopted by the circuit's judges. In other circuits, however, the basic procedures are established by administrative order promulgated solely by the circuit's chief judge.

Number of judges

Because the number of judges used to decide an appeal is currently a local matter– sometimes varying county-by-county within a circuit– it is difficult to determine the practices across the state. However, the practices can be summarized as follows.

Florida has twenty circuits. Nine of these circuits use three-judge panels to decide appeals. Eight of the circuits use a single judge. The remaining three circuits sometimes use three judges and sometimes use one judge.[1]

Comments on single judge appeals

There is growing concern over the practice by some circuits of having only one judge decide an appeal. Over the past decade, district courts of appeal have frequently commented on the practice.

One court stated that "Perfecting a dissent is the only judicial task of lasting import that an individual appellate judge may embark upon alone. This maxim of collective judicial action governs the undertakings of supreme court justices and judges of the district courts of appeal, and

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INSIDE:

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Introducing Your New Editorial Team . . .

New editors have taken the helm of *The Record*, starting with this issue. The new editors hope to maintain the high standard set before them by **Kim Mellow, Angela Flowers, Hala Sandridge,** and **Chris Kurzner.**

The Editor-In-Chief is now **Susan Whaley Fox,** a Board Certified appellate practitioner with 23 years experience in appellate practice. Susan practices with Macfarlane Ferguson & McMullen in Tampa, and is immediate past chair of the Appellate Court Rules Committee, and President-elect of the Florida Association for Women Lawyers. She received her undergraduate and law degrees from the University of Florida, and worked as a reporter for the *Florida Alligator.* She has previously served as editor of several law related and non-law related journals.

Assistant Editors for the coming year are **Siobhan Shea** and **Paul Regensdorf.** Siobhan is a University of Miami law graduate who serves as an Assistant Public Defender in Palm Beach County. She is currently chairing the Steering Committee for the Hot Topics in Appellate PracticeSeminar. She is Immediate Past President of Palm Beach FAWL. Her journalism experience includes having been editor of her college paper, a student in the Florida Governor's Program for Gifted and Talented Students in Journalism and a seminar at Columbia University's Journalism Program.

Paul Regensdorf practices with Akerman Senterfitt in Miami. He received his undergraduate degree from Florida State University, and his law degree from Vanderbilt. Paul is a former chair of the Appellate Court Rules Committee, and is Board Certified in appellate practice.

The Associate Editor will continue to be **Brendan Lee,** a 1998 Stetson College of Law graduate who served as Executive Editor of the Stetson Law Review.

We look forward to an interesting and productive year. Please do not hesitate to contact any member of the editorial team to share you ideas or to submit articles for publication. Anyone wishing to join the editorial team should come to the next meeting of the Publications Committee scheduled for September 14,2000, at 9:00 a.m., at the Tampa Airport Marriot, or contact Susan Fox at (813) 273-4212 or e-mail: *SusanFox@macfar.com*.

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Susan Whaley Fox
P.O. Box 1531
Tampa, FL 33601-1531
813/273-4212

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Citation Form: The Rules Are Changing Again

Part One of a Two-Part Series

Preface

In the past year, the Appellate Practice Section has published several articles dealing with the changing complexities of legal citation form. As it turns out, our section was not the only group grappling with this issue.

The Association of Legal Writing Directors (ALWD) published its own citation manual, as an alternative to the *Bluebook*, in April 2000. A Subcommittee of the Appellate Court Rules Committee is studying whether to amend Rule 9.800 to authorize use of the ALWD manual as an alternative to the *Bluebook*.

The ALWD manual has been already accepted by some law reviews and legal writing departments in Florida and around the nation.

Since the ALWD manual's author is Dean Darby Dickerson of Stetson University College of Law, we asked her to write an article for the Record about why ALWD published this manual and how it differs form the *Bluebook*.

In the Winter issue of the *Record*, we will review the 17th Edition *Bluebook* which has not yet been released as this issue goes to press.

— Susan W. Fox, Editor

Professionalizing Legal Citation: The *ALWD Citation Manual*

Darby Dickerson

To be effective, a system of legal citation must be consistent, rational, and stable. For many decades, the accepted system of legal citation has been *The Bluebook: A Uniform System of Citation*, which is prepared by law review students at Harvard, Yale, Columbia, and Penn. Despite its title, *The Bluebook* is far from uniform. Moreover, it contains many internal inconsistencies and other rules that simply do not make sense, especially from a practitioner's perspective.

A perennial problem is that *The Bluebook* issues a new edition about every five years.[2] In each edition, the student-editors make unnecessary changes – changes that sometimes affect the substantive content of legal opinions and other legal work. Introductory signals are a prime example. Signals indicate the type and degree of support that an authority provides for the stated proposition. If "*see*" means indirect support in one *Bluebook* edition, but means direct support in another, it is impossible for attorneys to know what the "*see*" signal means when used in a judicial opinion from a certain date – unless they have the corresponding *Bluebook* edition in front of them.[3]

Another frustrating aspect of *The Bluebook* is its dogmatic insistence that inconsequential rules be followed without deviation. Providing certainty is fine – and even necessary – but dictating on too many details is overkill. For example, when citing a span of pages, does it really matter when the reference is 512-513 or 512-13? The reader can easily find the material using either form.

A third problem from a practitioner's perspective is that *The Bluebook* requires attorneys to use the Practitioners' Note form, which differs from "law review" form, but then proceeds to place virtually all examples in law review form. This forces practitioners to first find the applicable rule and then to waste valuable time figuring out how to convert the citation to "practitioner" form.

Finally, *The Bluebook* gives short shrift to mandatory local court rules. Florida,[4] and several other states, have local court rules that require attorneys to cite certain sources in ways that deviate from *Bluebook* form. Except for a few passing references, *The Bluebook* ignores these rules.

For these and other reasons, the Association of Legal Writing Directors (ALWD; pronounced ALL-wid), which is devoted to producing quality legal scholarship on topics related to research and writing, determined that it was time to professionalize legal citation and to end the frustrating cycle of changes. Because I had an interest and expertise in legal citation, leaders within ALWD approached me about serving as lead author for an alternative – and hopefully replacement – citation manual. In cooperation with the ALWD leadership and a twelve-person Advisory Committee with members from public and private law schools across the country – I set about drafting the *ALWD Citation Manual: A Professional System of Citation*, which was published by Aspen Law & Business in March 2000.

Since March 2000, professors at over 73 law schools across the nation – including Research, Writing & Analysis professors at Florida State University College of Law, Nova Southeastern University, Stetson

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This newsletter is prepared and published by
the Appellate Practice and Advocacy Section of The Florida Bar.

CITATION FORM

from preceding page

University College of Law, the University of Florida College of Law, and Barry School of Law – have adopted the *ALWD Manual* in lieu of *The Bluebook*.[5] In addition, over twenty paralegal programs and six law journals have signed on. ALWD and Aspen learn of new adoptions each week.

One of the most significant changes is that the *Manual* eliminates the unnecessary and confusing variation in citation rules between briefs and law review articles. Under the ALWD system, the same citation format is used regardless of the type of document. Attorneys no longer have to "convert" examples to another format. On a related matter, ALWD eliminates the large and small cap typeface.

The *ALWD Manual* allows flexibility on points that will not affect the reader's ability to find a source. For example, a page span may be cited as 512-13 or 512-513. As one recent reviewer indicated, "the ALWD guide brings common sense to the common law."[6]

The *ALWD Manual* is user-friendly. It is printed in 12-point font, as opposed to *The Bluebook*'s 11-point font. There are also discernable margins. The *Manual* is published in two colors – black and green – so that examples jump off the page; the book also contains many diagrams for visual learners. Additionally, the *Manual* contains a detailed index and well-developed table of contents.[7]

The *ALWD Manual*, however, is not meant to break with long-standing citation practices. Instead, it was drafted in large measure as a "restatement" of citation. Although it does contain some changes, most changes were designed to eliminate rules that were inconsistent or simply frustrating. As just two examples, attorneys may now abbreviate the first word of a party's name in a case and may block a long quotation even if it is forty-nine, and not fifty, words long.

Following this article is a chart that compares several ALWD rules to Sixteenth Edition *Bluebook* rules. Probably the most dramatic change for Florida attorneys is the abbreviation of Southern Reporter, Second as S.2d, as opposed to So. 2d. This change was made to bring consistency to reporter abbreviations, especially to one that is frequently misabbreviated as So.2d.[8] Of course, attorneys who follow Rule 9.800 would still use the So. 2d abbreviation. Attorneys who review the *ALWD Manual* will see that the major differences are not in the "end product," but lie in clearer explanations and better examples.[9] Ease of use was a top priority.

Two additional points of interest for practitioners are an appendix that contains local citation rules for all courts – including Florida's 9.800 – and a Web site, *www.alwd.org*, that will contain any needed clarifications or updates. New editions of the *ALWD Manual* will be designed to provide citation information for new sources, to address points where clarification is needed, and to update examples. ALWD pledges not to make changes simply to sell new editions.

The *ALWD Manual* was written by professionals, for professionals. If adopted widely, it will bring a new level of consistency, rationality, and stability to legal citation, and in turn to legal writing. It will also allow attorneys to concentrate on the substance of their work and not on arcane rules of citation format.

Part Two of this article will appear in the Winter Issue.

***Darby Dickerson** is an Associate Professor of Law, Associate Dean, and Director of the Legal Research and Writing Program at Stetson University College of Law. She is a leading authority on American legal citation and has written in depth on the subject.*

(See chart on pages 5 & 6)

SINGLE JUDGE

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applies with no less force to judges of the appellate division of the circuit courts." *Melkonian v. Goldman*, 647 So.2d 1008, 1009 (Fla. 3d DCA 1994). Other courts have mentioned the practice. *See Metropolitan Property & Casualty Insurance Co. v. Cirincione*, 2000 WL 788413 (Fla. 4th DCA June 21, 2000) (Polen, J., concurring) (collecting cases).

The Florida Bar *News* recently published an article on the issue: "Should three-judge circuit panels hear county court appeals?", (The Florida Bar *News*, May 15, 2000, at 11.) And the Appellate Practice Section of the Bar has spoken, filing an amicus brief opposing the practice of having a single judge decide an appeal.

Most recently, the Supreme Court—after noting that "a solitary judge" had overturned a city's zoning decision—mentioned the controversy concerning the number of judges deciding circuit court appeals. *Florida Power & Light v. City of Dania*, 25 Fla. L. Weekly S461 (Fla. June 15, 2000). The court referred the matter for study to the Rules of Judicial Administration Committee of the Florida Bar. The committee has assigned the issue to a subcommittee, which is expected to make recommendations in late summer. Comments may be sent to the head of the subcommittee, Miami attorney Bruce Berman.

***Robert S. Glazier** is an appellate lawyer in Miami.*

Endnote:

[1] Three-judge panels are used by the following circuits: Fifth, Eighth, Ninth, Eleventh, Thirteenth, Fifteenth, Nineteenth, and Twentieth. A single judge is used by the following circuits: Second, Third, Fourth, Tenth, Twelfth, Sixteenth, and Seventeenth. Both three- and one-judge panels are used in the following circuits: First, Sixth, and Seventh.

This summary is based upon a variety of sources: a survey of the circuits conducted in early 1999 by a committee of the Criminal Law Section of the Bar; local rules and administrative orders available on the internet; discussions in DCA opinions; and telephone calls to clerks of court.

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www.flabarappellate.org

Comparison of Selected ALWD and Bluebook (16th Ed.) Rules

RULE	ALWD CITATION	BLUEBOOK CITATION	DIFFERENCES
Typeface	Ordinary type and *italics* (or underlining). No distinctions based on type of document (law review v. court document) or placement of citation within the paper.	Ordinary type, *italics* (or underlining), and small caps. Different fonts required depending on type of document and where source is cited within the paper.	ALWD has one set of conventions, not two. ALWD eliminates small caps as a typeface.
Spacing	F. Supp. F.3d	F. Supp. F.3d	No substantial differences.
Cases	*Brown v. Bd. of Educ.*, 349 U.S. 294, 297 (1955). *MBNA Am. Bank, N.A. v. Cardoso*, 707 N.E.2d 189 (Ill. App. 1st Dist. 1998). [required inclusion of district court information]	*Brown v. Board of Educ.*, 349 U.S. 294, 297 (1955). *MBNA Am. Bank, N.A. v. Cardoso*, 707 N.E.2d 189 (Ill. App. Ct. 1st Dist. 1998). [permissive inclusion of district information]	Under ALWD, you • may abbreviate first word of a party's name.* • do not have to abbreviate words in case names. • use S. instead of So. for the regional reporter, for consistency, unless local court rule requires otherwise. • include division and district information for state appellate courts. • eliminate "Ct." from most court abbreviations.
Statutes	18 U.S.C. § 1965 (1994).	18 U.S.C. § 1965 (1994).	No substantial differences.
Court Rules	Fed. R. Civ. P. 11 (1999).	Fed. R. Civ. P. 11.	ALWD requires a date, even for current rules, to help avoid confusion.
Books	Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* vol. 6A, § 1497, 70-79 (2d ed., West 1990). **OR** Charles Alan Wright et al., *Federal Practice and Procedure* vol. 6A, § 1497, 70-79 (2d ed., West 1990).	6A Charles Alan Wright et al., *Federal Practice and Procedure* § 1497, at 70-79 (2d ed. 1990).	Under ALWD you may, but use et al. for more than two authors.* ALWD places volume information after the title, just like any other subdivision. ALWD requires that the publisher be included.

Comparison of Selected ALWD and Bluebook (16th Ed.) Rules

RULE	ALWD CITATION	BLUEBOOK CITATION	DIFFERENCES
Legal Periodicals	L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 Emory L.J. 909, 915 (1980). Hope Viner Samborn, *Navigating Murky Waters*, 85 ABA J. 28 (July 1998).	L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 Emory L.J. 909, 915 (1980). Hope Viner Samborn, *Navigating Murky Waters*, A.B.A. J., July 1998, at 28.	ALWD eliminates most distinctions between consecutively and non-consecutively paginated articles. Include longer date for non-consecutively paginated journals, but do so within the parenthetical.
Signals	"No signal" is not treated like a signal. Use no signal for direct support and quotations.	[no signal]: Cited authority (i) identifies the source of a quotation, or (ii) identifies an authority referred to in text.	ALWD returns to long-used definitions.*
Quotations	ALWD says to block indent passages if they contain at least fifty words OR if they exceed four lines of typed text.	The *Bluebook* says to block indent passages if they contain at least 50 words.	ALWD does not require you to count the exact number of words in long quotations.

**The 17th Edition Bluebook is expected to be consistent with ALWD differences marked with an astersisk (*).*

Endnotes:

[1].Associate Dean, Associate Professor, and Director of Research & Writing, Stetson University College of Law. Dean Dickerson was the lead author of the *ALWD Citation Manual* and serves on the board of the Association of Legal Writing Directors, the organization that initiated and sponsored the citation manual. The citations in this article are in *ALWD Citation Manual* format. Interested readers may order a copy of the *ALWD Manual* from www.aspenpublishers.com. The *Manual* retails for $20.95. For reviews of the *ALWD Manual*, consult Steven D. Jamar, *The ALWD Citation Manual: A Professional Citation System for theLaw*, 8 Persp. 65 (Winter 2000) (also available at <http://www.law.howard.edu/faculty/pages/jamar/scholarship/alwdciterev.htm>), and James T.R. Jones, *Book Review: ALWD Citation Manual*, 73 Temp. L. Rev. 219 (2000).

[2].Since 1981, new editions of *The Bluebook* have appeared every five years. A. Darby Dickerson, *An Un-Uniform System of Citation*, 26 Stetson L. Rev. 53, 56 n. 1 (1996). The Seventeenth Edition, however, will be issued in July 2000, which is only four years after the Sixteenth Edition.

[3].For a more complete discussion of this concept, see Dickerson, *supra* n. 1, at 68-70. For information about the dispute that arose over the signal change in 1996, read A. Darby Dickerson, *Seeing Blue: Ten Significant Changes in the New Bluebook*, 6 Scribes J. Leg. Writing 75, 79-81 (1996-1997).

[4].Fla. R. App. P. 9.800 (West 2000).

[5].For a complete list of adoptions, visit Association of Legal Writing Directors, *ALWD Citation Manual* <http://www.alwd.org> (accessed July 11, 2000). Other schools whose Research & Writing programs have switched to the *Manual* include Northwestern University, the University of Michigan, the University of California at Hastings, Boston University, American University, and NYU.

[6].Michael Rustad, *Citations*, Bimonthly Rev. L. Bks. 10, 10 (July-Aug. 2000).

[7].The table of contents appears on the ALWD Web site, www.alwd.org.

[8].My historical research indicates that S. was the abbreviation used before So. I could never pinpoint the timing or reason for the switch. As a point of interest, LEXIS and Westlaw do recognize "S.2d" as Southern Reporter, Second.

[9].For a more detailed comparison chart, e-mail darby@law.stetson.edu.

CLE Committee

The Committee is seeking a few new members who are willing to assist in organizing one of our seminars for the 2000-2001 year. Anyone who is interested in serving on the Committee should contact Austin Newberry at The Florida Bar or come to the Committee's meeting at the Tampa Airport Marriott on September 14.

The following seminars are in various stages of planning:

1. Hot Topics in Appellate Practice

The Section will be once again hosting its "Hot Topics in Appellate Practice" seminar, on October 12, 2000. The program, which has become one of the most successful for the Section, will feature appellate judges from the district courts of appeal and from the Florida Supreme Court on topics of continuing and current interest in appellate practice. Among the judges who will participate are Justice Anstead and Justice Pariente from the Florida Supreme Court, Judge Farmer from the 4th DCA, Judge Griffin from the 5th DCA, Judge Padovano from the 1st District, and both Judge Parker and Judge Altenbernd from the 2nd District. The seminar will take place at the Tampa Airport Marriott and will be a full-day program.

2. Appellate Practice Certification Exam Review Course

Next year's course is scheduled to take place in late January, 2001.

3. Federal Appellate Seminar

The next Federal Appellate Seminar will be held in Spring, 2001, in Tampa. A steering committee is being formed which already includes Judge Kathryn Pecko, Rebecca Steele and Pat Kelly. The Federal Practice Committee has offered to assist in arranging and developing the program.

4. Appellate Practice Workshop

The Appellate Practice Workshop, entitled "Successful Appellate Advocacy", which has been held each of the past 2 years, was held again this year at Stetson University from July 26-28, 2000. As in the past, the faculty included distinguished appellate judges, law professors and appellate practitioners. The program was not being co-sponsored with The Florida Bar so the Section could take advantage of the opportunity for increased revenues.

Publications Committee

The Committee welcomes new members willing to assist in planning or preparing our publications. These include: *The Record*, *The Guide*, and the Section's articles in The Florida Bar *Journal*. Anyone who is interested in serving on the Committee should contact Austin Newberry at The Florida Bar or come to the Committee's meeting at the Tampa Airport Marriott on September 14.

Website Committee

As a part of the Appellate Practice Section's mission and the related goals established at the Section's Retreat this past April, Jack Aiello has agreed to take charge of the Section's website with the assistance of Steve Stark and June Hoffman. This group will monitor and consider prospective content for the website and will coordinate with the Section's committees, who should submit their proposed content to the group for review and inclusion on the website. You can contact Jack Aiello at (561) 650-0716.

Point & Click: Index to *Record* Articles Now on the Web!

by Valeria Hendricks

Appellate practitioners know an index is a helpful research tool and a well-organized index is a valuable resource (Hint-hint to the indexers of *Florida Statutes*). Coming to the Appellate Practice Section's website this fall is a topical index to the substantive articles appearing in *The Record* from its first issue in December 1993 to the present.

From appellate practice certification to technology, the index to *The Record* is organized to help the appellate practitioner easily find articles on relevant research topics. For example, there are individual sections on federal and state appellate, civil, and criminal practice, as well as substantive law updates. There is also a section listing the twenty-two book reviews written by Scott Makar over *The Record*'s history. Finally, the index includes a listing of articles on practical tips by and for appellate practitioners, as well as the articles of judicial views and comments.

To access the Appellate Practice Section website, go to: *http://www.flabarappellate.org*. While there, you can read the latest news for and about the Section and learn about the committees and leadership of the Section. The website also provides links to other sites of interest to Section members.

***Valeria Hendricks** is an appellate lawyer with Davis & Scarritt in Tampa.*

The editors appreciate Ms. Hendricks' hard work in compiling the index to past issues of The Record.

Bruce Rogow Wins Adkins Award

Bruce Rogow is the 1999-2000 recipient of the James C. Adkins Award, which was presented to him at the Bar's Annual Meeting on June 22, 2000.

Mr. Rogow graduated from the University of Florida Law School in 1963 and was admitted to The Florida Bar in 1964. That year he began his career with the Lawyers Constitutional Defense Committee, representing civil rights workers in Mississippi, Alabama, and Louisiana, until 1966, when he returned to Florida as a Legal Services lawyer.

Rogow then became the Assistant Director of the Dade County Legal Services Program, an adjunct professor at the University of Miami Law School, and of-counsel to Pearson, Josefsberg, and Tarre, P.A. In 1974 he became a founding professor at the Nova Law School, and is now the only professor who has been on the law faculty at Nova Southeastern since the inception of the law school

Cindy Hofmann presents Bruce Rogow with the Adkins Award.

In addition to teaching, Rogow has litigated extensively in federal and state trial and appellate courts. He has argued over 250 reported cases, including 11 cases in the Supreme Court of the United States. His cases have been civil and criminal, civil rights and commercial, plaintiffs' side and defendants' side. He has, literally, represented doctors, lawyers, Indian chiefs, rich men, poor men, beggarmen and thieves.

In the Supreme Court of the United States he has established the right to counsel for misdemeanants (*Argersinger v. Hamlin*), the right to an independent determination of probable cause (*Gerstein v. Pugh*); the protection of parody as an art form (*Campbell v. Acuff-Rose*). His litigation over the years has invalidated as unconstitutional dozens of municipal, county, and state statutes.

Rogow has been elected to the American Academy of Appellate Lawyers and the American College of Trial Lawyers. He has been listed for thirteen years in *the Best Lawyers in America* in two separate categories – criminal law and First Amendment law. He is Board Certified in Appellate Practice. Rogow has won numerous awards in his career, but in his remarks accepting the James C. Adkins Award, he called it a special pleasure because, as a circuit judge in Gainesville in 1962, Judge Adkins nearly flunked him in the trial practice course. "I played the role of prosecutor and early in the trial commented on the defendant's silence. Responding to the motion for mistrial, Judge Adkins told me that he would grant the motion, but if he did, the course would be over. Thankfully he took the motion under advisement and let me pass the course." Rogow said that receipt of the James C. Adkins award makes him feel "redeemed for that long-ago error."

Section Presents Hot Topics in Appellate Practice 2000 Seminar

by Siobhan Helene Shea, "Hot Topics in Appellate Practice" Chair

Florida Supreme Court Justices Barbara J. Pariente and Harry Lee Anstead will speak at the Hot Topics in Appellate Practice Seminar, on Thursday, October 12, 2000 at the Tampa Airport Marriott. Justice Pariente will speak on Effective Oral Argument and Justice Anstead will discuss Professionalism in Appellate Practice. Other confirmed speakers to date include: Fourth DCA Judge Gary Farmer, Fifth DCA Judge Jacqueline R. Griffin, First DCA Judge Philip J. Padovano, Second DCA Judge Chris W. Altenbernd, and Appellate Rules Chair Susan W. Fox. The lively one day seminar will cover Appellate Attorneys' Fees, Appellate Rule Changes, Standards of Review and Preservation of Error. This seminar is presented by the Appellate Practice CLE Committee of the Florida Bar. For more information contact the Hot Topics in Appellate Practice Chair Siobhan Helene Shea at 561/355-7638.

Sweet Success

The Appellate Practice Section wishes to express its deep appreciation to all those law firms and practitioners who contributed to the Annual Dessert Reception in June. It was a great success! Thank you.

Improving Your Writing Immediately

by Thomas J. Ellwanger

[*Ed. Note: These rules were written for summer law clerks and new associates at a large law firm]*

1. *WRITE FOR YOUR READER.*

a. Who you are writing for should affect what you write.

b. You may be writing for a client, for a judge, or for another lawyer who may or may not be familiar with the legal area involved. Adjust your writing accordingly.

c. Issues:

i. How basic should your structure and vocabulary be?

ii. How much should you explain?

iii. How sophisticated should your explanations be?

2. *STRIVE FOR READABLE WRITING.*

a. The key is this: whoever your readers are, don't make them work too hard to understand you. They may stop trying before you want them to.

b. Use normal words, not legalese.

i. Wherever possible, stick to Anglo-Saxon words (the most common in the language). Use other words (typically from French or Latin) for more effect or more precision.

ii. Use the shortest, simplest words which will convey the thought.

c. Generally use short declarative sentences. They are the easiest to understand.

i. Here is the structure: subject/verb/object. Don't pile on additional clauses or much else.

ii. Occasionally you will want to use longer sentence; the thought may require them, or the writing may otherwise be choppy. But, don't strive for Victor Hugo's record.

d. Stick to short paragraphs. They are much more inviting.

e. Use headings and subheadings to break up big blocks of text. This is also much more inviting.

f. Perhaps the biggest aid to readability is a simple, coherent structure to the writing which you consistently follow throughout it. People find writing easier to understand if they know where you are going, know how you get there, and are then reminded where they are.

3. *BE DIRECT.*

a. Write as if you mean what you say. After all, you're generally being paid for an answer to some legal question.

i. So, write with authority (even if you are authoritatively stating that the law is unclear).

ii. You want the reader to have confidence in you and in what you write. The first step is having confidence in yourself and in your writing ability.

b. Use the active voice as much as possible. The passive voice often sounds weak, vague and uncertain.

c. Use, on the average, short declarative sentences grouped in short but well-structured paragraphs. Short sentences sound more authoritative. It is often felt that long, meandering sentences which tend to make use of the passive voice sound rather hesitant by comparison; maybe even effete, or something like that.

d. You don't have to give up style or elegance by being direct. In fact, nothing is more elegant or stylish than saying, in the simplest terms possible, exactly what you mean.

4. *STRUCTURE, STRUCTURE, STRUCTURE*.

a. Have a plan. Make it obvious. Know what your plan is before you start to write (consider doing an outline on every piece of two pages or more). Stick to your plan. (And don't leave widowed lines, like this one.)

b. What you are writing, and who you are writing for, will generally determine the plan you have. But, these concepts tend to apply across all of expository writing:

i. The opening sentences or paragraphs should tell your readers where they are going. Write them last.

ii. The closing sentences or paragraphs should tell your readers where they've been. Consider writing them first.

iii. The discussion should progress in a logical manner. Usually, you should first give the answer on each point, then give the relevant authorities, and then (if necessary) distinguish any opposing authorities.

iv. Don't just wander along and eventually figure out where you're going. Save that for your exam answers.

DON'T SAY THIS: "Case A says this, Case B says that, and Case C says something else, and so it appears the answer is X, except in situation Y, where rule Z may apply some of the time."

SAY SOMETHING MORE LIKE THIS: "The general rule is X. Supporting this rule are Cases A and B. An exception, rule Y, applies under Z conditions. This is borne out by Case C."

v. Use direct quotes on key points. Yes, they sound more authoritative.

5. *REVISE, REVISE, REVISE.*

a. It can always be clearer; it can always be shorter; it can always be easier to follow.

b. It can always be better. Especially if you have someone who wants to pay for the best.

c. Don't forget to proof carefully. All of the credibility you build up with good, forceful writing can be undone by a stupid mistake.

Bonus rule:

6. *READ THE MASTERS.*

a. Strunk and White, *THE ELEMENTS OF STYLE*. There's a reason everybody tells you to read this. It's held up pretty well over the last 65 years or so.

b. Mellinkoff, *LEGAL WRITING: SENSE AND NONSENSE* (West Publishing 1982). Also check out his book, *THE LANGUAGE OF THE LAW*, which helps explain why legal English got to its present sorry state.

c. Anything ever written by Learned Hand, Oliver Wendell Holmes, or Chris Altenbernd.

If you read them enough, you'll start to write like them– which wouldn't be a bad idea.

Thomas J. Ellwanger *coordinated the Legal Writing Program at the University of Florida College of Law in 1974-75. He practices estate planning and probate law with Fowler White Gillen Boggs Villareal & Banker, P.A., Tampa.*

Section meets in Boca Raton on June 22, 2000

The Appellate Practice Section met at the Annual Meeting of The Florida Bar in Boca Raton. Here are some photographic highlights.

Smiling faces at the Reception congratulate Adkins award Winner, Bruce Rogow.

Justice Peggy Quince joined us for the Executive Council Meeting.

(L-R): Ben Kuehne, Angela Flowers, Cindy Hofmann.

(L-R): Justices Shaw, Harding, Wells, and Quince were panelists at the Discussion with the Court on June 22, 2000.

Tom Hall was recognized for his contributions to the Stetson Program, as well as his appointment as Clerk of the Supreme Court.

Cindy Hofmann expresses the Section's gratitude to Jack Aiello for his 5 years of service as chair of the CLE Committee. Seated are Ben Kuehne and Angela Flowers.

Ben Kuehne presents Cindy Hoffman with a copy of "the best appellate brief he had ever written."

Per Curiam Committee Releases Report:

Would Keep PCAs, But to Allow Requests for Opinion

by Susan W. Fox

In May 2000, the Judicial Management Council (JMC) Committee on per curiam affirmances (PCAs) released its long-awaited report. The full JMC immediately approved the report and forwarded it on to the Supreme Court of Florida.

The PCA Committee rejected a proposal to abolish the PCA and believes that the PCA "performs a useful function" in these situations: (1) when a case has not been fully briefed, and therefore, does not present issues necessitating a discussion; (2) when the law is so well settled on the issues presented that no further explication is required; and (3) that the principle of law upon which the decision rests is so generic that even reference to a citation would add nothing to the jurisprudence.

The Committee did recommend that Rule 9.330 of the Florida Rules of Appellate Procedure be amended to allow an appellant to ask for an opinion. This provision would add the following language to subsection (a).

> "When the order is a per curiam affirmance without opinion, and a party believes that a written opinion would provide a legitimate basis for Supreme Court review, the party may request that the court issue a written opinion. Such a request shall include the following statement: I express a belief based on a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for Supreme Court review because (state with specificity the reasons why the Supreme Court would be likely to grant review if an opinion were written [followed by attorney's signature and Florida Bar Number]."

The Committee also recommended adoption of "suggestions for opinion writing" to be disseminated to appellate judges and incorporated into judicial education programs. Without a commitment to suggestions for opinion writing, any "good intentions" regarding PCAs will disappear.

The suggestions for "Opinion Writing" include the following situations (1) the decision is in conflict with that of another district; (2) the decision appears to be in conflict, but can be harmonized; (3) there is an arguable basis for Supreme Court jurisdiction; (4) the decision establishes a new rule of law; (5) the decision modifies an existing rule of law; (6) the decision applies an existing rule of law to facts different from those to which the rule had previously been applied; (7) the decision applies an existing rule that appears to have been generally overlooked; (8) the issue is present in other pending cases; (9) the issue can be expected to arise in future cases; (10) the decision rules on a constitutional or statutory authority for the first time; (11) previous precedent has been overuled by statute, rule, or an intervening decision of a higher court; (12) a dissent has been written; (13) the error was harmless, but will likely be repeated by the trial court or counsel if not addressed; and (14) in a criminal case where the unpreserved error is material.

The Committee also rejected the concept of a mandatory checklist of reasons for the PCA. The PCA Committee felt that such a checklist "would demean the appellate function, create confusion if judges differ on the rationale for the decision, and provide little, if any, benefit to attorneys and litigants."

The PCA Committee stopped short of prohibiting PCAs in a case with a dissent, but "strongly discourages their use." The Committee felt that use of PCAs in such instances shows disrespect for the dissenting judge and present a less than desirable image to the public.

A minority report by Judge Gerald Cope of the Third District disagreed with the Committee majority on the central issue of when an opinion should be written. Judge Cope felt that PCAs should not be used for fully briefed appeals. If an affirmance in such a case rests on routine application of well settled law, then at least a citation to the authority on which affirmance is based would be appropriate. If the citation is not adequate to resolve the issues, then there should be a brief statement of the reasons for affirmance. The approach outlined by Judge Cope is consistent with the American Bar Association's *Standards Relating to Appellate Courts*. These standards provide:

> The court should give its decision and opinion in a form appropriate to the complexity and importance of the issues presented in the case. A full written opinion reciting the facts, the questions presented, and the analysis of pertinent authorities and principles, should be rendered in cases involving new or unsettled questions of general importance. Cases not involving such questions should be decided by memorandum opinion. Every decision should be supported, at minimum, by a citation of the authority or statement of grounds upon which it is based.

Nancy Daniels, Public Defender for Leon County, also wrote a minority report. She wanted a rule that would strictly limit PCAs. She felt that the Committee's report "seriously underestimates the gravity of the per curiam affirmed problem in Florida." She proposed a rule *requiring* a written decision in the types of cases the Committee listed in their "suggestions for opinion writing". Further, she recommended adoption of a system of using unpublished opinions in non-precedential cases. "These changes, I believe, would alleviate the current mood of frustration and bring Florida into line with other large states that suffer as we do from excessive appellate workload."

The Appellate Court Rules Committee has referred the issue to its General Subcommittee, chaired by Nancy Gregoire, (954) 761-8600, e-mail: nangrag@icanect.com. Please forward comments to her.

The full text of the report is available on the Supreme Court's website, or through the office of the State Court's Administrator at (850) 922-5094.

Brief Thoughts

by Bonnie Kneeland Brown (with input by Ty Cone)

"Respect!"

R-E-S-P-E-C-T. Aretha Franklin said it best in underscoring its importance. Recently, I have heard from a number of appellate lawyers who say that they do not get the respect that they deserve from the trial lawyers in their own firms. They get the impression that their appellate specialty is viewed as a second-class legal role, like "researcher" or "library drone," or new associate function.

Many trial lawyers believe that they could easily handle their own appellate work "if they only had the time." We must show them that they are wrong, and that appellate law is a specialty for good reason. To assist you, here are "Three Steps To Respect" as an appellate specialist:

1. **Use intimidation.** Depict the appellate process as a series of pitfalls from which there is no return. In talking to the trial lawyers, use the words "labyrinth," "quagmire," and "morass" as much as possible. Refer to the rule establishing when orders are "rendered" as if it were written in a secret code that only an appellate attorney can decipher. (Although I am being somewhat facetious here, there is much truth to these statements).
2. **Become an addiction.** "Be there" for trial counsel while the case is in the pre-trial stages, as well as in trial. If necessary, give free advice to feed this addiction. Let them come to depend on you so much that you become an equal partner in their cases, not an after-the-fact assistant.
3. **Write the brief that they could not.** This is the key. Tell a compelling story with the facts of the case before presenting the legal argument. Make your argument a model of good organization. Then, try to think "outside the box." Trial lawyers will respect an appellate attorney who brings creativity, new clarity, and fresh insight to the issues.

Aretha never said it would be easy.

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