The Record

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Federal Civil Case Update

by Beverly A. Pohl

***Harris v. Ballard*, 158 F.3d 1164 (11th Cir. 1998) (Improper Rule 4(a)(5) Extension of Time for Filing Notice of Appeal; Untimely Notice; Appellate Court Lacks Jurisdiction)**

A *pro se* civil rights litigant's tardiness, while accommodated by the district court, led the 11th Circuit to conclude that it had no appellate jurisdiction over this civil appeal. Rule 4(a)(5), Fed. R. App. P., permits a district court to extend the time for filing a notice of appeal 30 days, or 10 days from entry of the order granting the extension, whichever is later. Eight days beyond the original 30-day period, the appellant filed a motion for an extension of time for filing a notice of appeal, and the district court granted 30 days from the entry of the order – 13 days more than permitted under Rule 4(a)(5). Even so, the notice of appeal was filed late, 33 days after the order granting an extension.

The 11th Circuit held that the extension was improper, and although the Court may have allowed the appellant to rely on the district court's error, the untimely filing barred even that leniency. The Court then considered whether the original motion for an extension of time should be construed as a notice of appeal, pursuant to Rule 3(c), Fed. R. App. P. Joining the majority of circuits that have considered this question, the Court held that a motion for extension of time does not indicate an intention to appeal, and thus does not satisfy the rule's considerable latitude for pleadings which do not precisely conform to the requirements of a notice of appeal. (Other documents may be construed as the functional equivalent of a notice, *i.e.*, a brief, a motion for certificate of probable cause in a habeas case, a motion to proceed in forma pauperis).

***Bogle v. Orange Co. Bd. of County Comm'rs*, ___ F.3d ___, 1998 WL 850244 (Dec. 9, 1998) (No jurisdiction to review post-judgment Rule 11 Order, where Order en-**

See "Certifying Questions," page 2

Message from the Chair

We've come a long way, baby!

by Roy D. Wasson

Appellate practice has in recent years blossomed from being the poor stepchild of the litigation specialty, into a distinctive and distinguished profession. As recently as fifteen years or so ago, there were only a handful of real appellate specialists around; names like Sam Daniels, Joe Unger, Mallory Horton, Ed Perse, Jeannie Heyward, and Jim Tribble. Trial lawyers handled their own appeals for generations, until recently. Joe Unger, whose memory banks I tapped for this piece, credits the Perry Nichols law firm in Miami for creating a work environment which fostered the creation of the specialty, by allowing young lawyers like Alan R. Schwartz to focus on appellate work, and by encouraging the trial lawyers to stick to persuading the juries. Other pioneers just decided to buck tradition and taught themselves the specialty.

But, until very recently, neither The Florida Bar nor other groups offered much in the way of a supporting structure for members of our field. Our Section has changed all that. The founders of the Appellate Practice & Advocacy Section have

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tered post-judgment and attorney did not file separate notice of appeal).

The plaintiff/appellant sought review of the dismissal of his age discrimination claim, and in his brief argued that a post-judgment order imposing Rule 11 sanctions on his counsel should be reversed. The 11th Circuit found a lack of appellate jurisdiction over the sanctions order because: (1) the plaintiff's notice of appeal of the judgment was insufficient to confer jurisdiction over the Rule 11 order which had been entered two months later; and (2) the notice of appeal did not designate the sanctioned attorney as an appellant (sanctions were not imposed against the plaintiff). The attorney signed the original notice of appeal — as counsel for the plaintiff/appellant — but that was insufficient to advise the Court of the attorney's intention to personally seek review of a later-entered sanctions order. The sanctioned attorney should have filed a notice of appeal, with himself as a party appellant, after the sanctions order was entered. This decision discusses the timing requirements of Rules 3 and 4, Fed. R. App. P., and, while foreclosing appellate review of the Rule 11 sanction, states (in dicta) that "the district judge had no authority to grant a post-judgment Rule 11 motion."

***LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832 (11th Cir. 1998) (No jurisdiction to review post-judgment attorneys' fee award, where fee order entered post-judgment and losing party did not amend notice of appeal)**

In an appeal from a defense judgment in an ADA claim by a cook who was fired because epileptic seizures prevented him from safely performing the essential functions of the job, the Court held that it had no appellate jurisdiction to review a post-judgment attorneys' fee award in appeal, after the entry of the fee order. Again, the Court discussed that Rule 3, Fed. R. App. P., is liberally construed, but refused to find that a notice of appeal filed before the entry of a subsequent order on a collateral issue (fees) encompassed that order.

***Perez-Priego v. Alachua County Clerk of Court*, 148 F. 3d 1272 (11th Cir. 1998) (Report and Recommendation not an Appealable Order)**

A *pro se* civil rights litigant filed a notice of appeal from a Magistrate Judge's Report and Recommendation that the complaint be dismissed. The district court had not yet adopted the Report and Recommendation. The 11th Circuit held that it had no jurisdiction, because the Report and Recommendation was a non-appealable interlocutory order. This is to be distinguished from the situation where the district court enters a bench judgment, and a notice of appeal is filed prior to the entry of the written final judgment. There, the notice of appeal is deemed to relate to the later-entered final judgment. In this case, the Report and Recommendation was not the equivalent of a final decision under 28 U.S.C. § 1291, and the notice of appeal was simply premature and ineffective.

***CSX Transportation, Inc. v. Kissimmee Utility Authority*, 153 F.3d 1283 (11th Cir. 1998) (Interlocutory Appeals – Denial of State Sovereign Immunity not Appealable Under the *Cohen* Collateral Order Doctrine)**

Kissimmee Utility Authority (KUA), a Florida State agency, sought interlocutory review of an order granting CSX Transportation's motion for partial summary judgment on a contractual indemnity issue and denying KUA's motion, which claimed that state sovereign immunity barred the relief CSX sought. KUA sought to analogize *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), where the Supreme Court applied the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 a right to qualified immunity.

The 11th Circuit rejected that argument because, unlike qualified immunity in a civil rights case, sovereign immunity under Florida law is no immunity from suit, but only immunity from liability. Thus, because all three *Cohen* factors were not met (the order appealed must conclusively determine an important legal question, which question is separate from the merits of the underlying action and is not effectively reviewable in an appeal from a final judgment in the underlying action) KUA had no interlocutory appeal, and must wait until final judgment to appeal the sovereign immunity ruling.

***Construction Aggregates, Ltd. v. Forest Commodities Corp.*, 147 F.3d 1334 (11th Cir. 1998) (Finality – Voluntary Dismissal Without Prejudice is not a Final Appealable Decision)**

In a commercial dispute involving claims and counterclaims, summary judgment was entered on a contract claim and the parties, through a consent judgment, agreed to dismissal without prejudice of the other claims and counterclaims. Forest Commodities expressly reserved the right to re-file its counterclaim. It then appealed the partial summary judgment in Construction Aggregates' favor.

The 11th Circuit dismissed the appeal for lack of jurisdiction, noting that "voluntary dismissals, granted without prejudice, are not final decisions." The order was not certified for interlocutory appeal under Rule 54(b), Fed.R.Civ.P., nor was it appealable under 28 U.S.C. § 1292(b). The appellant argued that the *Jetco* exception to finality applied (*Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973) (allowing an exception to the finality rule when a series of court orders, considered together, terminated the litigation as effectively as a formal order)), but the Court distinguished *Jetco* because there, if the appellant's appeal had been unsuccessful, he would have had no further claims. In this case, Forest Commodi-

parties' use of a consent judgment eliminates concerns about harassment of the other party, parties cannot consent to jurisdiction if there is none, and absent a final judgment, no appellate jurisdiction existed.

***City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548 (11th Cir. 1998)**

Evidentiary issues abound in this appeal from a summary judgment in defendants' favor in a multi-party price-fixing antitrust, conspiracy, and fraud case against distributors of chlorine used for the treatment of drinking water, sewage, and swimming pools. The decision discusses in some detail evidentiary principles of hearsay, double hearsay, non-hearsay (party admissions), and hearsay exceptions (co-conspirator statements), finding an abuse of discretion in many of the district court's rulings. Rule 702, governing admission of expert witnesses, and the decision whether to apply *Daubert*, is also discussed. Finally, the Court discussed the "confusion and conflation of admissibility issues with issues regarding the sufficiency of the plaintiffs evidence to survive summary judgment." The discussion of rules of evidence and standards of review is too lengthy to summarize here, but sets out several Eleventh Circuit rules and standards, and warrants a thorough read by both trial and appellate lawyers.

A Few Words With Judge Parker

Judge Jerry Parker joined the Second District Court of Appeals in January, 1988, and began serving a two year term as Chief Judge in July, 1997. He graciously agreed to a role reversal and answered questions for Tom Elligett of Schropp, Buell & Elligett in the following interview in December, 1998.

The Second District brochure indicates you attended college and law school in Oklahoma. What brought you to Florida?

The FBI. After finishing FBI training in Washington, D.C., in October, 1966, my first assigned office was Tampa. I was transferred to Mississippi in September of 1967. I resigned from the FBI in February of 1973, and returned to Clearwater. I did so for two reasons: Jimmy Russell, the State Attorney in the Sixth Circuit, offered me a job; and my wife's family lived in Tampa.

Did serving as a Special Agent in the FBI prepare you for what you were to face as a trial and appellate judge?

Yes, my FBI time gave me some valuable insights on collection, preservation, and presentation of evidence. A grand jury proceeding was not just something I had read about in law school. I knew what was expected of a witness who appeared and testified. I understood first-hand about the preparation between an attorney and a witness to get ready for trial. I learned a good deal about a team approach to a major case — assigning tasks to various members and the collection of the results into a comprehensive report. I learned how valuable a good investigator can be to an attorney who needs immediate help in the middle of the trial to solve a problem with the case. Lastly, I learned about expert witnesses and the importance of evidence that they bring to the finder of fact in a case.

With the new constitutional amendment, Florida counties will have the option to vote for trial court judges or select them through merit selection and retention. Having participated in both methods, which do you favor?

There are problems with both methods of selecting judges in Florida. However, no one has yet thought of a better system than the two presented. The election of judges would be fine if we all lived in small settlements and everyone knew which attorney had the best qualifications and temperament to be a judge. However, in most of Florida, those days are long gone.

The winner of judicial elections now boils down to money, newspaper endorsements, and name recognition. But mainly money. Media advertisements, campaign literature, and banners flying over football stadiums, have all replaced personal contact. And since most of the money funding these approaches come from attorneys, some of the public continues to believe that lawyers buy judges. I am told that in Miami, for a six-year term on the circuit court that pays about $113,000 per year, candidates have spent over $600,000 on a campaign. I know that a circuit court race in the Sixth Circuit, where I reside, costs $80,000 or more.

To discuss the other method by which judges are chosen, I would split my observations between merit retention and merit selection. Obviously, the positive thing about merit retention is that it does not require a judge to go seek funds to ward off a challenger. Voters permit a judge to remain in office by voting to approve his or her performance by a "yes" or "no" vote.

But, for merit selection, Judge Joe McNulty once told me, "Merit selection does not take the politics out of selecting judges — it just raises it to a higher level." As you know, if a judicial opening occurs on a Florida appellate court, under merit retention, a selection committee seeks applications from qualified applicants, and thereafter submits three or more names to the governor for an appointment to the court. However, there are criticisms of this system.

One is that the minute an applicant files an application for a judicial vacancy to be appointed by the governor, the applicant's friends and associates start telephoning and sending letters to the committee members to try to get that applicant into the final list sent to the governor, and that this pressure may not produce the most qualified names to be sent to the governor. Whether true or not, there will always be rumors that the committee pays attention to outside influences that have nothing to do with qualifications, such as does the governor want some name to be in the final list, from which law firm does the applicant come, or does his appointment need to please a group of voters to whom the governor listens. Once the final names reach the governor, the criticism most often heard is that the supporters of an applicant who are closest to the governor will always get their applicant appointed. Even if none of these rumors are true, and I can tell you that many attorneys swear that some or all of the above does happen, the public will remain wary of this approach because a number of attorneys keep telling the public that politics controls the merit selection system. The positive side to merit selection is that if the committee performs their constitutional duty and sends only qualified names to the governor, any appointment made by the governor will put a qualified judge on the court.

One change that I suggested years ago never went anywhere. I proposed that whether a judge is appointed by the governor or elected by the voters, there should be a preliminary step. That step would be that before a candidate could qualify for election or selection, that candidate must pass an all-encompassing test of the rules of court as those rules apply to that court, and case law that relates to those rules, administered by *The Florida Bar*. It would be a pass or fail test, 70% or higher. Only those who passed the test could file for election or file an application with the selection committee. This process could be confidential in order that an attorney would not read in the newspapers that he or she failed a judge's application test. Although there is no test of which I know to determine judicial temperament, at least the public would have some comfort that the candidate had a level of competence to understand the job.

By January, 1999, at least half of the fourteen judges on the Second District will have taken office during the last four years.

What challenges does that pose for a Court that has always strived for collegiality?

Even with the large number of new judges on this court, collegiality remains very solid. This is because we who are here learned it from some very helpful and attentive judges, like Judges Danahy and Ryder, who learned it from judges who were here when they arrived. Those of us who are now the "old timers" hope that we pass on all that those judges taught us. I have never known a judge to arrive at this court who wasn't warmly greeted and offered full assistance by his or her fellow judges.

Our only concern with collegiality is the fact that the permanent locations of the judges are split between two cities. But we work very hard on maintaining those close contacts by sitting on panels often in both cities, and getting together for a court conference on a monthly basis.

Have you noticed any changes in the approach or philosophy of the Court in light of the change in personnel?

Everyone who comes to this court brings something new, depending often on the type of legal work that person was doing before they came here. However, how we approach the resolution of cases remains constant. That approach is to read the briefs, listen to oral argument, do independent research, and publish a result in a timely manner. But I feel the philosophy of the court can change based upon the make-up of the court.

I have seen over my time here that there are more concurring and dissenting opinions written than when I came to the court. I think today's members feel that concurring or dissenting opinions are a meaningful attempt to make sure that this court reaches the right result in each case. And if you read a dissent, you will not find any animosity in that dissent toward the majority opinion.

We know the Court's cases are assigned to panels through a random selection process. Are there times when a panel member may visit with a judge not on the assigned panel, where the non-assigned judge is viewed as having expertise in the subject matter of the case?

Judge Altenbernd and I are prime examples of what your question addresses. We are in each other's office daily, discussing a case not assigned to the other, but hoping to gain some insight that may have been overlooked. We often hand each other rough draft copies of an opinion to make sure that the opinion is a quality understandable product. He brings me questions in the criminal law area. I bring him all kinds of questions, but most certainly insurance law questions.

I am sure this is done often in our Lakeland office. I have often had discussions with Judges Blue and Fulmer over difficult cases. Sometimes a case will be brought to court conference to allow all of the judges to voice an opinion on the direction the final opinion should take.

Do you have a favorite case or type of appellate case?

I don't know that I have a favorite type of case. I feel most comfortable with criminal cases, simply because that I handled so many of these on the trial bench, and about 65% of this court's case load is criminal. I shall admit that my least favorite case is insurance, because of the difficulty in applying the statutory language to a particular insurance policy and the facts of the case.

What differences did you notice when you moved from the trial bench to the appellate bench?

Moving to the appellate court was the right move for me. I was tired of making rulings in cases by an educated guess where in many cases the attorneys provided, in my opinion, too little assistance. Unlike today, there were no staff attorneys assigned to aid a judge with research. I was tired of family law cases where some attorneys managed to make their clients even more angry. I was tired of starting a criminal case at nine in the morning and waiting until ten at night for a jury to return a verdict, knowing that I had to start another long trial the next morning. Being assigned to a criminal division in Pinellas County pretty well guaranteed that you could not get any vacation days.

I still work long hours at this court. Many hours are spent at home reading briefs and working on my computer. But what I like about this job is that I have time. There is time to attempt to find the answers if the attorneys' briefs have not provided them. There are excellent staff attorneys and judges nearby who freely give of their time to discuss a difficult case. There is time to produce a written opinion, and circulate it to the entire court to pass upon the quality of the opinion before the public ever sees it. There is time to travel to each of the circuits in the Second District and meet with the local bar and listen to how they feel this court is performing its function. There is plenty of work, but one never feels rushed to release an opinion that is less than this court expects.

What advice would you give to a lawyer with regard to her or his first appellate case before the Second District?

First, make sure that the attorney has an appealable order. Presuming that the notice of appeal was timely filed, I would advise the attorney to pay attention to the rules and make sure that the record is promptly filed, that the attorney has reviewed the record to make sure that it is complete, and that the brief is filed when due.

If this is a first ever brief for the attorney, I would recommend the attorney have a mentor who has done this task often look over the brief before it is submitted. The attorney should carefully heed the advice that this seasoned attorney will provide. Hopefully, the mentor will take time to listen to a trial run of the oral argument.

If the case is going to be scheduled for oral argument, the attorney should make sure of the location of the oral argument — don't be in Tampa if it is scheduled for Lakeland. Be on time for your case. Be prepared to answer the tough questions. If one is properly prepared, the tough questions will be obvious.

Don't plan twenty minutes of argument, because questions from the judges are likely to take away six to eight minutes of that twenty minutes. If all of the above has been done, when the case is called, the attorney should walk to the podium, take a deep breath, introduce oneself to the court, and present the argument. All will go fine.

continued...

A FEW WORDS WITH JUDGE PARKER

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How often did you find your preliminary view of a case changed by oral argument?

My preliminary opinion of how a case should be decided does not often change following oral argument. But it is important to note that my opinion **sometimes changes** and that change **always occurs based upon the attorney's oral argument**. How logical and convincing the attorney is does matter. It is also important to know that sometimes two judges on the same panel will each come to oral argument with two different preliminary opinions. The attorney's argument may change one of those opinions.

What is your reaction to the increase in appellate specialists?

I like appellate specialists because they know what they are doing, and they appreciate my role in this process. They understand we are not a jury and their presentation reflects that. They understand that my questions are not meant to embarrass them, but are asked to clarify something that helps me understand their case. Appellate specialists know both the strengths and weaknesses of their case and are prepared to answer questions directed to these areas.

You are a charter member of two American Inns of Court. The legal profession is showing increased attention to civility and professionalism. Have you noticed a decrease in these qualities in lawyers during your thirty-plus years as a lawyer?

I think the place to focus on the decrease of civility and professionalism is in the trial courts. Court transcripts that we read show that it is happening there. Sometimes judges need to remember that those rules should also apply to them.

However, as I reflect on it, some of the most confrontational, no-holds barred occurrences in the trial courts were in the late 70's and early 80's. I do see improvement, and I think that we should commend the many attorneys and judges who have worked hard to focus the Bar on the need for improvement.

Before the appellate bench, the civility remains firmly in place. Any lack of professionalism there comes from two areas: attorneys who file unnecessary motions; and attorneys who are new to the experience and make mistakes in composing their briefs or in oral argument because they do not yet realize what is expected of them.

What recommendations do you have to promote professionalism?

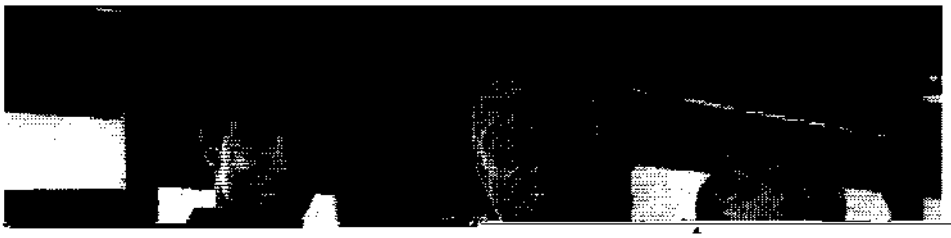
Simple things promote professionalism. Make sure the client knows that your opposing attorney is not your enemy. Make sure to shake the hand of your opposing attorney at the end of the court appearance. Don't argue to a judge about your opposing counsel's "tricks" or "misleading statements." There are more professional ways to make the point.

Agree to a continuance if there is a reason your opposing attorney needs one and it does not prejudice your client. You will some day need the same courtesy. I think an attorney exhibits true professionalism when a judge can say that the attorney was on time, prepared, fully represented his client, and showed no discourtesy to the judge, opposing counsel, or other court participants, and thanked the court for its time, whatever the result of the case.

Likewise, a judge shows professionalism by starting each hearing on time, listening to all of the evidence and argument presented, displays courtesy to both attorneys and all other court participants, promptly ruling on the matter at hand, and entering the necessary court orders without delay.

Thanks for taking the time to visit with us.

You're welcome.



Friendly Announcement

The Section's *Amicus Curiae*

COMMITTEE REPORTS

Appellate Rules Committee Liaison

In its September 4, 1998 meeting, the Appellate Court Rules Committee recommended some amendments to the Florida Rules of Appellate Procedure:

The Committee recommended an amendment to Rule 9.100 by adding subsection (l), which would state: "A denial or dismissal of a petition is not a disposition on the merits unless the order states otherwise."

The Committee also recommended a change to Rule 9.210(a)(2) to allow proportional spacing in briefs without requiring 10 characters per inch. The addition would state at the end of the rule, "Typed matter that is not proportionally spaced shall be in 12 point or larger type and shall not exceed 10 characters per inch (10 pinch); typed matter that is proportionally spaced shall be in 13 point or larger Times Roman, Times New Roman, CG Times, or similar type."

The Committee also adopted a rule regarding inmate filing of documents, which would be added as 9.420(a)(2): "Inmate Filing. A paper filed by a *pro se* inmate confined in an institution

sions. The slate of speakers was comprised entirely of appellate judges. Based upon the comments of the attendees, the speakers and course materials were very well received. This seminar will be held every other year and will next be held in the year 2000, with a similar format planned.

Appellate Practice Certification Exam Review Course

This year's course was held on February 5, 1999, in Tampa. Jennifer Carroll was the Chair of the Steering Committee. The course included a few new speakers. The Appellate Practice certification exam is scheduled for March 12, 1999.

Federal Appellate Seminar

The Federal Appellate Seminar, which will be held every other year, was held in 1998 and will be held again in the year 2000.

Appellate Practice Workshop

The 1998 Appellate Practice Workshop, which was held in July, was very successful. The Section has received its share of the proceeds. The program will be held again this year at Stetson University during the last week of

ous phases of a trial from an appellate perspective. It is anticipated that the program will be of interest to both trial lawyers and appellate lawyers. The Steering Committee includes co-chairs Steve Stark and Robert Glazier, Tom Elligett, Susan Fox, Allison Hochman, and Steve Wisotsky.

Co-Sponsorships

A co-sponsored appellate seminar is scheduled for September 23 and 24, 1999, in Miami and Tampa, respectively. Debra Sutton is coordinating the program on behalf of the Appellate Section. The Appellate Section and the Family Law Section will split the proceeds of the program. The program will include five segments on appellate topics with a focus upon family law practitioners. The Committee is presently inviting speakers and anticipates that at least one Supreme Court justice will participate. The Section is exploring the possibility of co-sponsoring seminars with other Sections of *The Florida Bar*, including the Government Lawyers Section.

Committee Membership

The Committee is seeking a few

COMMITTEE REPORTS
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pation.

The Committee first discussed the ongoing effort to publish a definitive article that appellate attorneys can use to promote their practice. There was a difference of opinion as to whether the article should be a subtle, "soft sell" approach or a direct, "hard sell" approach. The subtle style would be more palatable to a wider audience, while the direct style would more aggressively persuade trial attorneys who presently see no need to consider using appellate attorneys. The Committee recognized a value to both approaches and agreed that two articles should be written. The first article will discuss the basic differences between trial and appellate practice. The second article will address the evolution of Appellate Departments within a few law firms and suggest an occasional need for the utilization of lawyers who work primarily on appeals.

The second topic of discussion was the status of the extremely worthwhile Guardian Ad Litem pro bono project created and managed by Tracy Carlin, who chairs the subcommittee overseeing the project. Tracy has coordinated with the Directors of each circuit in Florida to offer appellate work on behalf of Guardian Ad Litem programs, which often have no other resource for appeals. Tracy also deals with the twenty-or-more volunteer lawyers who responded to the Committee's solicitation throughout the state.

The Pro Bono Subcommittee has handled five assignments, the outcomes of which were favorable to the Guardians' position in every case. We agreed at the meeting to (i) ask the Circuit Directors who have assigned cases to us to write letters of recommendation to other Circuit Directors, (ii) continue to make the Court Administrators and the Chief Judges in each Circuit aware of the program, and (iii) ask our volunteers to attend the training seminars provided to all Guardian Ad Litem Program attorneys. In addition, Nancy Gregoire agreed to maintain a bank of briefs for use by the volunteers, and Beth Coleman has started a valuable guide to be given to attorneys upon the acceptance of assignments.

Long-Range Planning Committee

The Long-Range Planning Committee, chaired by Cindy Hofmann, met on Thursday, January 21, 1999 at 11:00 a.m. Although the agenda included several areas for consideration, the Committee focused on the concept of planning for the Section's first retreat. The Section's former Administrator, Jackie Werndli, attended the meeting and generously shared with the Committee her insights and experience. All agreed that the Section would benefit from a retreat. Accordingly, it was decided that the first Appellate Section Retreat will be held in late April or early May of 2000, possibly at the easily accessible Indian River Plantation in Stuart, Florida. It is intended that all Officers, Executive Council members, and Committee Chairs and Vice Chairs will participate. Interested Section members are also welcome. Attendees are encouraged to bring their spouses and children.

The Long-Range Committee will meet by telephone in mid-March to continue planning the first Section retreat. The Committee will also meet at the Annual Meeting in June to follow-up on the retreat and begin to address the remaining agenda items.

MESSAGE FROM THE CHAIR
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exhibited the same innovativeness that the early appellate specialists showed in developing their professional identities. As far as I know, our group is among the nation's leaders in recognizing and developing the role of appellate practice in the legal field. One example is the fact that, as far as I know, there still is no section of the ABA for appellate attorneys. At last check, there was only some sort of appellate subcommittee within the ABA's litigation section.

Look how far we have come in so short a time. Six years ago, this Section was a concept, not a reality. Only five years ago, there were no board-certified lawyers in the field of appellate practice. Now there are nearly 120, with 20 or so applicants preparing to sit for the exam this year. Appellate lawyers now have a reliable source for the finest appellate CLE programs. We have innovative programs, like the appellate workshop put on at Stetson. We have informative publications like this one. We have direct links to the appellate courts, the Appellate Rules Committee, and *The Florida Bar's* Board of Governors. And we have a structure for the exchange of ideas and the continued improvement of our specialty which pioneers like Sam Daniels and Ed Perse did not enjoy.

We have truly come a long way, baby. But let's not stop here. Opportunities abound for each of us to continue to develop the field of appellate practice as a profession, and to assist the appellate judges in programs which benefit the administration of justice and the operation of their courts. One such specific opportunity lies within this publication.

This issue contains the Section's Committee Preference Form. Fill it out. Get more active. Become a real force in this still-new area of practice. We have come a long way from my early days, when we had to chisel our briefs out of stone tablets, writing motions on the back of a shovel with a lump of coal, by the light of the fireplace, using carbon paper. But there is still time to get in on the ground floor of an exciting and developing area. It is truly fun and satisfying to participate. Please join in and help us continue to grow and develop. Thanks.

The Ten or So Most Useful Web Sites for Florida Appellate Lawyers

by Robert S. Glazier

As the Internet becomes an increasingly important part of modern life, more materials of interest to Florida appellate lawyers have become available. Listed below are one appellate lawyer's view of the ten most valuable web sites for Florida appellate lawyers.

Several caveats are necessary. First, no sites on substantive areas of the law are included. The goal here is to list sites which practically all Florida appellate lawyers can benefit from, rather than the best sites in tort law, criminal law, etc. Second, the sites are free of charge, unless otherwise noted. Third, in typical list style, this top ten list contains thirteen sites. Fourth, the list is vaguely grouped by subject matter; the first site is not necessarily the most valuable. Finally, the list is only one person's views. If there is something which you think others would enjoy, please let me know, or even write a follow-up for the next issue of *The Record*.

1. ***Florida Law Weekly*** (www.polaris.net/~flw/): For keeping up to date on the latest Florida DCA opinions, nothing beats the on-line version of Florida Law Weekly which allows access to DCA opinions within two or three business days of their release. The short descriptions of the latest opinions can be viewed, and then the full opinions in cases of interest. The cost is $60 per year for subscribers and $360 a year for others.

2. ***Florida Supreme Court*** (www.flcourts.org/courts/supct/): The Florida Supreme Court has a great web site. Each Thursday at approximately 11:00 a.m. that week's opinions are posted for downloading. But there is much more—information on the justices, briefs from cases and links to other sites of interest.

3. ***Gavel to Gavel*** (wfsu.org/gavel2gavel/): You can now view or listen to Florida Supreme Court oral arguments over the Internet. The technical quality is not great, but this still presents a great opportunity to listen to oral arguments of cases of interest, get to know the personality of the Court and its justices, or just hear some oral arguments of varying quality.

4. ***Florida Legislature On-Line Sunshine*** (www.leg.state.fl.us): It is now possible to research legislative history over the Internet. The Florida Legislature has set up a site that allows you to trace the progress of bills through committees and onto the floor, and even view staff reports.

5. ***Florida Attorney General Opinions*** (legal.firn.edu/opinions/): Attorney general opinions are one of those legal authorities which appellate lawyers may need once a year, and are probably not worth purchasing in book form. They are now available on-line when you need them.

6. ***Florida Bar Ethics Opinions*** (www.flabar.org/newflabar/memberservices/Ethics/): The Florida Bar Ethics Opinions is another resource that is useful, but which few appellate lawyers have handy. They are now available on the Internet, listed by opinion number and by subject. Another excellent subject on legal ethics, with information from across the country, is ***American Legal Ethics Library*** (www.law.cornell.edu/ethics/).

7. ***United States Supreme Court opinions*** (www.findlaw.com/casecode/supreme.html): United States Supreme Court opinions from 1935 to date are available on-line in several locations. Best of all, the on-line versions contain the official page numbering. Also of interest is ***The Oyez Project*** (oyez.nwu.edu) which contains on-line audio recordings of selected Supreme Court oral arguments. The arguments generally are put on-line about a year after the end of the term in which they were argued.

8. ***Federal Web Locator*** (www.law.vill.edu/Fed-Agency/fedwebloc.html): There is an enormous amount of federal government material on the Internet—opinions of each circuit court of appeal, agency reports, agency rules, statistics, statutes, and much more. This site is a good guide to what is available.

9. ***Lexis on the Web*** (www.lexis-nexis.com) and ***Westlaw.com*** (www.westlaw.com): Both Lexis and Westlaw can now be accessed on the Internet. The advantage of this is that no special software is necessary. With any computer and web browser—at home, on the road, wherever—you can use these databases. Of course, the usual Lexis and Westlaw charges apply.

10. ***The Florida Lawyer*** (www.fla-law.com): This site is included here for two reasons. First, it contains a remarkable number of links to other sites which may be of interest to Florida lawyers. All sites mentioned in this article, and many more, can be found here. The second reason it is listed is, well, because it is my site. But I think that you will find it to contain links to many interesting sites.

Robert S. Glazier *is on the Executive Council of the Appellate Practice Section. He is author (with Michael Graham) of Handbook of Florida Evidence (Lexis Law Publishing). His email address is glazier@fla-law.com.*

1999 Adkins Award nominations now being accepted

Nominations are being sought for the Appellate Practice and Advocacy Section's annual James C. Adkins Award, established in 1995 to honor those who have made significant contributions to the field of appellate practice in Florida.

The 1999 Adkins Award will be presented at the Section's Dessert Reception, June 24 at the Boca Raton Resort & Club.

Nominations may be submitted by April 23, 1999, to Austin Newberry, Program Administrator, Appellate Practice and Advocacy Section, The Florida Bar, 650 Apalachee Parkway, Tallahassee 32399-2300.

BOOK REVIEWS

Reviewed by Scott D. Makar

"Florida Appellate Practice and Advocacy"

By Raymond T. Elligett, Jr. & John M. Scheb

Florida Appellate Practice and Advocacy is a text on contemporary Florida appellate law with emphasis on pragmatic pointers for appellate practitioners. In *Florida Appellate Practice and Advocacy*, (Book World Publications 1998, $65.00 (hardcover) $48.00 (paperback)), appellate lawyer Raymond T. Elligett, Jr. and Senior Judge John M. Scheb of the Second District have written a textbook on Florida appellate practice whose emphasis is on "practice tips" and annotations to familiar (as well as less familiar) secondary sources.

The text's genesis was the authors' course in Florida Appellate Practice at Stetson University College of Law. After receiving requests from practitioners for a published form of the authors' Florida-based materials, the authors took the next step of compiling a text that would be useful to the appellate bar in Florida as well as persons who teach Florida appellate practice in law schools. The text focuses primarily on the state's appellate court system, but also includes a discussion about aspects of practice in the Eleventh Circuit and United States Supreme Court.

Florida Appellate Practice and Advocacy provides a concise overview of almost every conceivable aspect of appellate practice in Florida. It is not designed to be encyclopedic. Instead, its contents are a direct reflection of the sixty-five years of experience and practice of its authors. Imagine preparing an outline of important cases on jurisdiction, preserving error for appeal, and the mechanics of an appeal that is in a continual state of revision. Add a case or two here and there. Add some citations to useful articles by respected judges and appellate practitioners from *The Florida Bar Journal* and various law reviews. Include some mention of classic works in the appellate field. Before long, a substantial "piece of work" emerges that the authors have molded and edited into this compact text (about 300 pages).

As the authors' acknowledge, *Florida Appellate Practice and Advocacy* is a "starting point" — not a substitute — for a practitioner's own research. It nicely complements the standard treatise on the topic, Judge Phillip J. Padovano's *Florida Appellate Practice*, by providing a number of interesting "sidebars" on topics that do not neatly fit into a hornbook format. For example, the authors chose to reprint a revised version of a lecture that Chief Justice Stephen Grimes delivered at the University of Florida in 1988. The article, which recounts Justice Grimes's personal reflections on appellate decision-making in Florida's appellate courts, was originally published in the inaugural issue of *The University of Florida Journal of Law and Public Policy*.

On a humorous note, the authors failed to catch the same typographical error in Justice Grimes's article that this reviewer overlooked a decade ago. In discussing the work of the Supreme Court, Justice Grimes made mention of his aversion to the Court's motto ("Sat cito si recti") and its inference that the Court could take as long as was needed to get the decision correct. Justice Grimes thought that a judgment should be rendered with the appropriate combination of deliberativeness and speed. The problem was that the article erroneously misstated the translation of the Latin motto as "Soon enough *is* correct" rather than "Soon enough *if* correct." One wrong letter changes everything — the former certainly has a somewhat greater emphasis on speedy adjudication compared to the latter! When the typo was brought to his attention, Justice Grimes took it in his usual good-natured stride. So, as a public service the second edition of *Florida Appellate Practice and Advocacy* should include the dreaded "[sic]" reference and correct this decade-old wart on Justice Grimes's thoughtful article.

Endnotes:

[1] *See* E. Canter Brown, Jr., *Florida's Black Public Official's*, 1867-1924 (Univ. Ala. Press 1998); E. Canter Brown, Jr., *Fort Meade* 1849-1900 (Univ. Ala. Press 1995); E. Canter Brown, Jr., *Florida's Peace River Frontier*, (Univ. Fla. Press 1991).

[2] Kermit L. Hall & Eric W. Rise, *From Local Courts to National Tribunals: The Federal District Courts of Florida*, 1821-1990 (Carlson Pub. 1991).

[3] Eric W. Rise, *The Martinsville Seven: Race, Rape, and Capital Punishment* (Univ. Press of Va. 1998).

[4] *Supreme Court of Florida And Its Predecessor Courts*, at 7.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 62-63.

[10] *Id.* at 64.

[11] *Id.*

[12] *Id.*

[13] *Id.*

"The Supreme Court of Florida and Its Predecessor Courts"

Edited by Walter W. Manley II

Two recent books address different aspects and eras of Florida's appellate judiciary. The first deals with the history of Florida's highest court as well as early territorial courts from their founding to the early years of the 20th Century. In *The Supreme Court of Florida And Its Predecessor Courts*, 1821-1917 (University Press of Florida, 1997 $49.95), the triumvirate of Walter W. Manley II, E. Cantor Brown, Jr., and Eric W. Rise have prepared the detailed and interesting stories of the events and people who shaped the early history of Florida's judiciary and Supreme Court.

Professor Manley served as editor of this ambitious undertaking, which took many years of dedicated work from a number of respected historians and researchers. For example, Professor Brown — a contributing editor and co-author — is a widely respected and acknowledged expert on Florida history who has written a

number of highly acclaimed books.[1] Co-author, Professor Rise, has published books of importance on Florida's judiciary[2] as well as a scholarly examination of the Virginia trial of seven black men convicted and later executed in 1951.[3]

The *Supreme Court of Florida And Its Predecessor Courts* is a masterful work. Books on judicial history too often read like biblical chapters that ramble on about who begat whom. Not so with this entertaining and informative volume. The opening chapters describe Florida's early statehood in a way that breathes life into characters such as Andrew Jackson, the state's first governor, and William Pope DuVal, the first federal judge of East Florida.

A great feature is the authors' use of quotations from original sources. For instance, shortly after he was appointed by President Monroe, Jackson learned that Congress had granted Monroe the power of appointment thereby rendering the governorship less powerful. What was his feeling about this slight? "At month's end a frustrated Jackson informed a confidant, 'I sincerely regret that I did not adhere to my first determination not to accept the government of [the] Floridas."[4] His resolve unbent, Jackson went on to promulgate "eight comprehensive ordinances" that gave him practical power to handle issues related to health, harbor regulations, citizenship, and fees. These became the "first printed expositions of Anglo-American jurisprudence" in the State's history.[5]

The book contains chapters on each of the judges who migrated into Florida to serve on early territorial courts. Beyond mere biographical sketches, these chapters provide candid insights into the daily lives of early members of the judiciary. Some are downright entertaining and demonstrate that judges are not dull. For instance, one chapter discusses Judge Robert Raymond Reid, Jr., of the Eastern District Superior Court, who served from 1832-1839. Born in South Carolina, Reid had "disastrous" early schooling due to "hazing" and other problems.[6] He recounted that he was "a dull, lazy, and unprincipled child" who was sent off to Savannah where, according to Reid, the schoolboys "imposed on me; my cousins cheated and scorned me; my aunt and uncle neglected and starved me."[7] He ultimately entered college in South Carolina and, although "ladies' company, poetry, and novels occupied a good deal of his time", he graduated and soon began practicing law in Augusta, Georgia.[8]

His hardscrabble childhood was followed by heartbreak as his first wife, and later his second wife, died causing him "serious depression" that led to "habitual drinking" and a yearning to relocate, which led him to Florida.[9] Due to his friendship with President Jackson, Reid was appointed to a superior court judgeship in Florida's Eastern District in St. Augustine.

Judge Reid's private writings prove the adage that some things never change. He described a typical workday as follows: "To work preparatory for Court. On the Bench from 10 A.M. to 3 P.M. Arguments dull and Judge sleepy — can hardly keep my eyes open."[10] Poor Tallahassee did not escape his vitriolic pen. In describing the territorial capital he said: "How far preferable is St. Augustine to Tallahassee! The latter place is full of filth — *of all genders*. I never knew such filthy houses and indifferent people. Gov. [John] E[aton] is a rowdy — his wife, drunk or crazy, and several other ladies but so-so."[11] His views of the legislature: "I have seen a noisy senseless crowd . . . a legislative council with little wisdom, a fashionable circles with little taste . . . a Governor's daughter, pretty, rouged, and sour; a Governor, shallow, blasphemous, and coarse; a Secretary (sometimes Governor) rough, fractious and egotistical."[12] And what about his brethren on the bench? "Judge Randall [c]hivalrous, intelligent and opinionated; Judge Cameron, Scotch! Scotch! Scotch!"[13]

Needless to say, Judge Reid is just one of the many colorful characters in *Supreme Court of Florida And Its Predecessor Courts*. The book is exceptionally well researched and written in such an enjoyable style. The authors have made the history of Florida's early judiciary a pleasure to read. It is not often that a book so entertaining is so informative. Don't let the book's stoic title and cover be misleading. It is a "must read" for anyone with interest in Florida's history or its judiciary.

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

Florida Judicial Evaluation Program

On January 1, 1998, Florida implemented a program for evaluating the state's judges that places it at the forefront amongst states with judicial evaluation procedures.

The Florida Judicial Evaluation Plan provides for voluntary, confidential evaluations of trial and appellate judges by the attorneys who appear before them. The lawyers will offer private, written feedback on perceived strengths and weaknesses of judicial performance.

The program was approved and funded by The Florida Bar Board of Governors after years of study and development by the Bar's Judicial Evaluation Committee. Chief Justice Gerald Kogan of the Florida Supreme Court has written to all state judges encouraging their participation in the program, which he calls "important to the credibility of the judiciary." Details of the evaluation program are available on The Florida Bar's Internet website at www.FLABAR.ORG.

For more information, contact Doris Maffei, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, phone 850/561-5670 and fax 850/661-3859.

NOTICE OF PROPOSED AMENDMENT TO BYLAWS

During the Annual Meeting of the Section which is scheduled to take place at the Annual Meeting of *The Florida Bar* in June, the membership of the Section will be asked to consider amending the Bylaws to change the Section name to the "Appellate Practice Section". The proposed amendment was approved by the Executive Council at the Midyear Meeting held in January, 1999.

Appellate Practice and Advocacy Section

1999 Annual Meeting Activities
Boca Raton Resort & Club

June 23, 1999

3:00 p.m. - 5:00 p.m.	**Civil Appellate Practice Committee**

June 24, 1998

8:30 a.m. - 10:00 a.m.	**CLE Committee**
9:00 a.m. - 10:00 a.m.	**Amicus Curiae Committee**
10:00 a.m. - 12:00 noon	**Executive Council\Section Annual Meeting**
2:30 p.m. - 4:00 p.m.	**Long Range Planning Committee**
3:00 p.m. - 4:00 p.m.	**Appellate Mediation Committee**
4:00 p.m. - 5:30 p.m.	**Discussion With The Court**
9:30 p.m. - 11:30 p.m.	**Dessert Reception - Adkins Award Presentation**

The Florida Bar
650 Apalachee Parkway
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Updates were approved for the Federal Rules of Evidence, the Federal Rules of Appellate Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Bankruptcy Procedure. There is a pending rule change for Rule 30 of the Fed. R. Civ. P. that may be approved next year for implementation on December 1, 2020.Â When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f) conference may provide an occasion for beginning discussion of these topics. In appropriate cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16. You can keep an eye on the proposed amendment here.