The Record

JOURNAL OF THE APPELLATE PRACTICE AND ADVOCACY SECTION

Volume V, No. 1 | THE FLORIDA BAR | October 1996

Message from the Chair

by Raymond T. (Tom) Elligett, Jr., Chair
Appellate Practice and Advocacy Section
Schropp, Buell & Elligett, P.A.

What's your specialty?

If someone asks what my specialty is when it comes to making dinner, "reservations" is probably the most accurate answer. When it comes to a specialty in the practice of law, many of our Section members have no reservations about indicating appellate practice.

To paraphrase a recent commercial, will being a Section member make you a better appellate lawyer? Well, actually, it probably will. Simply reading *The Record* and the articles reproduced in *The Appellate Practice Guide* will keep you apprised of the inner workings of our District Courts of Appeal (the Publications Committee is working on updating Roy Wasson's fine articles). *The Record* covers a variety of other subjects and Editor Hala Sandridge plans to expand the scope of coverage this year (with the help of ever-valuable Chris Ng and some new recruits).

Numerous appellate decisions highlight the growing recognition of appellate practice as a specialty. Competent appellate counsel must master a separate set of rules—both as codified in the Florida Appellate and Federal Appellate (and Eleventh Circuit) Rules, and in the decisional law (for example, standards of review and rules for the preservation of error and exceptions to those rules).

But simply learning the rules is not enough. Numerous authors and judges have observed that appellate practice requires a separate set of skills from trial practice. Great cross-examination skills simply do not help one select and brief the issues that might result in the reversal the appellant seeks (or to preserve the appellee's result).

An attorney's membership in the Appellate Practice and Advocacy Section demonstrates a level of interest in appellate practice. One of our ongoing projects this year is to continue the phenomenal growth the Section enjoyed under Chairs Steve Stark

continued, page 2

The Supreme Court Series, Part II

The Operation of the Florida Supreme Court

by Gerald Kogan[1] and Robert Craig Waters[2]

Editor's Note: *This article is an excerpt from "The Operation and Jurisdiction of the Florida Supreme Court," by Gerald Kogan and Robert Craig Waters. ©1993 by Gerald Kogan and Robert Craig Waters. It was originally published at 18 Nova L. Rev. 1151 (1994), and reprinted in 1995 by the Supreme Court of Florida. It is reprinted here with permission.*

The judiciary is Florida's most poorly understood branch of govern-

continued, page 8

INSIDE:

CHAIR'S MESSAGE
from page 1

and Tony Musto.

Toward that end, Raoul Cantero is chairing our membership committee. His committee will be inviting lawyers who handle appeals to join the section. Raoul is looking for a few good committee members to help. Fax him your interest at 305/858-4777 (or Jackie Werndli at The Florida Bar, 904/561-5825).

Full speed ahead

The Section has experienced a great two-plus years, engineered by Tony and Steve with help from many others. We want to thank dessert reception co-sponsor, the Young Lawyers Division, and our appellate dessert sponsors (see the list inside). Congratulations to Chair Angela Flowers and her Program Committee for another great job (although I'm not sure I believe she really baked all those desserts).

We also appreciate the Florida Supreme Court's appearance for the second Discussion with the Court. As I observed in *The Record* previously, the Court's willingness to interact with, and field questions from, Florida lawyers reaffirms its level of interest in the Bar.

As you will see from the Section columns, we have a number of exciting projects continuing and some new ones planned for the year. If you are not already on a committee and would like to become active, let Jackie Werndli at The Florida Bar know.

Letters to the Editor

Editor:

As the author of the petitioner's briefs in the Supreme Court in *Saffor v. State*, I read the deconstruction of the case by my colleague David A. Davis with great interest ("Shaping Appellate Opinions: The Appellate Role," March 1996). Since *Saffor* is a significant case with long-range consequences, I have a few comments on its gestation that I hope will shed more light on the appellate advocate's "art."

My problem in the Supreme Court lay in finding something to argue that hadn't already been covered in the four opinions issued by the en banc district court. In fact, most of what I wanted to say about applying *Heuring* to my case had already been said by Judge Allen in his dissent. So I took a different tack. I interpreted the certified question, "What is the correct standard to be utilized in determining the admissibility of collateral crime evidence in cases involving sexual battery within the familial context," as opening the floor to more than just a fine-tuning of *Heuring v. State*, 513 So.2d 122 (Fla. 1987).

From previous cases, I'd concluded that *Heuring* wasn't merely imprecise and difficult to apply, it was based on two false premises. First, I think the Court was mistaken in assuming that credibility is a material fact in issue, like identity, plan or preparation, when really it is just a means of assessing facts. Second, I think the Court had no business creating a special rule of admissibility for collateral evidence in this type of case, when the evidence code already had a rule (section 90.404(2)) passed by the legislature governing admission of such evidence.

I didn't really expect the Supreme Court to side with either of these arguments, but as an assistant public defender I try not to let long odds keep me from doing my job. I think part of that job is to speak unpopular truths to power. I also thought my strategy might help my client by making Judge Allen's perspective seem more the centrist approach, and I relied on his views as a fallback position.

Unfortunately, I didn't get to make my pitch personally, as a medical problem kept me from participating in oral argument. I understand from my sub that the Court didn't think too much of my approach. Nonetheless, I think it worked. The Court granted Saffor a new trial and nudged the law into what looks like a more equitable orbit. I still believe the special judge-made rule of evidence created in *Heuring* and tweaked in *Saffor* is indefensible, and I'll again tell that to the Court if I get the chance and if I think it will help my client. As to whether such an argument is helpful to the Court—a focus of Mr. Davis' analysis—I figure that's why the justices have clerks.

Glen P. Gifford
Assistant Public Defender
301 S. Monroe St., Suite 401
Tallahassee, FL 32301
April 12, 1996

Please send your letters to Hala A. Sandridge, Editor, The Record, P.O. Box 1438 , Tampa, FL 33601-1438.

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

The Case of the Defamed Stripper:
Why Appellate Lawyers Should be on the Internet

by Robert S. Glazier

In the summer of 1985, after my first year of law school, I was lucky enough to have a job working for a law firm. My responsibilities were not so much law clerk as librarian and grunt. One of my first assignments was to go to a warehouse and see what was in boxes the firm had placed there during the previous 30 years. Most of the materials were uninteresting: wills, contracts, pleadings from long-forgotten cases.

But one document was particularly interesting. The lawyer who had started the firm had in its earliest days represented a stripper who had brought a defamation action. (The lawyer went on to become successful and respected, and eventually became president of The Florida Bar. In the event he may no longer wish to recall the case, I will not disclose his identity.)

The case of the defamed stripper had gone up on appeal. In the same way that a booklover enjoys seeing old books, as an aspiring appellate lawyer I was interested in seeing a brief from an earlier time.

But what was perhaps most interesting about the brief was that it was a *carbon copy on onion skin paper*. It was from the pre-photocopier era, when the only copy of a document was its carbon copy.

The file also contained a letter from a law student in Mississippi, who had heard about the case and wanted to see the brief. The lawyer wrote the student back, with the carbon copy enclosed, and asked the student to return the brief when he was finished. This letter, quite ordinary in its day, seemed remarkable to me: The lawyer had only the carbon copy of the document, and the only way to share it with someone was to lend it. Something we take for granted many times each day—the ability to cheaply and quickly make copies of documents—was at that time simply not part of the daily life of a lawyer. Now, almost 40 years later, we take for granted the remarkable conveniences which technology provides.

The lesson of this story—other than to be very careful about the files you allow your law clerk to look through—is that technology can and does transform the practice of law. Photocopiers, computers, on-line research, CD-ROMS, overnight delivery, among other innovations, have made the work of an appellate lawyer easier than before. Those who adapt—that is, those who adopt the technological advances—can make their lives easier and their practices more profitable.

Appellate Lawyers on the Internet

Perhaps the most important technological advance in recent years is the Internet. You certainly have heard of it. But what can the Internet do for an appellate lawyer? Do appellate lawyers—who pride themselves on practicing law at its purest, and who sometimes scorn technology as demeaning a grant tradition—have anything to gain from the overhyped Internet? The answer, without doubt, is yes.

In summary, the Internet allows appellate lawyers to (1) obtain case law and other materials at far less cost than in any other way, (2) communicate with other lawyers and clients, (3) increase their profile in the legal community, and (4) find a community of lawyers with similar interests.

Resources available on the Internet

Perhaps the greatest benefit of being on the Internet for an appellate lawyer is the primary law material such as case and statutory law. While the Internet is not as comprehensive or as well-organized as Lexis or Westlaw, it has two advantages. First, Internet access generally costs about $1.00 an hour, compared to $240.00 an hour on Westlaw. Second, many of the legal materials available on the Internet are available there almost immediately, and before they are available on the commercial legal research services.

There are many legal materials available on the Internet. Some of the most valuable are discussed below.

Florida law: Florida is among the nation's leaders in providing legal materials on the Internet. The Florida Supreme Court has a website which is probably the best of any court's site in the country. The site contains much information which would be useful to appellate lawyers.

Florida judicial opinions are posted on the Internet in two places. The quickest way to obtain access is through Florida Law Weekly's website. It posts Florida Supreme Court opinions each Thursday, within hours of their release. It posts district court of appeal opinions two to four days after release, which is still a least a week before publication in the printed version of Florida Law Weekly. This quick access to opinions can give you an edge. I recently spoke at a continuing legal education seminar on one particular issue which was important to everyone at the seminar. When the outline was prepared there was no case law on the issue. However, about a week before the seminar a district court decided the issue. Because of the Internet, I was able to tell the people at the seminar about a case which none of them knew about. (Florida Law Weekly on the Internet is available without charge, but only to those with a print subscription to the publication.)

Florida Supreme Court opinions are also posted by the University of Florida, but there is a delay.

Florida statutes are available on the Internet, as is information on the Legislature. Bills filed in the Legislature are available on-line, and so is information on the status of bills.

Administrative materials are also available. The Florida Administra-

continued...

tive Weekly is on-line, and many state government officials and agencies have web sites.

Federal case law: The United States Supreme Court and every circuit court of appeal posts their opinions on the Internet. Whenever I see an article about a recent federal appellate opinion which I am interested in, I can quickly retrieve it at no cost.

The Supreme Court is particularly well-established on the Internet. Lawyers can arrange to have the official synopses of all Supreme Court opinions sent to them via e-mail on the day of release. The e-mail message also contains information on how to obtain the full text of the opinions, which are also available on the day of release.

In recent months, a number of law schools have set up sites which allow people to search federal judicial opinions on the Internet. The searching abilities are not as elaborate or as simple to use as those on Westlaw or Lexis, but again the cost is almost nothing, rather than $240.00 per hour. If I need to research a federal issue on-line, I often start my research on the Internet, and only afterward move to a commercial service, if necessary.

There are limitations to federal opinions on the Internet. First, they do not contain Federal Reporter or U.S. Reports citations. Second, the initial version of the opinion is posted on the Internet; there may have been modifications made, but the original posting will not necessarily be changed to indicate this. Third, only more recent opinions are on the Internet. If you want a case from before 1990, you will have to use the books or Westlaw/Lexis. Fourth, the Internet is still an imperfect medium. You may want to get a Third Circuit opinion, but the Third Circuit website may not be operating. In short, the Internet does not replace Westlaw and Lexis; it merely lessens the need for them.

Case law of other states: Many other states are joining Florida in posting case law on the Internet. As of mid-June, at least 28 states had at least some judicial opinions available on the Internet: Alaska, Arizona, Arkansas, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. These states often also have statutes available on the Internet.

Listed above is just a small portion of the legal resources available on the Internet. The materials can be difficult to find, as they are spread over the vast Internet. To assist people, numerous guides have been created. My own site, The Florida Lawyer, provides links to the most important resources. The site is located at http://www.gate.net/~rglazier. (Don't forget the tilde.)

E-mail

The most basic function of the Internet is e-mail, electronic messages sent from person to person. An appellate lawyer's ability to benefit from e-mail depends to a considerable extent on who else the lawyer knows who is on the Internet. At this time, businesses and students are far more likely to be on the Internet and use e-mail than lawyers, so lawyers who communicate with businesses and students are more likely to benefit.

I have used e-mail for businesses in two ways. First, I recently published an evidence book which I coauthored with a University of Miami law professor. Our publisher, located in Virginia, is on the Internet. Late in the publication process I had small changes to make in the manuscript. Instead of sending them to my editor in a letter—which requires formatting, printing, stuffing an envelope, putting on a stamp, and perhaps faxing—I merely wrote an e-mail, and he received it within minutes. When he had comments in response, I received them minutes later.

I have also found e-mail to be useful in communicating with my law clerk. My clerk often does research for me at the law school library. If I want to communicate with him during the day, I can send him an e-mail at his law school e-mail address, which he can retrieve from a terminal within the library. In addition, I can send him e-mail whenever it is convenient for me to communicate with him. For examine, I might bring work home during the weekend. Sunday afternoon I realize that there is an issue I want my clerk to research. Without e-mail I could either call him at home, but (1) this would interrupt his weekend, and (2) very possibly he would not be at home, so we would begin the game of telephone tag. Alternatively, I could make a note to remember to tell him on Monday morning. But with e-mail I can immediately write him a note explaining the assignment.

The way you can use e-mail depend on your type of practice. For example, if you deal with insurance companies or larger businesses which are on the Internet, you may be able to use e-mail to contact them.

Setting up your own website

Appellate lawyers can also use the Internet to set up their own website, on the portion of the Internet known as the "World Wide Web." The Internet is unique in that it is the only medium which allows a person to communicate with a mass audience at little expense. At one time it was said that freedom of the press exists for those who own presses; now it exists for anyone able to learn the fairly simple commands for setting up a website.

People set up websites for various reasons: Ideology, love of a hobby, public service, sex (this tends to get the most publicity), or business. Lawyers have begun to set up sites for the age-old desire to garner new clients.

Those lawyers who have put up legal websites have generally come to the conclusion that little if any business will *directly* result from the sites. However, a website can be a useful part of a larger public relations plan. The attractiveness of a website will generally be a function of its cost. For those firms which have lawyers or staff who enjoy computers and could create a web site themselves, then there is littlecost other than the $20.00 or so per month to make the web site available. The hiring of a consultant to

create the website can cost anywhere from $1,000 and up.

My own experience has been favorable. I created a website in September of 1995, which was very early in the Internet age. Between 30 and 120 people a day visit the site. As my site is clearly geared toward lawyers, I assume that most of the visitors are lawyers, but I have no way of knowing this. As a direct result of my site, I have picked up one modest size appeal. While the lawyer who sent me the appeal already knew of me, we had never communicated; it was the website which brought us in contact with one another. Aside from the one appeal, the website has brought me some exposure. I have received dozens of e-mails and letters from people who have enjoyed the site.

As of mid-June at least 80 lawyers or law firms in Florida have websites. You may want to consider joining them.

Legal Discussion Groups

On the Internet there are various mailing lists and newsgroups which are basically discussion groups. A small number of these groups are on legal issues. Some lawyers may find these to be worthwhile.

Getting on the Internet

How do you get on the Internet? You need a computer, a modem, and a service to link you to the Internet. Perhaps the easiest way is to sign up with the very popular America On-Line. To sign on to America On-Line, call them (1-800-827-6364), or buy almost any computer magazine; they commonly include a disk which allows you to sign on.

After a while you may prefer to sign up with a different Internet service provider. America On-Line is about $3.00 per hour; other services are about $1.00 per hour. At the beginning, though, the convenience of America On-Line may be worth the extra cost.

Once you are on line, you may want to visit my web site, The Florida Lawyer, which includes links to materials of interest to Florida lawyers. The address of the site is http://www.gate.net/~rglazier.

Editors' note: For those who want to "wade" rather than "surf," there are two outstanding Internet sites to begin with. Bob Glazier's site has a comprehensive listing of legal resources and is a "must see." Likewise, the Florida Supreme Court's "Judicial Online Supreme Highway User Access System (JOSHUA) is excellent. It is strongly state-oriented, and has a wealth of material for the lawyer and layperson. The Internet addresses for JOSHUA and other sites of interest to lawyers are:

Judicial Online Super Highway User Access System (JOSHUA)—http://justice.courts.state.fl.us/

United States Supreme Court Opinions—http://www.law.cornell.edu.supct.table.html

Federal Circuit Courts of Appeal—http://www.law.emory.edu/FEDCTS/

Florida Law Weekly—www.polaris.net/~flw/flw.htm

Florida Supreme Court opinions—http://nersp.nerdc.ufl.edu/~lawinfo/flsupct/

World Wide Web Virtual Library (law)—http://www.law.indiana.edu:80/law/lawindex.html

The "lectric Law Library"—http://www.lectlaw.com

The Florida Attorney General—http://legal.firn.edu/agweb.html

Several Public Defenders have home pages, *e.g.*, Bennett Brummer, Public Defender for the 11th Circuit—http://www.metro.co.dade.fl.us/defend/homepage.htm

This is by no means a comprehensive list, but the result of jumping from hypertext link to hypertext link one afternoon. If you have other addresses that may be of interest, pass them along, and we will publish them in *The Record*.

Robert S. Glazier *is an appellate lawyer in Miami. He is the author, with Prof. Michael H. Graham, of the recently-published* Handbook of Florida Evidence (2d ed.). *He clerked for Judges Daniel S. Pearson and Gerald B. Cope, Jr. of the Third District Court of Appeal. His e-mail address is rglazier@gate.net*

Appellate Practice and Advocacy Section Actual Budget 1995-96

REVENUE	**1996-97**
Dues	$19,600
Dues Retained by Bar	9,800
Net Dues	9,800
Directory Ads	1,350
Reception Sponsor	2,500
Videotape Sales	797
Audiotape Sales	1,213
CLE Courses	4,673
Interest	1,155
Material Sales	85
Returns/Allowance	(214)
TOTAL REVENUE	**$21,359**
EXPENSES	
Postage	$922
Printing	233
Newsletter	1,801
Photocopying	158
Officer Travel	300
Council	301
Bar Annual Meeting	3,753
Awards	665
Committee Expense	222
Council of Sections	300
Staff Travel	1,147
Directory	9,928
TOTAL EXPENSES	**$19,730**
Beginning Fund Bal.	**$18,928**
Plus Revenues	**$21,359**
Less Expenses	**$19,730**
Plus Net from Other Center	**$6,243**
Ending Fund Bal.	**$14,277**

The Appellate Practice and Advocacy Section thanks its Annual Meeting reception sponsors:

Adorno & Zeder
Akerman, Senterfitt & Eidson
Arnold, Matheny & Eagan
Berg & Wheeler
Brown, Obringer, Shaw, Beardsley
Caruso Burlington Bohn & Compiani
Dean, Ringers, Morgan & Lawton
DeWolf, Ward, O'Donnell & Glatt
Fox, Grove, Abbey, Adams, Byelick & Kiernan
Fowler, White, Burnett, Hurley, Banick & Strickroot
Fowler, White, Gillen, Boggs, Villareal and Banker
Greenberg Traurig
Hicks, Anderson & Blum
Hill, Ward & Henderson
Holland & Knight
Kubicki Draper
Kynes, Markman & Felman
Litchford and Christopher
Maguire Voorhis & Wells
Maher Gibson & Guiley
Rumberger, Kirk & Caldwell
James M. Russ
Russo & Talisman
Schropp, Buell & Elligett
Stearns Weaver Miller Weissler Alhadeff & Sitterson
Sharon L. Stedman
Stephens, Lynn, Klein & McNicholas
Troutman, Williams, Irvin, Green & Helms
Jane Kreusler-Walsh

Committee Updates

Appellate Court Liaison Committee

The committee is going to attempt to present a program at The Florida Bar's mid-year meeting in Miami on January 22-25, 1997. The topic of the program would be the infamous "PCA." Our intent is to have a round-robin discussion among the panel members, followed by a question and answer session. We are hoping to have a panel consisting of two current district court judges, two current appellate practitioners, and two former district court judges who are back in private practice. We are presently in the process of contacting sitting district court judges in this regard, and will identify other participants from that point.

As you know, appellate judges have, in many cases, quite strong feelings about the "PCA." While appellate practitioners often understand the reasons that they are the receipient of a PCA, those who do little appellate work often do not understand, and feel they have been shortchanged. The basic purpose of this discussion is to open lines of communication so that the practitioners will understand the reasons for PCAs and the types of cases in which they occur, and so that the appellate judges will understand how "citation PCAs" and the like would reduce the level of practitioners' frustrations. The audience for this program is not so much the appellate practitioner, but the attorney who only handles a few appeals each year, at most. We need to explore the best ways of "getting the word out" to non-appellate attorneys who might be interested in attending.

Civil Appellate Practice Committee

At our prior meeting we adopted the following statement of purpose for our Committee: "The goal of the Civil Appellate Practice Committee of the Appellate Practice and Advocacy Section of the Florida Bar is to promote and improve the perception of appellate practice as a specialty to the trial bar and the general public, and to promote excellence before the appellate tribunals."

Towards that end, we formed a subcommittee to poll Florida's appellate judges to obtain their opinions regarding the value of appellate specialists. We spent a good deal of time narrowing the questions down to five or six, with added space for comment. We also intend to interview and poll appellate specialists and the heads of appellate departments in certain law firms throughout Florida. The goal of this effort is to publish an article for appellate specialists to use as a tool to generate business.

Another subcommittee was formed to solicit members of the Section to participate as amicus curiae in "cases that present substantively neutral, but procedurally significant" appellate issues. John Crabtree, the proponent of this idea and the chairman of the subcommittee, has in my opinion adequately overcome such obstacles as how appropriate cases may be found, and how to determine the position to be taken as amicus. What seem to make this project timely are the new amendments to the Appellate Rules. This idea caught fire with other Committees, and the chairs and members of these other Committees concluded that it may be appropriate to form an independent Amicus Curiae Committee for the Section.

We again resolved to generate articles for *The Record*; hopefully, we will have spinoff subjects from our polling and interviews with appellate judges and practitioners. We have formed a subcommittee to obtain and maintain a bank of exemplar appellate briefs, which we hope will be selected by judges. The added criteria given to the chair of this subcommittee is to make the project monetarily self-sufficient. Finally, the subcommittee formed to render advice to new lawyers on elementary appellate procedures or issues has been abandoned due to lack of activity and mild worries over potential conflict or malpractice exposure.

CLE Committee

Appellate Practice Certification Exam Review Course. The review course given on February 16, 1996, was well received. On a scale of 1 to 5, the course received a rating from the participants of 4.34 for contents; 4.07 for presentaiton; 4.44 for materials; and 4.28 overall. The outline materials were much praised. Next year's review course will be held on February 14, 1997, as the exam is tentatively scheduled to be given on March 4, 1997. Bonnie Kneeland will again chair the program, but is looking for a vice-chair to learn the ropes. Kitty Pecko has tentaively agreed to perform this function, and will let Bonnie know shortly whether she will be able to do so.

Co-Sponsorships. The co-sponsorship with the government lawyers section was successful. The co-sponsorship with the criminal lawyers section was successful in Tampa, but the Miami session had to be cancelled because of lack of attendance. Bonnie Kneeland has sent out letters to all CLE chairs suggesting a co-sponsorship with our Section and we are waiting for responses to this letter. We have tabled the suggestion that we co-sponsor a seminar with the general practice section on "appellate practice for the general practitioner." Steven Mason has agreed to chair our co-sponsorship with the criminal section next year. The government lawyers section has asked us to co-sponsor a 1997 program with them as well.

Federal Appellate Seminar. The federal appellate seminar held on March 8, 1996 in Tampa was a rousing success. Chris Kursner did an excellent job as chair of the seminar. Unfortunately, he will be unable to chair the seminar next year and we are looking for a replacement. Hala Sandridge and Steve Wisotsky have agreed to work on this program, but we need more people. We are asking for anyone interested in working on the federal appallate seminar

continued...

steering committee to please respond to Jack Aiello, the incoming CLE chair.

"Hot Topics" in Appellate Law. Our flagship program is being chaired by Tom Hall. Marisa Mendez, Paul Gayle-Smith and Cindy Hofmann are also on the steering committee. The program is tentatively scheduled for November 21 and 22, 1996 (Miami live; Tampa live and taped). It is then scheduled to be shown on tape at numerous locations around the state. We are in the process of choosing topics and speakers.

New Chair. The meeting in ended with the passing of the chair to Jack Aiello. Kitty Pecko will be serving as vice-chair of the committee. The next meeting of the CLE committee will be held in conjunction with The Florida Bar's general meeting to be held in Tampa in September 1996.

Membership Committee

Last year the Section grew by slightly over one hundred members. This year the Membership Committee will strive toward further increasing the Section's membership. We intend to advertise membership in the Section at all Section-sponsored seminars, and include a membership application in seminar materials. We will also identify lawyers, through the Florida Law Weekly, who have recently been involved in appellate decisions but are not members of the Section. We will also be extending membership offers to appellate judges who are not yet members of the Section. The Membership Committee actively seeks members to help coordinate these activities. Ideally, the committee would have at least two committee members from each appellate district so that those members could also advertise the Section to their local bar associations. The committee currently needs members practicing in the 1st, 4th and 5th Districts.

---

ment. A lack of general public knowledge about the Courts' routine operation is nearly demanded by the institution itself. Judges and their employees, unlike legislative or executive officials, cannot talk publicly about matters pending before them. Official silence is imposed not merely by constitutional constraints, but also by codes of ethics and the requirement that judges receive information on a case only through the closely regulated process of briefing, motions, and adversarial argument.[3] The information going out of the courthouse is so severely restricted that most Floridians have only a dim understanding of how the judiciary works.

The same conclusion applies with greater force to the Florida Supreme Court. The seven justices and their staffs perform virtually all of their official duties away from public view, behind the security barriers on the second floor of the Supreme Court Building in Tallahassee.[4] What is publicly known of the Court consists largely of its more ceremonial aspects: black-robed justices seated at the Court bench, listening to arguments by lawyers often talking in legal jargon unchanged since medieval times. Officially, the Court speaks only through its formal opinions and orders, all funneled through the Clerk's Office, which appear with little warning.

Part of the purpose of this article is to dispel some of the mystery and lift some of the misconceptions about the Florida Supreme Court's daily operations, including the exercise of its jurisdiction. Only a few prior sources illuminate the topic addressed here, and none of these have attempted a more-or-less comprehensive study. This paper is intended to fill this gap by compiling information useful both to lawyers and to laypersons interested in how the Court operates within its constitutional constraints.

On another level, this article will review the top level of a judicial system that has come into existence in Florida because of the various constitutional reforms that began with the adoption of the 1968 Florida Constitution and continued with the jurisdictional reforms of 1980. The authors believe that the present operations and jurisdiction of the Florida Supreme Court are one of the success stories of the state's efforts to modernize its governmental structure in recent decades. This article examines how that constitutional mandate is translated into the Court's daily functions.

II. The Routine Operations of the Court

Although the internal procedures of the Court are not widely known, they follow a fairly well defined code. A few rules have been distilled into the Supreme Court Manual of Internal Operating Procedure[5] and portions of the Rules of Judicial Administration,[6] though these by no means contain all or even most of the principles by which the Court operates. Some of the flavor of day-to-day Court operations can also be obtained from other works detailing the Court's history.[7] The purpose of this section is not to belabor material that can be obtained elsewhere, but to review the more significant operations regulated by the Court's customary, unwritten code,[8] some aspects of which date to the Court's first sessions in 1846.

Much of the mystery behind the Court's daily operations arises from the fact that almost none of the internal machinery is visible to public view. Unlike the Legislature with its committee system or the Executive branch with its cabinet meetings and press liaisons, the Court's meetings and research—apart from oral arguments—are entirely secret until the release of an opinion or order. The most important meetings of the seven justices occur during conferences that are closed even to the Court's own staff, and the Court has never found any necessity for maintaining a permanent press liaison.[9]

This lack of daily contact with the public is an unfortunate feature, but

one born out of a necessity. The Court must retain absolute impartiality until the day a case is decided. The constitutional requirement of due process,[10] among other reasons, gives litigants a right to have their cases reviewed in an impartial forum. Out of deference to due process, the Florida Code of Judicial Conduct requires judicial impartiality and prohibits judges and their employees from talking about pending or impending[11] proceedings except through briefing, internal discussions among Court personnel, and the adversarial process.[12] As a general rule, no such discussion outside the secrecy of the Court is permitted while a case is pending or impending unless all parties to the case are given a chance to participate and respond.[13]

Yet, the procedures leading up to the release of a written opinion or order are by far the most important work of the Court. Binding precedent may be created in this way, affecting the lives of all Floridians. Even citizens elsewhere in the United States can be affected. Florida is a major state, and its courts' opinions are often used for guidance in other states' courts throughout the nation.[14] It appears paradoxical that a state like Florida, which is so deeply committed to "government in the Sunshine," is required by its constitution to conduct the bulk of its judicial proceedings in secret. However, there clearly is no other way to preserve litigants' rights under the rule of due process. Unlike legislators or governors, judges and their employees cannot be required or allowed to take public stands on pending or impending matters that are yet to be resolved.

A. A Case Study: *In re T.A.C.P.*

In an effort to dispel some of the lack of knowledge that this mandatory secrecy has created, this article will begin by reviewing the internal process by which a recent case, *In re T.A.C.P.*,[15] was decided. Understanding how this case was handled may give a broader perspective on the Court's operations and exercise of its constitutional powers.

The case was chosen for several reasons. First, it presented an issue that has never been decided by any other court in the United States: Whether a terminally ill child, born without a complete brain but whose heart is still beating, can be considered "dead" for purposes of organ donation.[16] Thus, the case has potentially set a national precedent that will be considered by the courts of other states in confronting the same issue. Second, the decision *In re T.A.C.P.* has become final and thus, there is no ethical impediment in discussing it to a limited extent.[17] Lastly, the case received wide publicity and is, therefore, better known than most cases decided by the Court.

In March 1992, justices and employees of the Court became aware through media reports that a child, known in court records as T.A.C.P. and popularly known as "Baby Theresa," had been born in South Florida with the medical condition known as "anencephaly." Anencephalic children lack the upper portions of their brains and have only a partial skull, which leaves the remaining brain tissue open to the air. The condition is invariably fatal because the incomplete brain is unable to maintain a heartbeat for very long, partly because the exposed brain tissue is disrupted by infection or the process of childbirth.[18]

News accounts of cases like *T.A.C.P.* often are the Court's first warning that a major case may be impending for review. The Florida Supreme Court library stocks current major Florida newspapers each working day, and the justices and their staffs commonly examine the papers for such information. The news accounts, however, are used primarily for the knowledge that a new case may be impending[19]—not for the substance of the news accounts. The Court knows that news accounts sometimes contain misleading or incomplete information, though they may be informative for other purposes.

In *T.A.C.P.*, the sole question before the Court was whether organs could be removed from a child born with so serious a birth defect that she must inevitably die in a few days' time. The parents' request in this regard was both poignant and touching. They had known of their daughter's congenital defect prior to her birth but had decided to carry her to term so her organs could be donated to help other children. The parents' hope was that their own tragedy might be redeemed by saving the lives of others who needed transplantable organs, especially other infants. As the Court itself recognized in its later opinion, there is a continuous and pressing national need for organs that can be transplanted into infants.[20]

However, health care providers refused to comply with the parents' wishes because the child had a heartbeat independent of life support. The providers feared they might run afoul of the law if they removed the child's organs for transplant.[21]

A rather speedy round of lawsuits ensued. The parents sued for a judicial determination that T.A.C.P. was dead and that her organs could be donated, notwithstanding the heartbeat. A Broward County trial judge declined their request.[22] The parents then filed an emergency motion in the Fourth District Court of Appeal, in effect suing the trial judge. They asked that the district court overturn the trial judge's determination and direct that T.A.C.P. be declared dead. The intermediate appellate court declined to do so.[23]

At this point, the Florida Supreme Court's jurisdiction was invoked by the parents. Initially, they filed a petition for a writ of mandamus, one of several legal matters over which the Court has "original" jurisdiction.[24] When issued by a court, a writ of mandamus directs a public official to perform duties that he or she is obligated to undertake. Baby Theresa's parents, in essence, were asking the Florida Supreme Court to order the trial judge in South Florida to rule that their daughter was dead. On March 30, 1992, the Florida Supreme Court denied the motion without comment.[25]

At virtually the same time, however, the Fourth District Court of Appeal took the extraordinary step of certifying the case as a question of great public importance requiring immediate resolution by the Florida Supreme Court.[26] This created an entirely new basis for jurisdiction apart from mandamus. Under the Florida Constitution, a district court can authorize parties to "skip" the intermediate appellate court and di-

continued...

rectly petition the Florida Supreme Court to hear a case, although the latter has discretion to accept or to deny the petition as it deems fit.[27] In practice, such cases are almost always accepted for review.[28]

Within hours, the press reported that Baby Theresa had died.[29] The Florida Supreme Court, nevertheless, chose to exercise its inherent authority to review the case on the grounds that it presented an issue of great public importance "capable of repetition yet evading review." This is a long-standing traditional basis for hearing cases that have a tendency to be rendered moot by physical events before a court of final jurisdiction can decide them.[30] Anencephalic children are likely to die before litigation can be completed; a decision to dismiss the case as moot thus might forever bar an appellate court from deciding the issue. The result would be the perpetual lack of a controlling court decision on a legal issue obviously capable of recurring. Accordingly, the case was scheduled for oral argument on September 2, 1992, during the first oral argument week[31] after the regular summer recess had ended.[32]

During the summer recess, the Florida Supreme Court library staff, assisted by summer law student interns, began compiling legal, medical, and ethical books and articles that had studied anencephaly. Compilation of such materials largely was complete by the end of the summer, so that the Court would have the benefit of the widest range of scholarly views on the subject. Of course, such materials in no way are used to reflect on the actual facts of the case at hand, but rather to enlighten the Court as to opinions of experts on the purely legal and medical questions at stake. In *T.A.C.P.*, for example, the Court heavily relied on a medical definition of "anencephaly" published by the New England Journal of Medicine, which represented a consensus view among medical experts in fields such as pediatrics, neurology, and obstetrics.[33]

The oral argument in *T.A.C.P.*, in early September 1992, was high-profile and well attended. Virtually the entire Tallahassee capital press corps was present, as were a large number of persons associated with children's rights groups, some of which had filed amicus briefs in the case.

Immediately following oral argument, several persons from the various groups in attendance held impromptu press conferences in the rotunda of the Supreme Court Building. The scene was one of the liveliest in recent Court history.

In *T.A.C.P.*, as with most other cases orally argued, the Court immediately held a closed-door conference the afternoon of the argument. Neither the public nor the Court's own staff are allowed to attend such conferences. At this point, the justices tentatively voted on how the case should be decided. The official Court file was then transmitted to the office of the justice assigned to the case, for a proposed majority opinion to be drafted and circulated to the Court.[34]

T.A.C.P. was decided quickly by the usual standards of the Court. The normal elapse of time between oral argument and the release of an opinion can be as short as a few months, although the Court attempts to render decisions within six months of oral argument or submission of the case without oral argument.[35] Occasionally, the duration can be longer in especially difficult cases.[36] The *T.A.C.P.* opinion was released quickly, just over two months after oral argument, on November 1992.[37] The decision was unanimous.[38] Although some of the parties and amici criticized the decision in published press accounts, none filed a motion for clarification or rehearing. The opinion thus became final without further challenge. This is an unusual event because motions for clarification or rehearing are filed almost routinely. At this point, the Court's work was done.

B. Internal Case Assignments & Opinion Writing

As the discussion of *T.A.C.P.* indicates, the Court's work in writing official opinions is not conducted by all seven justices simultaneously. Rather, work is delegated to individual offices. The system by which this delegation occurs is perhaps one of the least understood aspects of the Court's routine operations. As a result, on some occasions, parties have erroneously assumed that particular justices have some unusual or unfair ability to control case assignments. The reality is very nearly the opposite.

The actual method by which cases are assigned in the Florida Supreme Court differs substantially from that used in the United States Supreme Court, in which seniority equates to power. In the latter Court, the assignment typically is made by the Senior Justice who is in the majority, with the Chief Justice always considered more senior than any other Justice. Thus, Senior Justices in the nation's highest court do, in fact, have an unusual ability to control case assignments.

In the Florida Supreme Court, however, the bulk of cases in which opinions must be written[39] are assigned at random by the Office of the Clerk, and assignments typically are made as soon as briefing is completed. There are, however, some exceptions, discussed below.[40] In other words, case assignments in the Florida Supreme Court are generally accomplished by a kind of lottery system. This can lead to some very interesting situations when the justice assigned to write a majority opinion in a case disagrees with the majority viewpoint.

After assignment, the case file is sent to the office of the designated justice, who then usually will assign one of that office's law clerks to begin preparing the case. The process that follows varies somewhat depending upon the type of case at issue. There are four broad categories of cases in which an opinion will be written: (1) cases scheduled for oral argument; (2) cases accepted without oral argument ("no request" cases); (3) petitions by death-row inmates ("death cases"); and (4) special cases, often requiring expedited consideration by the Court.

1. Oral Argument Cases

In all cases scheduled for oral argument, the law clerk assigned to the case is required to write an "oral ar-

gument summary" that contains a condensed, objective version of the parties' briefs.

No recommendation regarding the case's disposition is included.[41] In some offices, the law clerk is required to prepare a separate bench memorandum for the personal use of the justice, but this practice is not uniform throughout the Court. Bench memoranda sometimes are shared with other justices; this practice, however, is more the exception than the rule. In other offices, no memorandum is prepared, and the law clerk and justice simply sit down together and discuss the case prior to the date of oral argument.[42]

As noted earlier in the discussion of *T.A.C.P.*, a closed-door conference of the seven justices is usually held the afternoon after oral argument, although conference may be delayed up to a few days due to conflicts in the schedules of the justices. In some district courts of appeal, law clerks are permitted to attend court conferences or are even asked to participate in the judges' discussion of cases. However, in the Florida Supreme Court, the strict secrecy surrounding court conferences forbids the admission of any law clerk into a conference. Indeed, no one but the justices themselves are allowed into any official court conference. There is a single exception to this rule. By custom, the Clerk of the Court may be admitted, but usually is not required to be present unless requested by the justices.

If any other Court staff members need access to a justice or the Clerk of the Court during a conference, they are permitted only a single liberty that is seldom exercised: knocking on the conference room door. By custom, the Clerk, if present, answers the door. In the Clerk's absence, the most junior justice in the room answers the door. Staff members may not enter the room while a conference is in session, but they can ask the person answering the door to deliver a message inside or to convey materials to a justice. Non-staffers are not permitted to interrupt a conference for any reason.

The secrecy surrounding conferences means that most justices, and especially the justice assigned to write the particular case, must take notes regarding the positions espoused by the other members of the Court. During the conference, all the justices are given a chance to indicate their initial and tentative preferences regarding a case's disposition.[43] These preferences are noted by the justice already assigned to write the opinion.

Responsibility for opinion writing varies from office to office in the Court. Some justices prefer to write their own opinions, with law clerks often being asked to check the finished product for accuracy and style. Other justices assign law clerks the responsibility of drafting most opinions, with the justice then reviewing the draft and making any changes deemed necessary. In still other offices, opinion writing is a shared responsibility of both the justice and the assigned law clerk, and may, in fact, involve every staff member in that office at some point in the process.

The exact way an opinion will be written may be discussed in conference, but it usually is left to the discretion of the assigned justice subject to some significant exceptions. For example, the Court has promulgated a system of legal style contained in a Rule of Appellate Procedure.[44] For matters not covered in the Rule, style is governed by the latest edition of *The Bluebook: A Uniform System of Citation* published by The Harvard Law Review Association. If nothing in *The Bluebook* is on point, style is governed by the *Florida Style Manual* published by the Florida State University Law Review in Tallahassee.[45] If none of these sources are on point, the Court generally considers that style should be governed by the closest analogous rule or example contained in the three sources listed here, in the same order of preference. As a practical matter, most authorities not covered by the rule and style manuals are Florida documents, and these typically are dealt with by reference to the closest analogous rule or example from the *Florida Style Manual*.

Another significant exception deals with gender-specific language. In the wake of a report by a Court commission investigating gender bias,[46] the Court now has instructed its staff and The Florida Bar agencies charged with developing Rules of Court to avoid all gender-specific language wherever possible. The purpose is to avoid masculinizing language, which suggests an inferior status of women. The most common methods of complying with the rule are to use plural pronouns instead of singular,[47] and to rewrite sentences so that gender-specific language is not needed. Strained language and newly coined words are also avoided.

The parties to a cause have their greatest opportunity to influence the Court in their briefs. Briefs are summarized and read prior to oral argument and thereby introduce the Court to the case. Therefore, a bad brief is a bad first impression, whereas a strong brief can sway the Court. Some cases may be won in oral argument, but these are a minority and usually involve close issues. Oral argument primarily allows the justices to test the strengths and weaknesses of first impressions created by reading the briefs. As a result, attorneys should scrupulously prepare their briefs to the Court.

Style and content of briefs are governed by court rule;[48] beyond that, counsel should avoid anything that creates confusion as to facts and issues. One practice sometimes used by respondents or appellees, for example, is to ignore the sequence of issues framed by the petitioners or appellants. This creates needless confusion and should be avoided. If the issues in the briefs do not match one another, the Court then must perform a kind of mental "cut and paste."

The better practice is to address the issues in the same sequence, even if only to note that an issue is redundant or irrelevant, and then to list separately and to discuss any issues the opponent may have failed to raise. Another practice to avoid is incorporating by reference an argument from a brief in a different proceeding or different court, except when the Court grants leave to do so. Often the other brief may not be readily available, which renders the later brief unintelligible. It is always better to make sure a complete statement of the argument can be found within the four corners of the brief.

One peculiarity of the Court's method of case assignment is that

continued...

SUPREME COURT
from page 11

the assigned justice sometimes is not in the majority. Under long-standing Court custom, this fact alone does not

sheets, and every justice must manually vote on each one in much the same manner they vote on a proposed majority opinion. Once all vote sheets are returned to the clerk's office, one of two things will occur. If the case has generated no further controversy among the justices, it

week in advance,[56] and copies of the final version of the opinion or opinions are then circulated to all justices and each member of their staffs prior to release. The purpose of this last exercise is to allow for further proofreading of opinions. Justices and their staffs sometimes find errors or

garding the same issue of law. In these circumstances, the law clerk assigned to the case will prepare a memorandum that essentially is a hybrid of an oral argument summary and a bench memorandum for circulation to the entire Court. The first part of this memorandum summarizes in objective fashion all the relevant facts and information about the case, as well as the parties' arguments. In the second part, the memorandum discusses the options available to the Court and states the disposition preferred by the justice to whom the case is assigned.[61]

The case is then scheduled for discussion at the next available court conference. At this time, the justices state their own preferences regarding the case and a vote is taken. The assigned justice then either drafts a proposed majority opinion or assigns the law clerk to do so. The proposed majority opinion is circulated to the entire Court using the same procedure that would occur had oral argument been granted. Any differences among the justices are resolved in the same manner as would apply in oral argument cases, including additional conference discussions as the justices are satisfied that no further controversy remains about the case, the majority opinion and any separate opinions are prepared for public release.[62]

3. Death Cases

While appeals from judgments imposing the death penalty are treated like any other oral argument case, the Court traditionally follows a somewhat different procedure in collateral challenges by death-row inmates. Many of these cases involve claims raised via a traditional habeas corpus petition or through the related procedure set forth in Florida Rule of Criminal Procedure 3.850.[63] Occasionally, other means of collateral review are sought, including the Court's "all writs" jurisdiction, mandamus, or other means. The most pressing of these cases involve claims by inmates who have been scheduled for execution.

Except where there is an active death warrant, collateral challenges are handled much the same as other cases. Oral argument is sometimes granted but can be denied—unlike in appeals from judgments imposing the death penalty where oral argument is always granted.[64] Some justices require their staffs to prepare a fact-sheet detailing the entire procedural history of the case, from trial to the latest collateral challenge, but this practice is not uniform throughout the Court. Opinions are usually issued for each collateral challenge filed, though the Court sometimes denies a claim in a summary order if the claim clearly is barred or meritless.

When a case involves an active death warrant, different procedures are used. Litigation often comes at unpredictable times and typically must be decided on a severe deadline.[65] Thus, the office to which the case is assigned frequently must review the record[66] immediately after the warrant is signed and before any pleadings have been filed in the Florida Supreme Court. Typically, the justice and law clerk assigned to the case confer as soon as possible to discuss any claims that seem likely based on the record.

As soon as pleadings are received from the inmate and the State, the justice and law clerk assigned to the case usually meet immediately. The justice then may confer informally with the other justices or request that a court conference be held, if one seems necessary. If the case seems to involve a meritorious claim, the Court may be inclined to grant an emergency oral argument, or may stay the execution until the matter can be studied further and an opinion issued.

In the absence of a viable claim, the justice or law clerk assigned to the case usually prepares an opinion (or in some cases a summary order) denying all relief. If a proposed majority opinion is prepared, a copy faced with a vote sheet will be circulated to the Court on an expedited basis and, once all votes are tabulated, will be issued to the public immediately. Summary orders may be handled in a formal or informal court conference, with the order itself later issued by the Clerk of the Court.

As the time for the inmate's execution approaches, the justice and law clerk assigned to the case remain on call for any last minute petitions that may be filed. By custom, the chief justice or a justice designated by the chief justice will be present in the Supreme Court Building at the time of execution and is usually assisted by the Clerk of the Court and sometimes also by the law clerk assigned to the case.[67] The Governor or a member of the Governor's staff opens a three-way telephone line connected with the death cell of the state prison and the designated justice and all three parties remain on the phone until the execution is completed and the inmate is declared dead. Under the Florida Constitution, any single justice could order the execution stayed for good reason shown,[68] but this power has not been exercised in memory. Any problems associated with the execution generally are reported back to the full Court.[69]

4. Other Special Cases

The Court sometimes receives other more unusual kinds of cases, often involving emergency issues that will be resolved in a written opinion. Examples include: pressing constitutional questions between the branches of state government;[70] requests for an advisory opinion by the Governor;[71] or a petition to invoke the Court's own emergency rulemaking powers.[72] Oral argument is often granted in cases of this type, though not always, with argument usually scheduled as soon as possible. Whether accepted for argument or not, emergency matters are normally handled like any other case, except that preparation of the opinions typically is expedited and the case is assigned to an office by the chief justice.[73] The opinions themselves may be released outside the normal cycle if necessary to better resolve the particular emergency.

C. Types of Separate Opinions

As noted above, the Florida Supreme Court follows the traditional practice of American appellate courts in assigning a single justice to write the majority opinion in a case. However, justices are not obligated to agree with the proposed majority opinion's viewpoint or even with the unsigned majorities they themselves have written. Any view apart from the majority's is expressed through the vehicle of a separate opinion at-

continued...

tached to and published with the majority opinion.

Although about seventy percent of the Court's decisions are unanimous,[74] the press has a strong tendency to focus on disagreements embodied in separate opinions. Strongly worded dissents catch the most attention. This public focus can create a seriously exaggerated sense of division on the Court and may suggest that dissents carry a legal significance that they actually lack.

Dissenting views almost always are the least influential in the long term, due to the fact of their apparent rejection by the Court's majority.[75] A well reasoned concurring opinion, while technically not establishing any precedent,[76] may still be cited for persuasive authority in future cases and occasionally may become more influential than the majority opinion to which it was attached.[77] Dissenting views sometimes prevail in the long-run[78] but this is a far rarer occurrence. To embrace a prior dissent, the Court usually must overrule its own precedent notwithstanding the doctrine of stare decisis;[79] but a well reasoned concurrence can be accepted without overruling anything, on grounds that it illuminated or explained the majority opinion it accompanied.

Concurrences and dissents, however, constitute only two of six different kinds of separate opinions that are in customary usage by the Court. This variety has sometimes confused lawyers and the public alike, because the Court has never fully clarified what each of the categories implies. Confusion has been increased by the fact that the six categories are not necessarily discrete but often blur into one another. Much depends on exactly what the individual author has stated in the separate opinion, although the choice of category is often a strong indicator of the strength of the justice's feelings about the majority view.

Below, the six categories are ranked and their customary usage described. This ranking begins with the category having the strongest sense of concurrence and ends with the category having the strongest sense of dissent.

1. Concurring Opinions

A separate concurring opinion usually indicates that the justice fully agrees with the majority opinion but desires to make additional comments or observations. Concurring opinions often are used when a justice wishes to explain individual reasons for concurring with the majority. As a general rule, concurring opinions should be presumed to indicate complete agreement with the majority opinion unless the concurring opinion says otherwise. Thus, a concurring opinion can constitute the fourth vote needed to establish both a decision and a Court opinion,[80] subject only to any reservations expressly stated in the concurring opinion itself.[81]

2. Specially Concurring Opinions

A "specially concurring"[82] opinion indicates general agreement with both the analysis and result of the majority opinion but implies some degree of elaboration of the majority's rationale, unless the separate opinion itself says otherwise. The most common use of a special concurrence is when the author believes the majority's analysis is essentially correct though perhaps in need of elaboration or clarification. For example, a specially concurring opinion may be used to explain why a separate dissenting opinion has mischaracterized the majority's views and why the majority is correct.[83]

A specially concurring opinion can clearly constitute the fourth vote needed to create a binding decision under the state constitution[84] and can be sufficient to establish an opinion as binding precedent. However, in this last instance, the true nature of the precedent would not necessarily consist of the plurality opinion, the special concurrence, or even both taken together. Rather, the Court's opinion for purposes of precedent would consist of those principles on which at least four members of the Court have agreed.[85] In other words, it is possible for a special concurrence to deprive a plurality opinion of precedential value with respect to matters about which the concurring justice has expressed reservations.[86]

3. Opinions Concurring in Result Only

A "concurring in result only" opinion indicates agreement only with the decision (that is, the result reached) and a refusal to join in the majority's opinion. A separate opinion that "concurs in result only" can constitute the fourth vote necessary to establish a "decision" under the Florida Constitution,[87] but the effect in such a case is that there is no "opinion" of the Court and thus no precedent beyond the specific facts of the controversy at hand.[88] There may be cases in which a justice writes a "concurring in result only" opinion that also appears to agree with more than just the result. However, it seems doubtful that such an action could constitute the fourth vote needed to give the opinion validity as precedent.

4. Opinions Concurring in Part, Dissenting in Part

An opinion that "concurs in part and dissents in part" is commonly used to indicate disagreement with only one or some of the results reached by the majority opinion, but may also be used to show disagreement with part of the analysis, depending on what the separate opinion itself says. Where an opinion of this type establishes part of the Court's majority, a careful reading of the different opinions may be needed to ascertain the actual precedent of the case.[89]

5. Dubitante Opinions

The rarest category of separate opinions are those issued "dubitante,"[90] a notation expressing serious doubt about the case. Only one such opinion has been issued in the Court's history, although it is recent.[91] With this sparse usage, it still is not entirely clear in Florida whether a dubitante opinion should be regarded as a type of concurrence or dissent or something else,[92] or indeed, whether a dubitante opinion can constitute the fourth vote necessary to fulfill the constitutional requirement that four justices must concur in a decision.[93]

In the federal system, an opinion

designated "dubitante" at least sometimes appears to constitute a very limited form of concurrence,[94] and some federal judges have gone to the trouble of designating their opinions as "concurring dubitante."[95] At least one has issued a dubitante opinion that expressly concurred in part and dissented in part, although the author seemed to indicate doubts only as to the partial concurrence.[96]

In Georgia, the courts have sometimes issued "dubitante" dissents, apparently meaning dissenting views in which the author has serious doubt.[97] Thus, a "dubitante dissent" would seem to constitute a species of dissenting opinion less vigorous than a full dissent. However, there also seem to be times when an opinion marked merely "dubitante" is neither a dissent nor a concurrence, but an expression of doubts so grave that the judge or justice can neither agree nor disagree with the majority.[98] This probably is the best construction, for example, in those rare cases in other jurisdictions in which a judge votes "dubitante" without writing a separate opinion.[99]

Because of the still uncertain nature of dubitante opinions in Florida, the better practice would be for the authors to indicate whether they intend to concur, to dissent, or neither to concur nor to dissent. Perhaps a statement to that effect could be included in the text of the opinion.

In any event, a statement that the justice "concurs dubitante" certainly would seem necessary where the dubitante opinion is relied upon as the fourth vote needed to create a binding decision; but even then, it remains to be seen whether that concurrence would give the written opinion itself the value of precedent. Some diminished form of precedential value might be in order in such a situation, but only where it is clear from a careful reading of the different opinions that at least four members of the Court, in fact, have agreed on some rationale, not merely the result. Otherwise, there would be no court opinion, and the plurality's view would not create precedent beyond the case at issue.

6. Dissents

A "dissenting" opinion should be presumed to indicate a complete refusal to join with the majority's decision and opinion. A close reading of some dissenting opinions may disclose that the author actually only disagrees with part of the majority opinion.[100] Such a dissent could be read as though it were an opinion concurring in part and dissenting in part; but the fact that the justice has labeled the separate opinion as a full "dissent" almost certainly means the opinion could not constitute the fourth vote needed to create a binding court opinion or decision. As a result, it is doubtful that the dissenting justice should be viewed as joining the majority's views for any other purpose.

D. Per Curiam Opinions

At one time, the Florida Supreme Court followed the practice, still common in the district courts of appeal, of issuing very cursory opinions designated per curiam, with the identity of the author not disclosed. Historically, per curiam opinions came to imply short opinions devoid of a rationale. This was the general sense conveyed by the Court in 1956 when it defined the term per curiam as indicating "the opinion of the Court in which the judges are all of one mind and the question involved is so clear that it is not considered necessary to elaborate it by any extended discussion."[101] Some attorneys have ruefully noted the potential for abuse inherent in the power to issue such opinions,[102] because even a "clear" rationale helps no one if left unstated.

After the creation of the district courts of appeal and the later adoption of jurisdictional reforms, the traditional short per curiam opinion has fallen into disuse in the Florida Supreme Court.[103] The Court now seldom issues unsigned opinions devoid of an obvious rationale. The few that might qualify typically involve questions of law now fully resolved in a recently issued opinion, to which the lower courts and parties are referred. Instead, Florida Supreme Court per curiam opinions now have metamorphosed into something else all together. Increasingly, they are fully analyzed majority opinions whose authors simply are not identified. The news media typically call such cases "unsigned majority opinions."

There are a variety of reasons for not identifying the true author or authors.[104] One is because the author of the majority opinion actually disagrees with its analysis, an eventuality that can occur because of the Court's method of assigning cases.[105] Another reason is that portions of the opinion were written by more than one justice. As a matter of courtesy, justices usually avoid claiming credit for material partially written by another office. Such a per curiam opinion might be issued, for example, when a majority of the Court has not agreed with the full analysis of a proposed majority opinion and has decided to engraft onto that opinion part of a separate analysis prepared by another justice.

In other circumstances, the decision to make an opinion per curiam is left to the discretion of the justice whose offices originated the opinion. Subject to some exceptions, most Bar discipline cases and disciplinary actions against judges are now issued per curiam. The same is true of a good number of death cases, though by no means all.

There is no way for the public to know the reasons an opinion was issued per curiam and the justices and court staff are never permitted to publicly identify the true author. In any event, the fact that an opinion is issued per curiam by the Florida Supreme Court has no significant effect other than to identify the Court itself, and not any particular justices, as the author. Per curiam opinions bear the same status as any other opinion in which the justices have voted the same way.[106]

E. Role of the Chief Justice or Acting Chief Justice

The chief justice is Florida's highest ranking judicial officer, serving both as head of the Court and chief executive officer of the entire Florida judicial branch.[107] The chief justice presides at all official Court functions and governs the state court system through the machinery of the Office of State Courts Administrator. One of the chief justice's most significant powers in a legal sense is the ability to dispose of motions and procedural matters connected with pending cases.[108] This is a marked change from earlier court practice,

continued...

which required a meeting of the Court to consider motions. Today, some motions may be placed on the full Court's agenda for further guidance, particularly on controversial matters; but by far, most are handled by the chief justice alone.

Whenever the chief justice is absent or unable to act, the role of acting chief justice automatically falls upon the next most senior justice who is available. Most commonly, the Dean of the Court[109] is the acting chief justice, but on occasion so many members of the Court are absent that the duty descends to the more junior justices. The Rules of Judicial Administration also specify that the Dean of the Court automatically becomes acting chief justice if the sitting chief leaves office for any reason; but in that event, the Court is also required to promptly elect a successor to serve the balance of the unexpired term.[110] Each chief justice's term runs for a period of two years beginning and ending on July 1 of each successive even-numbered year.[111] Prior to the end of each two-year term, the Court must elect the chief justice who will serve during the next term. For some time now, the Court has followed a custom that has largely eliminated political considerations in the election. By a custom unbroken for more than a decade, the Court elects as chief justice the next most senior justice who has not yet held the office.[112] In the unlikely event that a time comes when all seven have served, the Court presumably would begin the rotation again, starting with the Dean of the Court.

One beneficial result of this rotation system is that it lessens the possibility that any particular justice or group of justices could gain indefinite control of the Court's executive functions. This is vastly different from the United States Supreme Court, where the Chief Justice is nominated by the President subject to Senate confirmation and is life-tenured. The Florida Supreme Court's customary rotation system creates a significant check and balance omitted from the constitution itself, which specifies only that the Court must choose a chief justice by majority vote.[113] By honoring the rotation system, the Court ensures that no particular ideological bent will continuously dominate the highest level of the state's judicial branch.

F. Role of the Other Justices

The power of the chief justice, however, is not limitless. Very significant powers reside in the Court as a body, particularly through the fact that all judicial opinions and many major administrative concerns require assent by at least four justices. Moreover, the chief justice alone cannot possibly supervise all of the various committees and Bar offices under the Court's control. The effect is that the Court in practice operates on a highly collegial basis, with all of the justices involved in some aspect of administration. Accordingly, the most effective chief justices tend to be those that build a consensus before taking actions affecting the Court and its governance.

Collegiality is expressed most noticeably in the fact that each justice is assigned a variety of supervisory duties. These include: oversight of the internal committees and offices that govern the Court; liaison responsibility with Bar organizations; and assignment to a variety of special commissions created, from time to time, to address questions of public policy involving the courts. For example, members of the Court have chaired or supervised public commissions charged with reforming guardianship laws, investigating gender bias in Florida's judiciary, and examining ways to eliminate racial and ethnic bias from the judicial system. Each of these commissions ultimately produced extensive proposals for reform, most of which now have been implemented by the Governor, the Legislature, and the courts.[114] To this extent, members of the Court use their offices to help effect changes in public policy beneficial to the state and consistent with the sound administration of justice.

G. Role of the Judicial Assistants, Law Clerks, & Interns

Because the justices' duties are so extensive, they could not possibly discharge their obligations without the help of a staff. Each justice accordingly is permitted to hire three staff members: a judicial assistant and two law clerks. The chief justice, with far greater responsibilities, is permitted to have three law clerks, one of whom is called an executive assistant. The latter's responsibilities can include both legal research and some administrative functions. In addition, the chief justice's office has a permanent staff of judicial assistants, a staff attorney, and an internal auditor, all of whom remain attached to the office through different administrations. Finally, the staffs of the justices are usually supplemented three times a year by an internship program that brings law students into the Court to act as research aides.

1. Judicial Assistants

In Florida's judiciary, secretaries of judges are called judicial assistants. Their duties vary from office to office, but almost always include supervising the flow of paperwork, keeping files, overseeing the justices' schedules, and dealing with correspondence and telephone calls. Members of the public who call individual justices almost always deal with the judicial assistant first. Judicial assistants are hired by and serve at the pleasure of their respective justices.

2. Law Clerks

As noted above, the duties of law clerks also vary among the offices, but they are usually responsible for conducting legal research for their justices. Many also have the primary responsibility of drafting opinions for their justices after receiving guidance from a court conference vote. In this situation, law clerks typically are told the result and analysis that should be used in the proposed majority opinion, but are given primary responsibility for conducting research and writing an opinion for the assigned justice to review, revise, or edit.

Opinion writing is a responsibility that can be both time-consuming and labor—intensive.[115] Few justices would be able to manage their schedules unless at least some opinion writing was conducted by their staffs. Partly as a result, members of

the Court have often chosen law clerks not merely based on academic performance in law school but also on proven writing ability, often demonstrated in prior professional careers.[116] The writing of legal opinions can be very exacting, if only because every majority opinion establishes legal precedent. Law clerks responsible for opinion writing, thus, must be able to master a style of English that is not merely formal, but very precise as well.

Because of this heavy responsibility, it is somewhat paradoxical that the common public image of law clerks is of young people freshly graduated from law school, with little real experience, who will leave to enter private practice after a year or two of clerking. At times the image has been borne out by reality. But the Florida Supreme Court throughout its history, and increasingly so today, has had a strong tendency to employ "permanent law clerks."[117] These most often are attorneys whose skills and temperaments especially suit the justices who employ them and who remain on staff indefinitely, at the pleasure of the justice. The vast majority of present justices have at one time or another employed such clerks.[118]

A number of factors have contributed to this tendency to keep "permanent law clerks." Perhaps the most significant is that the administrative and public responsibilities of the justices have so greatly increased in recent years that a poor choice of law clerks can be a serious liability. This has reinforced a tendency not to change staff once law clerks with demonstrable skills have been found. Another factor is that the legal job market that boomed in the 1980's has turned quite sour in the 1990's.[119] As a result, the competition for clerkships has increased drastically,[120] and those few hired as law clerks have a greater incentive to stay in their present jobs. Yet another factor is an increasing tendency among some young lawyers to steer away from the stress that can exist in private law firms.

3. Interns

The Court also supplements its staff with student interns who work on an unpaid basis during each of the three semester periods common in law schools. Internships vary in length but usually commence each August, January, and May. By longstanding arrangement, the Court accepts its August and January interns only from students selected by the faculty of the Florida State University College of Law in Tallahassee and these students in turn are given academic credit for their work at the Court.

Internships starting in May are potentially available to students from any law school and may be more or less informal in nature.[121] These interns serve on a purely volunteer basis and are responsible for their own expenses. Academic credit is available only if the students can make the necessary arrangements with their law schools.

Summer internships have become commonplace at the Court almost by a process of unguided evolution. They began sporadically and informally with a handful of students whose colleges would give them academic credit for summer work with government agencies. Now, summer internships have become a routine dominated by students who, despite good academic qualifications, have been squeezed out of paying summer jobs by the tight market of the 1990's.[122] Many law school placement officers are encouraging students to take volunteer summer jobs to gain experience rather than do nothing. This has resulted in greater demand for volunteer summer internships by well-qualified students. In response, the Court has gradually expanded the number of interns it takes each summer.

Job responsibilities of interns vary among the offices, but usually involve assisting the law clerks. Many offices have a structured program in which student interns are given increasingly more responsibility as they demonstrate aptitude. Very promising students may even be assigned to write a simple majority opinion under the close supervision of the assigned law clerk and the justice. Much of an intern's work, however, consists of more routine matters such as writing memoranda to the justice on petitions for jurisdiction, photocopying research material identified by law clerks, and writing memoranda to the law clerks on legal issues.

Perhaps the most valuable aspect of the Court's internship program is an insight into the Court's operation and an opportunity to work with a justice of the state's highest tribunal. An internship can be a strong credential. Moreover, a very significant number of former interns have gone on to find jobs as law clerks at the Florida Supreme Court or in other courts. Therefore, an internship can be an important stepping stone for a student interested in working as a law clerk after graduation. It is also a way in which the Court assists in educating succeeding generations of lawyers.

H. Ethical Constraints on the Justices & Their Staffs

The public, and even some members of the legal profession, do not fully appreciate the ethical constraints imposed upon judges and their staffs, including interns. Justices at the Court frequently receive letters from people asking that particular cases be decided certain ways or that judges should correct some perceived oversight in a case. On occasion, news reporters have even contacted judicial assistants or law clerks in an effort to learn the inside story about particular cases. Members of the public are sometimes offended when queries of this type go unanswered. However, the Court and its staff live under a very rigorous code of ethics that forbids them to comment in many instances.

1. Constraints on Justices

Perhaps the most common misunderstanding, especially among the lay public, is a widespread belief that judges or justices can be approached about their official duties in much the same way a governor, a legislator, or their respective employees can. However, the Constitution[123] and ethics codes[124] absolutely require that judges be and appear to be impartial. For that reason, judges and justices are not permitted to publicly discuss any aspect of pending or impending cases[125] and there are even restrictions regarding cases that have become final.[126]

In an effort to maintain the public image of impartiality, judges and jus-

continued...

tices are also required to maintain a broad detachment from politics. In a recent case, for example, the Florida Supreme Court determined that a judge or justice may be reprimanded for writing public endorsement letters of a candidate in a nonpartisan judicial election.[127] This conclusion was based on an ethics rule generally prohibiting a judge or justice from lending the prestige of the office to any political cause.[128] As a result, judges and justices are required to refrain from participation in most types of political activities beyond those necessary for their own judicial elections.

Even the personal finances of judges and justices are closely regulated. For example, they are not permitted to be involved in any business transactions that might reflect poorly on their impartiality or job performance.[129] They are required to divest themselves of investments that result in their frequent recusal in cases before the Court, such as where a judge or justice owns stock in a corporation that is a frequent litigant.[130] Gifts, loans, and favors are closely regulated[131] and some restrictions even apply to the finances of a judge or justice's family and household members.[132] Judges and justices must also file disclosures of their income, assets, and business interests.[133]

A battery of other ethical constraints imposed upon judges and justices are set out in considerable detail in the Code of Judicial Conduct. Moreover, the level of detail may be expanded by a revision of the Code still pending review at the time this article was being written. The revision focuses on restrictions on the political activities in which judges may participate.

Enforcing ethical constraints on justices of the Florida Supreme Court poses a unique problem because, in theory, the Court is the final arbiter of what is ethical and what is not.[134] As a result, the Florida Constitution has created special mechanisms to deal with alleged impropriety by a justice.[135] First, members of the Court are subject to inquiry by the Judicial Qualifications Commission ("JQC"), as are all Florida judges.[136] The JQC recommends proposed discipline for breaches of judicial ethics, subject to review by the Florida Supreme Court. However, when a justice of that court is being investigated, all sitting members of the Florida Supreme Court are automatically recused. Thereafter, the seven most senior chief judges of Florida's twenty judicial circuits automatically sit as temporary associate justices[137] to review the case and to impose discipline if appropriate. Discipline can include reprimand, suspension, or removal from office.[138]

Justices of the Court are also subject to impeachment and to removal by the Legislature. Grounds for impeachment are any misdemeanor in office as determined by a two-thirds vote of the State House of Representatives.[139] Once impeached, a justice is automatically suspended and the Governor can appoint a temporary replacement until completion of the trial.[140] Trial after impeachment occurs before the Florida Senate, and the justice being tried can be removed from office upon a two-thirds Senate vote. The Senate can also take the additional step of disqualifying the justice from holding any future Florida office,[141] though this requires an affirmative act and is not an automatic consequence of removal.[142]

The Florida Constitution specifies that the chief justice of the Florida Supreme Court must preside or choose another justice to preside over the Senate at all trials after impeachment.[143] Where the chief justice is under investigation, the Governor presides.[144] This mandatory language could lead to the problematic situation of a chief justice presiding over the trial of another justice. While the constitution is not entirely clear, it may be possible for the chief justice to appoint an impartial judge of a lower court as an associate justice solely for purposes of presiding over the Senate trial. Such an appointment would better ensure the impartiality of the presiding officer. In any event, a future revision of the Florida Constitution may be in order to address this problem.

2. Constraints on Justices' Staffs

Judicial assistants, law clerks, and court interns are subject to much the same ethical constraints imposed on justices, at least with respect to official matters on which they work.[145] For their tenure on the staff, these persons are effectively a kind of alter ego of the justice when dealing with the Court's official business. As a result, they are subject to the canons of judicial ethics in a derivative sense, though the JQC obviously lacks jurisdiction over persons who are not judges. However, it deserves emphasis that this conclusion applies only to official matters, not to all activities of staff members outside the Court.

Prior to 1992, many persons assumed that judicial staff members were subject to all of the constraints imposed upon the justices, even for matters conducted on personal time.[146] In May 1992, the Florida Committee on Standards of Conduct Governing Judges reinforced this interpretation in an advisory opinion concluding that judicial assistants were prohibited from engaging in partisan political activities, just as judges and justices are.[147] The Committee's conclusions obviously implied that all judicial staff members were subject to the canons of judicial ethics as though they themselves were judges.

This view, however, was rejected by the Florida Supreme Court in a court conference in the fall of 1992. At that time, the Court took the unusual step of overruling[148] the advisory opinion and issuing its own statement on the question. This occurred after some of the judiciary's employees voiced objections to the Committee's reasoning.

In its statement, the Court found that judicial staff members have a First Amendment right to engage in political activities provided this is done outside of Court, on personal time, and without reference to the judge or the judge's office.[149] In support of this conclusion, the Court said that members of a judge's staff are analogous to the spouses of judges, who have a right to engage in political activities using their personal time and resources.[150] This reasoning implies that staff members may be

treated the same as a judge's spouse in other contexts involving the use of free time, though the analogy obviously is not a perfect one[151] and could be less forceful outside the context of exercising free-speech rights.

A special variety of ethical problems commonly arises with respect to law clerks. Some law clerks decide to enter private practice after completing two or more years of work at the Court, and some firms have voiced confusion over the ethical standards that govern the process of hiring a law clerk. Obviously, a problem could develop if the hiring firm has any case pending before the Court. Thus, law clerks should generally disclose any possible conflict of interest to their justices.

To assist in proper disclosure to the justice, at first contact or soon thereafter, the firm should probably disclose to the law clerk all of its cases pending for review in the Court or that are likely to be pending, before employment negotiations are concluded.[152] At that time, the law clerk should discuss the matter with the justice, who should then segregate the law clerk from the disclosed cases if there is any possibility or appearance of a conflict of interest. At a minimum, the law clerk may not personally or substantially work on any of the disclosed cases during the pendency of negotiations for employment with the firm. Furthermore, the law clerk may be segregated even after negotiations end or fail if the justice deems it necessary.[153]

Upon leaving the Court, former law clerks must be segregated from working on any case involving matters in which the law clerk participated personally and substantially, except upon consent by all parties after disclosure.[154] A problem of this type might occur, for example, where the firm, after hiring the law clerk, acquires a client who had a case pending in the Court. Moreover, law clerks seldom can ethically reveal information learned at the Court, including the nature of their work assignments. Therefore, it would be wise for all involved parties to assume that the disqualification rule should apply to each of the firm's cases that were pending in the Court on the date of the law clerk's last employment there. In any event, if the former law clerk states that the disqualification rule applies in a particular case, the parties probably should not inquire as to the reasons why and former law clerks should not answer if asked.

Similar restrictions apply as to judicial assistants and interns, though problems are less frequent in this regard. Judicial assistants are fewer in number and do not change employment with the frequency more common for law clerks. Interns, meanwhile, are present at the Court for a few months at most and seldom are exposed to any but the most routine matters. However, both judicial assistants and interns should adhere to the rules applicable to law clerks if there is any possibility of a conflict of interest.

Interns, in particular, are routinely warned about conflicts that may be created by employment or negotiations for employment. For example, during their time at the Court, interns are not permitted to engage in part-time or volunteer work assisting anyone engaged in the practice of law. This is because all Court staff are prohibited from engaging in or providing support services for the practice of law, except in representing their own personal interests. Likewise, interns should disclose the fact that they are interviewing for jobs during their time at the Court and should not work on any matter in which their job prospects have an interest. Usually, the supervising law clerks regulate the interns' compliance with these ethical duties.

Enforcement of ethical constraints imposed on judicial staff differs from that used in the case of justices and judges. Ethical violations of a less serious nature typically are handled by the justice and can include reprimand or termination of employment. Serious violations also can result in contempt proceedings being brought, though only one such incident has occurred in the last few decades.[155] Any staff member who is an attorney is also subject to professional discipline by The Florida Bar, with penalties ranging from a private reprimand to disbarment. Student interns who plan to become licensed attorneys can be investigated for ethical breaches by The Florida Board of Bar Examiners, possibly resulting in a denial of licensure.[156]

I. Court Protocol

In its day-to-day operations, the Florida Supreme Court has followed a simple protocol that sometimes borders on the informal. The unifying factor of the protocol, and perhaps its most formal aspect, is a seniority system in which more senior justices outrank their colleagues, with the sitting chief justice always deemed most senior.[157] If more than one justice is appointed to the Court simultaneously, seniority is determined by reference to the appointee's prior career using a standard adopted in 1968.[158] Virtually every other aspect of business in the Supreme Court Building is governed by this seniority ranking.

Justices are listed according to seniority in court stationery, choose their office suites in the same order, and appear formally in public ranked from most senior to most junior. When the Court is in session the justices are seated with the chief justice presiding in the center, the next most senior justice placed to the immediate right, the next most senior justice placed to the immediate left, and so on until all are seated. Even the separate opinions attached to a majority opinion are ranked by reference to seniority.[159]

The seniority system also expresses itself in other ways. For example, a listing of justices in a publication should adhere to the system. However, formal public introductions reverse the seniority ranking on the premise that the most senior justices should be introduced last, giving them the "last word."[160]

Formal modes of addressing justices in writing have varied over time. However, in 1992, at the request of Allen Morris,[161] and through Justice Parker Lee McDonald, the Court established a few guidelines. The Court concluded that it would be appropriate in addressing correspondence to refer to the chief justice as "The Honorable (name), Chief Justice, Florida Supreme Court."[162] By analogy, letters addressed to other justices would be the same but with the word "Chief" omitted. The most common introductory salutation in a letter is "Dear Chief Justice (name)"

continued...

or "Dear Justice (name)."

A member of the Court should not formally be called "Judge (name)." In the Florida judiciary, the title "Justice" is given exclusively to members of the Florida Supreme Court[163] because the constitution clearly distinguishes "justices" from "judges" sitting on the state's lower tribunals.[164] Contrary to the practice in the United States Supreme Court, the term "Associate Justice" is not a proper title for any sitting member of the Florida Supreme Court. The term is not used in the constitution. "Associate Justice" is the temporary title given to judges of a lower court assigned for temporary service on the Florida Supreme Court.[165] Thus, the title should not be used in any context except when a judge is temporarily assigned to the Florida Supreme Court.

In less formal situations, or when addressing a justice verbally, the members of the Court usually are called simply "Justice (name)." For example, this has become the standard method of addressing a member of the Court during oral argument. In the late 1980s, the Court completely abandoned the use of the gender-specific titles "Madam Justice (name)" or "Mister Justice (name)" though a few attorneys still use these without incident.[166] The staff of the Florida Supreme Court commonly address a justice verbally with the single word "Judge," though this is an informal and familiar usage.

Justices who have retired from the Court commonly are addressed by the courtesy title "Justice," though this is not required and is subject to some ethical constraints. The courtesy title should not be used during the practice of law in which a former justice may be engaged except for purely biographical purposes. Nor should the title be used in any other context in which the title may create a false impression. The title "Chief Justice" can be used only with respect to a sitting chief justice of the Florida Supreme Court and is never used as a courtesy title.[167] Likewise, "Associate Justice" is never used as a courtesy title by lower court judges who previously have been temporarily assigned to sit on the Florida Supreme Court.

A few other matters of court protocol have been distilled into written form by Allen Morris, including details of the investiture ceremony for new justices[168] and protocol for funeral ceremonies of justices.[169] The Court generally has adhered to these two protocols. By tradition, the Court also generally has adhered to these two protocols. By tradition, the Court also lowers its flags to half-staff upon the death of any present or former justice.

J. The Clerk's Office

The vast majority of the Florida Supreme Court's contact with lawyers and the public occurs through the Office of the Clerk of the Court.[170] Briefs are filed through the Clerk, and virtually all routine communications with lawyers are handled by this office. Yet, the Clerk's staff does far more than just deal with the public. The Clerk, who serves at the pleasure of the Court,[171] is charged with the responsibility of maintaining all papers, records, files, and the official seal of the Court.

Moreover, the Clerk's staff maintains the Court's docket,[172] oversees the rigorous procedural requirements imposed on death penalty cases,[173] arranges the exact timing of oral argument,[174] and prepares finalized opinions for release to the public.[175] Orchestrating routine functions such as these requires considerable coordination among the lawyers, the parties, and the Court. All such matters are handled by the Clerk's Office,[176] and the workload is substantial. In 1992, the Clerk's Office filed dispositions in 1890 cases and opened files in 1844 new cases, in addition to handling 314 motions for rehearing.

K. The Florida Supreme Court Library

For its entire history, the Court has maintained its own law library, which consequently is the oldest state supported library in continuous operation in Florida. An 1845 catalog in the library's possession still lists the 260 volumes that comprised the Court's first collection in the year Florida was granted statehood. Today, the library maintains around 100,000 volumes along with some 10,000 monograph titles, 1400 serial titles, and 700 linear feet of archival and manuscript material.[177]

But the library has not lost touch with its considerable history. A number of rare Florida legal books are in the Court's collection, including Spanish texts that were of great importance in the years after the Spanish Crown ceded Florida to the United States.[178] The library also still retains and uses a large number of antique glass-fronted "barrister" book cases that have belonged to the Court since they were first purchased in 1913. These Globe-Wernicke sectional bookcases filled five railroad cars when originally delivered, prompting a proud headline in the October 3, 1913, edition of a Tallahassee newspaper, the *Weekly True Democrat*.[179]

The office of the Supreme Court librarian[180] has existed only since 1957, and the occupant serves at the pleasure of the Court. Beginning in 1862, the Clerk also wore the hat of "head" librarian, though from 1899 until 1957 a full-time assistant librarian was employed. The library is open to the public, but it does not circulate books. Its hours of operation are 8:00 a.m. to 5:00 p.m., Monday through Friday, although the stacks are available to Florida Supreme Court justices and staff at any time.

L. The Office of State Courts Administrator

One of the newest internal components of the Court is the Office of State Courts Administrator, which was created on July 1, 1972. Its initial purpose was to assist the Court in the technical and fiscal problems associated with preparing the operating budget of the judicial branch, as well as compiling statistics on the need for new judges and specialized court divisions throughout Florida. Today, the State Courts Administrator[181] also serves as the Court's liaison to a number of other agencies, including the Legislature, the Governor, auxiliary court agencies, and national judicial agencies. The Office oversees a variety of legal programs and continuing education for judges,[182] information systems used

by the courts,[183] and the judicial branch's accounting and fiscal activities.

M. The Marshal

The Court also appoints a Marshal[184] to be the custodian of the Supreme Court Building and grounds and to be the conservator of the peace in the building or any place where the Court is sitting. The Marshal is also authorized to execute the process of the Court throughout Florida. To this end, the Marshal is vested with constitutional authority to deputize the sheriff or a deputy sheriff in any Florida county.[185] The Marshal also is responsible for performing some court budgeting, purchasing and contracting, security, and property accountability and maintenance.

Next Issue: "The Supreme Court Series, Part III—The Jurisdiction of the Supreme Court"

Endnotes:

[1] Justice, Supreme Court of Florida 1987 to present; J.D., University of Miami, 1955; B.A., University of Miami, 1955. Justice Kogan is currently the Chief Justice of the Supreme Court of Florida.

[2] Law Clerk, Supreme Court of Florida, 1987 to present; J.D., University of Florida, 1986; A.B., Brown University, 1979. The authors express gratitude to the following persons for reviewing drafts of this article, providing information, or suggesting helpful revision: Clerk of the Florida Supreme Court Sid White and Chief Deputy Clerk Debbie Casseaux; Florida Supreme Court Librarian Joan Cannon and her staff; Florida Supreme Court Marshal Wilson Barnes and his Administrative Assistant, Linda Alexander; the Office of State Courts Administrator; Nancy Shuford and Deborah Meyer of Justice Kogan's staff; Jim Logue of the Florida Supreme Court staff; Susan Turner, and the law firm of Holland & Knight. Special thanks to Karl Schultz of the Court Administrators staff for providing statistical help on the Florida Supreme Court's docket. General research assistance was provided by Gary Lipshutz and Benjamin Pargman, students at the University of Florida College of Law.

[3] *See* Fla. Code Jud. Conduct, Canon 3 (West 1993).

[4] The current high-technology security barriers are a recent addition, dating only to the Fall of 1989. They were added as a result of violent attacks inside courtrooms that have occurred elsewhere in Florida and the nation, and because of threats received by some members of the Court. Prior to 1989, security was far more lax, and it was not unusual for persons to walk off the street and into a justice's office.

[5] *See* Sup. Ct. Manual of Internal Operating Procedures.

[6] Fla. R. Jud. Admin. 2.030.

[7] *E.g.*, Joseph A. Boyd, Jr., et al., *A History of the Florida Supreme Court*, 35 U. Miami L. Rev. 1019 (1981).

[8] Of course, it will be necessary to reiterate a few matters addressed in the Supreme Court Manual of Internal Operating Procedures in order to lay the groundwork for a discussion of the Court's unwritten procedures. The authors also note that there are some aspects of Court operations that are confidential for a variety of reasons. These will not be discussed here.

[9] Most routine releases of court-related information are handled by the Clerk of the Court or the staff of the Chief Justice.

[10] Fla. Const. art. I, § 9.

[11] The terms "pending" and "impending" convey an important distinction. A case is pending if it has been properly filed and is awaiting review. A case is impending if Court personnel have reason to suspect that it will eventually be filed for review.

[12] Fla. Code Jud. Conduct, Canon 3 (West 1993).

[13] *Id.*

[14] *E.g., Kerans v. Porter Paint Co.*, 575 N.E.2d 428 (Ohio 1991) (adopting analysis developed in *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So.2d 1099 (Fla. 1989)).

[15] 609 So.2d 588 (Fla. 1992).

[16] *Id.* at 589.

[17] The authors will not discuss the legal significance of the opinion, only the process by which it was shepherded through the Court. Nor will matters be discussed that fall within the secrecy of the Court.

[18] *In re T.A.C.P.*, 609 So.2d at 590-91.

[19] Justices and their staffs actually have a need to know this information, because the ethics codes applicable to them prohibit public comment on impending cases. The news accounts help put the Court on notice that silence now is required.

[20] *In re T.A.C.P.*, 609 So.2d at 591.

[21] *Id.* at 589.

[22] *In re Pearson*, No. 92-8255 (Fla. 17th Cir. Ct. Mar. 27, 1992).

[23] *In re T.A.C.P.*, No. 92-0942 (Fla. 4th DCA Mar. 27, 1992).

[24] *See* Fla. Const. art. V, § 3(b)(8). Original jurisdiction means simply that the case can be originated in the Florida Supreme Court without need of proceeding through a trial court first. Mandamus is discussed in the next installment of this article.

[25] *In re T.A.C.P.*, No. 79,581 (Fla. Mar. 30, 1992) (mem.).

[26] *In re Pearson*, No. 92-0942 (Fla. 4th DCA Mar. 30, 1992) (order); *see In re T.A.C.P.*, 609 So.2d at 589.

[27] Fla. Const. art. V, § 3(b)(5). This type of jurisdiction popularly is called "passthrough jurisdiction." *See Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1146 (Fla. 1985).

[28] The Florida Constitution creates a distinction between the terms "appeal" and "review." Appeals constitute those appellate cases in which the Florida Supreme Court must hear the case. *See* Fla. Const. art. V, § 3(b)(1), (2). Reviews are those appellate cases in which the Florida Supreme Court merely has discretionary jurisdiction. *See* Fla. Const. art. V, § 3(b)(3)-(6). The Court traditionally has observed another standard for judicial nomenclature relevant to the distinction between appeals and reviews. For appeals, the Court either affirms or reverses the decision below; for reviews, the Court either approves or quashes the decision below. By contrast, when the Court expressly agrees or disagrees with a decision other than the one below, the Court "approves" or "disapproves" the decision. On occasion, there may be lapses in the use of this nomenclature, but the convention now is well established as a matter of court custom.

[29] *Baby Without Viable Brain Dies, But Legal Struggle Will Continue*, *N.Y. Times*, March 31, 1992, at A14.

[30] *In re T.A.C.P.*, 609 So.2d at 589 n.2 (citing *Holly v. Auld*, 450 So.2d 217 (Fla. 1984)).

[31] By tradition, the Florida Supreme Court usually observes its regularly scheduled oral arguments during the first full business week of each month, with the exception of July and August when no oral argument usually occurs. However, the chief justice has discretion to schedule the regular oral argument calendar as may be necessary. For example, oral argument sometimes is scheduled for weeks in which the Monday or Tuesday is the last day of a month. Special oral arguments can be scheduled at other times by the chief justice, a practice that especially occurs when the Court deems oral argument necessary on a pending death warrant, in some requests for advisory opinions, in cases involving pressing constitutional questions, and in other emergency matters.

[32] The Florida Supreme Court traditionally observes a summer recess that usually occurs from the middle of July through the middle of August, but occasionally has been observed earlier or later. The suspension of a regular oral argument calendar in these two summer months is a traditional consequence of the summer recess.

[33] *In re T.A.C.P.*, 609 So.2d at 590 (citing David A. Stumpf, et al., *The Infant with Anencephaly*, 322 New Eng. J. Med. 669, 699 (1990)).

[34] The process of opinion writing and voting on cases is discussed more fully *infra* notes 39-58 and accompanying text.

[35] Fla. R. Jud. Admin. 2.085(d)(2).

[36] *See id.* In rare cases, the Court fractures so badly that no single justice is able to obtain the concurrence of three other justices in a decision, which the Florida Constitution requires for any decision to be binding. *See* Fla. Const. art. V, § 3(a). Release of any opinion thus may be delayed for unusually long periods of time while members of the Court seek a compromise. It is very rare, however, that the Court is completely unable to reach some decision in which at least four justices agree. When that happens, the Court's precedent holds that the lower-court opinion under review is automatically affirmed or approved for want of a majority or, if the Court's original jurisdiction is being invoked, the relief requested is deemed to be denied. Opinions issued in the absence of a four-member majority set no precedent and do not constitute a decision for legal purposes. *See State v. Hamilton*, 574 So.2d 124, 126 n.5 (Fla. 1991)(citing *Powell v. State*, 102 So. 652 (Fla. 1924)); *State ex rel. Albritton v. Lee*, 183 So. 782 (Fla. 1938); *Honaker v. Miles*, 171 So. 212 (Fla. 1936).

continued...

Thus, the doctrine of stare decisis does not apply to such cases.

[37] *In re T.A.C.P.*, 609 So.2d at 588.

[38] *Id.* at 589, 595.

[39] This article will not discuss the large volume of motions and petitions that are disposed without an opinion for lack of merit. For example, the Court receives numerous petitions for habeas corpus, mandamus, and similar extraordinary writs from Florida inmates. Relief is denied most of the time, but where the petition appears to have merit, the assigned justice (sometimes with the advice or consent of other justices) will order a response from the State. If the case still appears to have merit in light of the response, the Court then will accept jurisdiction, and the office to which the petition was originally assigned will usually be assigned to write the opinion. The process of opinion writing in such cases is essentially the same as in any other.

[40] *See infra* notes 70-73 and accompanying text.

[41] Some district courts of appeal, on the other hand, require clerks to include a recommendation as to disposition.

[42] Oral argument summaries, bench memoranda, and other documents associated with the preparation of a case are internal court documents and thus cannot be released to the public or any person not on the Court's staff. Violation of this rule is considered an ethical breach and can be punished by contempt of court. In 1974, for example, the Court ordered one of its law clerks to show cause why he should not be held in contempt for releasing copies of oral argument summaries to unauthorized persons. Based on the mitigating evidence, the Court withheld a contempt citation but publicly reprimanded the law clerk and placed him on probation for a period of two years under close supervision. *In re Schwartz*, 298 So.2d 355 (Fla. 1974).

[43] These preferences are by no means final. Justices frequently change their minds after giving a case more thought, after closer review of the record or the law, or after another justice proposes a method of analysis that seems more correct. On occasion, the Court has decided a case completely contrary to the initial conference vote, although such instances are the exception rather than the rule.

[44] *See* Fla. R. App. P. 9.800.

[45] Fla. R. App. P. 9.800(n) (referencing *Florida Style Manual*, 15 Fla. St. U. L. Rev. 137 (1987)).

[46] *See Report of the Florida Supreme Court Gender Bias Study Commission*, 42 Fla. L. Rev. 803 (1990).

[47] In the English language, plural pronouns are inherently gender-neutral.

[48] Fla. R. App. P. 9.210, 9.800.

[49] Per curiam opinions are discussed *infra* notes 101-06 and accompanying text.

[50] The possible votes vary slightly according to the kind of case.

[51] If a justice is out of town and there is a pressing need for a vote on the case, the justice by telephone may authorize a staff member to indicate the proper vote on the vote sheet.

[52] These votes mean precisely what they say. "Concur" indicates a full acceptance of the majority opinion and decision. "Concur in result only" indicates an acceptance only of the decision, and a refusal to join in the analysis expressed in the opinion. Dissent indicates a refusal to join in either the decision or opinion. Members of the Court usually do not vote "specially concur" or "concur in part and dissent in part" unless they also write a separate opinion, although there are exceptions even here. *E.g., Maison Grande Condominium Ass'n, Inc. v. Dorten, Inc.*, 600 So.2d 463, 465 (Fla. 1992)(McDonald, J., concurring in part, dissenting in part). Moreover, in death penalty cases, each justice votes separately as to conviction and sentence. Therefore, a justice can concur as to the conviction but dissent as to the sentence without writing a separate opinion. *E.g., Maharaj v. State*, 597 So.2d 786, 792 (Fla. 1992)(McDonald, J., concurring as to conviction, dissenting as to sentence). Though less common, justices also may vote separately as to punishment in cases of attorney discipline. *E.g., The Florida Bar v. Morse*, 587 So.2d 1120, 1121 (Fla. 1991)(McDonald, J., concurring as to guilt, dissenting as to punishment).

[53] *See* discussion *infra* part II.C.

[54] Conference agendas are produced by the office of the chief justice.

[55] For example, a justice may have written a separate dissenting opinion that clearly reflects the views of at least four members of the Court. In such cases, the Court's majority and the chief justice may agree informally among themselves that the author of the dissent will simply recast the dissent as a majority and circulate it to the full Court without need for a conference discussion. In that case, the now-failed "majority" opinion may be recast as a dissent.

[56] This is not true, however, of some emergency cases such as collateral challenges by death-row inmates scheduled for execution. When some urgency is involved, the chief justice has discretion to order opinions released at any time after voting is finalized and the justices have resolved any differences as fully as is possible.

[57] Opinions are not issued during the Court's summer recess, except for opinions already finalized that could not be released before recess began. Opinions also are not released if none are available, an event common immediately after recess ends.

[58] The Court routinely notes that it will not entertain motions for rehearing or clarification in cases requiring immediate finality, such as cases in which a death warrant is pending, or after an opinion has been revised upon the granting or denial of a motion for rehearing or clarification.

[59] The term "no request" refers to the fact that the Court has made no request for oral argument by the parties. In appropriate cases, it may also refer to the fact that the parties themselves have not requested oral argument. There is no absolute right to oral argument in any case, although the Court's manual of internal operating procedures requires that oral argument always be scheduled in every appeal from a judgment imposing a death sentence. Sup. Ct. Manual of Internal Operating Procedures § II(B)(3).

[60] There are exceptions to the random assignment process, most commonly, where a number of cases all pose the same issue. In such circumstances, all the cases may be assigned to the same office.

[61] The use of this memorandum process in more controversial "no request" cases is a recent innovation introduced by Justice Stephen Grimes and modeled after a similar procedure used when he was a member of the Second District Court of Appeal.

[62] "No request" cases are prepared for release in the same manner as other cases.

[63] Although habeas corpus and Rule 3.850 have some differences, the Court has held that the latter is a procedural vehicle for providing relief otherwise available through habeas corpus. *State v. Bolyea*, 520 So.2d 562, 563 (Fla. 1988).

[64] Sup. Ct. Manual of Internal Operating Procedures § II(B)(3).

[65] Because of the Florida Supreme Court's mandatory role in reviewing death cases, the Governor, by long-standing tradition, does not sign death warrants to be effective during the time when the Court will be in its summer recess. *See* Fla. Const. art. V, § 3(b)(1), (9) (requiring the supreme court's review of death penalty cases).

[66] All records of death-row inmates remain stored in the Florida Supreme Court's vaults or in the Florida Archives located across the street from the Supreme Court Building, and are thus readily accessible to the staff.

[67] The law clerk's presence may be especially important if there is any concern that a legal issue might be raised at the last minute.

[68] *See* Fla. Const. art. V, § 3(b)(9). Of course, the full Court could probably dissolve any stay improvidently granted. *See id.*

[69] For example, Florida's electric chair malfunctioned during the execution of Jesse Tafero in 1990, resulting in unusual generation of heat and the need to pass electric current through Tafero's body three separate times. This malfunction was reported back to the full Court by the justice assigned to be present in the Supreme Court Building during the execution.

[70] *E.g., Florida House of Representatives v. Martinez*, 555 So.2d 839 (Fla. 1990); *The Florida Senate v. Graham*, 412 So.2d 360 (Fla. 1982).

[71] *In re Advisory Opinion to the Governor*, 509 So.2d 292 (Fla. 1987).

[72] *In re Emergency Petition to Extend Time Periods Under All Fla. Rules of Procedure*, No. 80,387 (Fla. Sept. 2, 1992) (emergency rulemaking related to Hurricane Andrew).

[73] Emergency cases are thus an exception to the Court's random assignment system. The chief justice has broad discretion over these assignments, subject as always to the will of the full Court, but often may assign the case to an office with special expertise in the field or one that is most current in its workload.

[74] Records of the Clerk of the Court show that of the 3186 opinions filed between January 1, 1986, and September 30, 1992 seventy percent were unanimous.

[75] See *Ephrem v. Phillips*, 99 So.2d 257 (Fla. 1st DCA 1957). It is worth noting, however, that dissents often contain statements that are "dissent dicta" because they exceed

the scope of what the majority is deciding. A majority opinion should not be read as rejecting extraneous dissent dicta, but only as rejecting anything in the dissent contrary to what the majority has actually said. There are occasions when dissent dicta may later be embraced by a majority without overruling any prior opinion. Some attorneys erroneously assume that the majority necessarily has rejected everything stated in a dissent.

[76] *Greene v. Massey*, 384 So.2d 24 (Fla. 1980).

[77] *See, e.g., In re Forfeiture of 1976 Kenworth Tractor Trailer Truck*, 576 So.2d 261, 262-63 (Fla. 1990)(applying *Wheeler v. Corbin*, 546 So.2d 723, 724-26 (Fla. 1989)(Ehrlich, C.J., concurring)).

[78] *E.g., Pullum v. Cincinnati, Inc.*, 476 So.2d 657, 659 (Fla. 1985), *receding from Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1980). In *Pullum*, the Court expressly embraced Justice McDonald's dissent in *Battilla*, 392 So.2d at 874-75 (McDonald, J., dissenting).

[79] Many people erroneously view stare decisis as rigidly inflexible. The Court, however, has held that stare decisis is not an ironclad, unwavering rule that the present must bend to the dead voice of the past, however outmoded or meaningless; rather, it is a rule that precedent will be followed except when departure is necessary to vindicate other principles of law or to remedy continued injustice. *Haag v. State*, 591 So.2d 614 (Fla. 1992). In a similar vein, the Court has said that the common law will not be altered or expanded unless demanded by public necessity or to vindicate fundamental rights. *In re T.A.C.P.*, 609 So.2d 588 (Fla. 1992). Although attorneys sometimes argue that only the Legislature can change the common law, the Court in actuality has not hesitated to change the law when proper reasons exist to do so, at least where the Legislature has taken no action on the precise subject. *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130, 132 (Fla. 1957); *see, e.g., Waite v. Waite*, 618 So.2d 1360 (Fla. 1993)(abrogating common law doctrine of interspousal immunity); *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973)(abrogating common law doctrine of contributory negligence). "Common law," of course, refers to law that has arisen from the customary practices of the courts of Florida and their predecessors, which exists in its most authoritative form when embodied in the written opinions of the Florida Supreme Court. Once common law is codified within a legislative enactment, the Court is far more hesitant to overrule it, because of the doctrine of separation of powers. *See* Fla. Const. art. II, § 3.

[80] *See* Fla. Const. art. V, § 3(a). There is a distinction between the terms "decision" and "opinion." The decision is the court's judgment — *i.e.*, the specific result reached. Whereas, the opinion is the written document explaining the reasons for the decision. *Seaboard Air Line R.R. Co. v. Branham*, 104 So.2d 356 (Fla. 1958). Thus, so long as at least four members of the Florida Supreme Court agree on the decision, it is irrelevant that no similar agreement was reached regarding a written opinion. Similarly, at least four justices must concur in an opinion for it to have any precedential value beyond the case at hand. *Greene v. Massey*, 384 So.2d 24 (Fla. 1980). However, the word "decision" may have a different meaning in the context of the Florida Supreme Court's jurisdiction over particular categories of "decisions."

[81] Such reservations, depending on their strength, may give the concurrence the appearance of actually being a special concurrence or a concurrence in result only. However, the fact that the author has chosen to concur necessarily implies a greater sense of agreement with the majority view. However, attorneys and lower courts may still legitimately take note of any reservations expressed in a concurrence, especially where they may indicate that at least four justices have not agreed on a relevant point.

[82] Members of the Court sometimes label this type of separate opinion "concurring specially." This label is synonymous with "specially concurring." The transposition is a matter of each individual justice's preference.

[83] *E.g., Public Health Trust of Dade County v. Wons*, 541 So.2d 96, 98-102 (Fla. 1989)(Ehrlich, C.J., concurring specially).

[84] Fla. Const. art. V, § 3(a).

[85] An example of such a case is *In re T.W.*, 551 So.2d 1186 (Fla. 1989), in which Chief Justice Ehrlich specially concurred but expressed reservations about certain points in the plurality's analysis.

[86] *See id.* A word of caution is in order here. It is easy and common, though not actually correct, for courts and lawyers to overlook the fact that a specially concurring opinion has expressed reservations about some legal point. For example, Chief Justice Ehrlich's special concurrence in *In re T.W.* expressed reservations about the plurality opinion, yet few courts later analyzing *T.W.* seemed much concerned with that fact. Indeed, few have even noted that *T.W.* was merely a plurality opinion; and at least one court has ignored Chief Justice Ehrlich's special concurrence, even where his comments actually supported the result being reached. *See Jones v. State*, 619 So.2d 418 (Fla. 5th DCA 1993).

[87] Fla. Const. art. V, § 3(a). For an example of a case in which the fourth vote concurred in result only, *see Dougan v. State*, 595 So.2d 1 (Fla. 1992). The result is that there is a decision in *Dougan*—in other words, a result in which at least four justices concurred—but no court opinion.

[88] *See Greene*, 384 So.2d at 24.

[89] The Florida Supreme Court has not consistently followed the United States Supreme Court's practice of dividing opinions into numbered sections, in which members separately can indicate agreement or disagreement. There are exceptions, *e.g., Traylor v. State*, 596 So.2d 957 (Fla. 1992), but most opinions of the Florida Supreme Court are not divided in this manner. This means that a careful reading may be necessary to determine the actual majority position; and in some cases, the true majority view simply may be unclear. However, the Florida Supreme Court's practice has the grace of avoiding the fractured opinions sometimes found in the United States Supreme Court, in which two or more justices may separately write and sign parts of opinions that collectively constitute the "majority" view.

[90] The term "dubitante" means doubting. *Black's Law Dictionary* 499 (6th ed. 1990).

[91] *In re Constitutionality of Senate Joint Resolution 2G*, 601 So.2d 543, 549 (Fla. 1992)(Barkett, J., dubitante). It should be noted that other separate opinions have been written that in effect constituted a species of dubitante opinion, but without using the designation "dubitante." *E.g., Johnson v. Singletary*, 612 So.2d 575, 577-81 (Fla. 1993)(Kogan, J., specially concurring).

[92] The single instance in which a dubitante opinion was issued in Florida suggests that it indicated neither a concurrence nor dissent, but rather a statement of complete doubt as to the disposition of the case. *See In re Constitutionality of Senate Joint Resolution 2G*, 601 So.2d at 549.

[93] *See* Fla. Const. art. V, § 3(a).

[94] Indeed, some federal judges have marked their separate opinions with the heading "concurring" but have indicated in the text that the opinion is "dubitante." *New York v. Halvey*, 330 U.S. 610, 619 (1947)(Rutledge, J., concurring); *see also Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 403 (1967)(Douglas, J., dubitante); *Radio Corp. v. United States*, 341 U.S. 412, 421 (1951)(Frankfurter, J., dubitante).

[96] *E.g., Feldman v. Allegheny Airlines*, 524 F.2d 384, 392-93 (2d Cir. 1975)(Friendly, J., concurring dubitante).

[96] *United States v. Walker*, 9 M.J. 892, 894 (A.F.C.M.R. 1980) (Mahoney, J., dissenting in part, concurring in part, & dubitante).

[97] *E.g., Kelleher v. State*, 371 S.E.2d 450, 451 (Ga. Ct. App. 1988) (Deen, P.J., dissenting dubitante); *City of Fairburn v. Cook*, 372 S.E.2d 245, 255 (Ga. Ct. App. 1988)(Deen, P.J., dissenting dubitante).

[98] *See In re Constitutionality of Senate Joint Resolution 2G*, 601 So.2d at 549.

[99] *Adams v. Williams*, 838 S.W.2d 71, 73 (Mo. Ct. App. 1992) (Crandall, J., dubitante). In the absence of a written opinion, it is impossible to tell what the author's views were, other than an expression of doubt.

[100] *E.g., In re T.W.*, 551 So.2d 1186, 1204-05 (Fla. 1989) (McDonald, J., dissenting) (dissenting opinion agreeing with part of plurality's rationale).

[101] *Newmons v. Lake Worth Drainage Dist.*, 87 So.2d 49, 50 (Fla. 1956).

[102] Toby Buel, *Conflict Review in the Supreme Court of a District Court of Appeal Per Curiam Decision*, 56 Fla. B.J. 849 (1982).

[104] The bulk of the Florida Supreme Court's jurisdiction now is discretionary, in which case the Court has authority simply to deny jurisdiction. This is vastly different than the situation that existed when the supreme court was Florida's only appellate tribunal, with much broader mandatory jurisdiction.

[104] Members of the Court, including the true author, still must indicate their votes regarding a per curiam opinion, and those votes are recorded with the published opinion. There is no anonymity in this sense. Moreover, only a majority opinion can be issued per curiam. The Court has never issued, for example, per curiam dissents or concurrences.

[105] *See supra* text accompanying note 49.

[106] *See Newmons*, 87 So.2d at 49.

[107] Fla. Const. art. V, § 2(b).

[108] Fla. R. Jud. Admin. 2.030(a)(2)(B)(ii).

[109] The present Dean is Justice Ben F. Overton.

[110] Fla. R. Jud. Admin. 2.030(2).

[111] *Id.*

continued...

[112] The custom actually predates the 1980s but was interrupted during the 1970s when some members of the Court were under investigation for alleged improprieties. The custom resumed in 1984 with the election of Justice Joseph A. Boyd, Jr.

[113] Fla. Const. art. V, § 2(b).

[114] *E.g.*, *Report of the Florida Supreme Court Gender Bias Study Comission*, 42 Fla. L. Rev. 803 (1990).

[115] As a result, law clerks, at a minimum, must have a law degree before the date they begin work. The Court previously required admission to The Florida Bar soon after law clerks began work, but this requirement was dropped as part of the job description in the mid-1980s. Justices, however, remain free to require Bar membership if they desire, and pay scales overwhelmingly favor those who have Bar membership. As a result, only rarely are law clerks not members of The Florida Bar.

[116] Florida Supreme Court law clerks, for example, have included former journalists, former law professors, and former assistant prosecutors.

[117] Law clerks are not permanent in the sense of having a job with civil service-style protections. Rather, these law clerks, at the request of their justices, agree to stay for some indefinite period beyond the two-year minimum commitment typically required by each justice at the time the law clerk is hired.

[118] Of the fifteen law clerks employed by justices in the summer of 1993, eight had been employed indefinitely. One of these eight had worked for the same justice for more than a decade, while four others had worked as law clerks in excess of five years each. Very long clerkships have not been uncommon. One former law clerk remained employed in that capacity for fourteen years before leaving to enter private practice.

[119] In the mid-1980's, for example, it was common for nearly every Florida law student to have been hired for a job by the time of graduation. Now, it is common for half or more of a graduating law school class to still be looking for work after graduation.

[120] Members of the Court now receive applications from law students throughout the United States on a nearly continuous basis. Many are students with top credentials.

[121] Application is usually accomplished by the student sending in a cover letter, resume, and writing sample to a justice at the court, in late winter or early spring, prior to the summer in question. Standards for these internships vary from office to office, as do the number of interns that will be accepted. Some offices take only one intern, while others take two or three.

[122] In the mid-1980s, for example, it was very common for students to be employed as summer associates in law firms. Top students could often earn thousands of dollars in a single summer and even mediocre students could earn respectable salaries. As the market for legal services has soured, many law firms have been forced to sharply curtail or even to eliminate their summer associate programs.

[123] U.S. Const. amend. XIV; Fla. Const. art. I, § 9.

[124] Fla. Code Jud. Conduct, Canons 2, 3 (West 1993).

[125] *Id.* at 3A.(6).

[126] These include, for example, the fact that matters were discussed at Court conference, the content of unpublished draft opinions, and the Court's initial vote or changes in votes prior to release of an opinion.

[127] *See In re Inquiry Concerning a Judge, Hugh S. Glickstein*, 620 So.2d 1000 (Fla. 1993); *see also In re Code of Judicial Conduct (Canons 1, 2, and 7A(a)(b))*, 603 So.2d 494 (Fla. 1992).

[128] Fla. Code of Jud. Conduct Canon 7 (West 1993).

[129] *Id.* at 5C.(1).

[130] *Id.* at 5C.(3).

[131] *Id.* at 5C.(4).

[132] *Id.* at 5C.(5).

[133] Fla. Code Jud. Conduct, Canon 6B.(1) (West 1993).

[134] The Court itself promulgates the ethics rules. *See* Fla. Const. art. V, § 2(a).

[135] *See* Fla. Const. art. V.

[136] *Id.* § 12.

[137] The significance of the term associate justice is discussed *infra* note 165 and accompanying text.

[138] Fla. Const. art. V, § 12(b).

[139] *Id.* art. III, § 17(a); *see also Forbes v. Earle*, 298 So.2d 1 (Fla. 1974).

[140] Fla. Const. art. III, § 17(b).

[141] *Id.* § 17(c).

[142] *Smith v. Brantley*, 400 So.2d 443 (Fla. 1981).

[143] Fla. Const. art. III, § 17(c).

[144] *Id.*

[145] Fla. Code Jud. Conduct, Canon 3B.(2) (West 1993).

[146] *See* Scott D. Makar, *Judicial Staff and Ethical Conduct*, Fla. B.J., Nov. 1992, at 10.

[147] *See* Harvey L. Goldstein, Chairman, Committee on Standards of Conduct Governing Judges, Advisory Opinion 92-33 (Aug. 14, 1992).

[148] The Court has traditionally used a somewhat unusual method of overruling advisory opinions of the Committee on Standards of Conduct Governing Judges. This is something that, in any event, is rarely done. If any member of the Court disagrees with the advisory opinion, the matter is discussed in a Court conference and a vote may be taken. If a majority of the Court agrees, a statement is prepared overruling the advisory opinion and that statement is then placed in the official minutes of the Court. At this time, the Clerk of the Court notifies the Committee chair of the Court's action and transmits a copy of the relevant portion of the minutes to The Florida Bar *News* for publication. The act of overruling the advisory opinion in this manner obviously does not constitute a decision of the Court and, for that reason, is not absolutely binding. But the Court's statement is highly persuasive and one from which the Court is unlikely to depart if discipline were attempted for some alleged ethical breach.

[149] Florida Supreme Court Conference, Minutes of Meeting (Sept. 8, 1992) (on file with Court).

[150] *Id.*

[151] It is unlikely, for example, that the financial activities of a judge or justice's judicial assistant would create a substantial conflict of interest. The financial activities of the judge or justice's spouse could.

[152] This should include any case in which the firm has an interest in its own right or as counsel to a party.

[153] R. Regulating Fla. Bar 4-1.12(b).

[154] *Id.* at 4-1.12(a).

[155] *See supra* note 42.

[156] The Florida Board of Bar Examiners routinely sends detailed questionnaires regarding former interns to the justices and their staffs. The questions probe such matters as the intern's thoroughness, promptness, work ethic, background, and personal problems. If the answer to any question raises a concern about fitness to practice law, the Bar Examiners will investigate further.

[157] Except for the chief justice, seniority is determined according to the order of appointment to the Court. Upon ceasing to be chief justice, members of the Court revert to the seniority they otherwise would have had.

[158] *See* Florida Supreme Court, minutes of meeting (Jan. 12, 1987) (on file with the Court). On October 14, 1968, the Florida Supreme Court adopted the following resolution:
BE IT RESOLVED:

Seniority on this Court shall be determined by length of continuous service on this Court:

In the event more than one Justice assumes office on this Court at the same time, seniority of such Justices shall be determined in the following manner:

1. Former Justices of this Court;

2. Judges or former Judges of the District Courts of Appeal. Seniority of such District Court Judges shall be based upon the length of continuous service;

3. Judges or former Judges of the Circuit Court. Seniority of such Circuit Court Judges shall be based upon the length of continuous service;

4. Judges or former Judges of other courts of record of this State. Seniority of such Judges shall be based upon the length of continuous service;

5. Lawyer[s] without former judicial experience. Seniority of such lawyers shall be determined by length of time they have been admitted to The Florida Bar.

This Resolution shall become effective immediately.

This policy was reaffirmed on January 12, 1987, when two justices assumed office simultaneously. Because one of these justices had served on a district court, he was accorded a higher seniority than the other, who had served on a circuit court.

[159] As a general rule, separate opinions are divided into the six separate categories and, within each category, are then ranked according to the author's seniority.

[160] Allen Morris, *Practical Protocol For Floridians* (Revised) 77 (1988).

[161] Clerk-Emeritus/Historian, Florida House of Representatives.

[162] Letter from Justice Parker Lee McDonald, Florida Supreme Court to Allen Morris, Clerk-Emeritus/Historian, Florida House of Representatives (Nov. 2, 1992) (on file with author).

[163] *Id.*

continued, page 28

The Florida Bar Continuing Legal Education Committee, the Appellate Practice & Advocacy Section and the Government Lawyer Section present

Hot Topics in Florida Appellate Practice

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentations:
November 21, 1996—Tampa • November 22, 1996—Miami

Video Replays:
December 17, 1996 – January 16, 1997
Eight Locations

Course No. 7742R

This program will address the "hot" issues facing today's appellate practitioner, and will feature many outstanding speakers, including two Florida Supreme Court justices, and appellate judges from four of the five district courts of appeal. The seminar will provide participants with a comprehensive examination of the recent changes to Florida's appellate rules, as well as a review of current legislation affecting criminal appeals. Participants will also receive valuable insight into the professional standards governing appellate practitioners, and obtain useful information on other pressing topics in appellate practice.

8:30 a.m. – 8:55 a.m.
Late Registration

8:55 a.m. – 9:00 a.m.
Opening Remarks

9:00 a.m. – 11:00 a.m.
Appellate Rules Update
• ***General Overview***
The Honorable Larry A. Klein
Fourth District Court of Appeal
• ***Workers' Compensation and Administrative Appellate Rules***
The Honorable Marguerite H. Davis
First District Court of Appeal
• ***Juvenile Appellate Rules***
The Honorable Gerald B. Cope, Jr.
Third District Court of Appeal
• ***Criminal Appellate Rules***
Thomas D. Hall
Tallahassee, Florida

11:00 a.m. – 11:15 a.m.
Break

11:15 a.m. – 12:05 p.m.
The New Criminal Appeals Reform Act of 1996
Nancy A. Daniels
Tallahassee, Florida

12:05 p.m. – 1:10 p.m.
Lunch (on your own)

1:10 p.m. – 2:00 p.m.
Ethics and Professionalism in the Appellate Arena
Justice Harry Lee Anstead
Florida Supreme Court (Miami only)
Justice Charles T. Wells
Florida Supreme Court (Tampa only)

2:00 p.m. – 2:30 p.m.
Appellate Attorneys' Fees
Lauri Waldman Ross
Miami, Florida

2:30 p.m. – 2:45 p.m.
Break

2:45 p.m. – 3:35 p.m.
The Uses—and Misuses—of Extraordinary Writs
The Honorable Jacqueline R. Griffin
Fifth District Court of Appeal

3:35 p.m. – 4:05 p.m.
Appellate Mediation—A New Frontier
Donna Riselli Gebhart
Mediation Officer
First District Court of Appeal

4:05 p.m. – 4:35 p.m.
Appellate Certification
Benedict P. Kuehne
Miami, Florida

CLER PROGRAM
(Maximum Credit: 7.0 hours)
General: 7.0 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM
(Maximum Credit: 4.0 hours)

Appellate Practice	3.5 hours
Criminal Appellate	3.5 hours
Criminal Trial	3.5 hours
Civil Trial	3.5 hours
Workers' Compensation	.5 hour

Credit may be applied to more than one of the programs above but cannot exceed the maximum for any given program. Please keep a record of credit hours earned. RETURN YOUR COMPLETED CLER AFFIDAVIT PRIOR TO CLER REPORTING DATE (see Bar *News* label). (Rule Regulating The Florida Bar 6-10.5).

REGISTRATION / REFUND POLICY

Requests for refund or credit towards the purchase of audio/videotapes of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable. A $15 service fee applies to refund requests.

Register me for "Hot Topics in Florida Appellate Practice" Seminar

TO REGISTER OR ORDER TAPES/BOOKS, MAIL THIS FORM TO: The Florida Bar, CLE Programs, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 904/561-5831. ON SITE REGISTRATION, ADD $10.00. **On-site registration is by check only.**

Name _____ Florida Bar # _____
Cannot be processed without this number.

Address _____

City/State/Zip _____
(JW) **Course No.: 7742 R**

METHOD OF PAYMENT: ❑ Check Enclosed (Payable to The Florida Bar) ❑ Credit Card (Advance Registration Only)
____MASTERCARD / ____VISA

Name of Cardholder _____ Card No. _____

Expiration Date _____ /_____(mo./yr.) Signature _____

❑ Member of the Appellate Practice & Advocacy or Government Lawyer Section: $115.00
❑ Nonsection member: $130.00
❑ Full-time law college faculty or full-time law student: $65.00

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

I plan to attend (check one):

__ (049) **Tampa*** ** (Airport Marriott) (11/21/96)
__ (024) **Miami**** (Hyatt Regency) (11/22/96)
__ (068) **Orlando*** (Downtown Marriott) (12/17/96)
__ (227) **Ft. Lauderdale*** (Sheraton Suites Plantation) (12/18/96)
__ (042) **Sarasota*** (Hyatt) (12/19/96)
__ (054) **Tallahassee*** (The Florida Bar) (01/02/97)
__ (184) **Ft. Myers*** (Lee County Justice Center) (01/09/97)
__ (232) **West Palm Beach*** (Palm Beach County Bar) (01/10/97)
__ (154) **Jacksonville*** (Omni) (01/10/97)
__ (040) **Pensacola*** (Escambia/Santa Rosa Bar Assn.) (01/16/97)

COURSE BOOKS—AUDIO/VIDEOTAPES

Private taping of this program is not permitted.

Delivery time is 4 to 6 weeks after November 22, 1996. PRICES BELOW DO NOT INCLUDE TAX.

_____ COURSE BOOK ONLY: Cost $20.00 plus tax TOTAL $_____

_____ AUDIOTAPES (includes course book)
Cost: $85.00 plus tax (section member), $90.00 plus tax (nonsection member) TOTAL $_____

_____ VIDEOTAPES (includes course book)
Cost: $150.00 plus tax (section members), $160.00 plus tax (nonsection members) TOTAL $_____

CLE credit is not awarded for the purchase of the course books only.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course books must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

E091696B.PM6

The Florida Bar Appellate Practice and Advocacy Section presents

Per Curiam Affirmances: A Roundtable Discussion

January 23, 1977 • Crowne Plaza Hotel • Miami

Course No. 1027 7R

This program will feature a roundtable discussion of per curiam affirmances, including why courts use them, what types of cases they are used in, what alternatives the courts have to meet the same objectives, the use of citation PCAs, frustrations that practitioners have with them, and what a practitioner can/should do upon receipt of a unfavorable PCA. The panel will consist of two DCA judges, two former DCA judges who have returned to private practice, and two current appellate practitioners.

4:00 p.m. - 6:00 p.m. — Roundtable Discussion 6:30 p.m. - 7:30 p.m. — Reception (Cash Bar)

CLER PROGRAM
(Maximum Credit: 2.5 hours)
General: 2.5 hours

CERTIFICATION PROGRAM
(Maximum Credit: 1.0 hour)
Appellate Practice: 1.0 hour
Civil Trial: 1.0 hour
Criminal Appellate: 1.0 hour

Credit may be applied to more than one of the programs above but cannot exceed the maximum for any given program. Please keep a record of credit hours earned. RETURN YOUR COMPLETED CLER AFFIDAVIT PRIOR TO CLER REPORTING DATE (see Bar *News* label). (Rule Regulating The Florida Bar 6-10.5).

REFUND POLICY: Requests for refund **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable. A $5 service fee applies to refund requests.

Register me for "Per Curium Affirmances: A Roundtable Discussion"

1\23\97, Crowne Plaza, Miami.
TO REGISTER MAIL THIS FORM TO: Jackie Wemdli, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 904/561-5623. ON SITE REGISTRATION, ADD $10.00. **On site registration is by check only.**

Name _____ Florida Bar # _____
Cannot be processed without this number.

Address _____

City/State/Zip _____

(JW) **Course No:1027 7R(AP007)**

METHOD OF PAYMENT: ☐Check Enclosed (Payable to The Florida Bar) ☐Credit Card (Advance Registration Only)
____ MASTERCARD / ____ VISA

Name of Cardholder _____ Card No. _____

Expiration Date _____ (Yr./Mo.) Signature _____

☐ Registration fee: $15
☐ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

[164] *See* Fla. Const. art. V.

[165] Fla. R. Jud. Admin. 2.030(g). Temporary assignments are made, for example, when a quorum of the Court is not available. Id.

[166] This change dates from the appointment of the first woman justice, Rosemary Barkett. Shortly after her appointment in 1985, Justice Barkett indicated she would not use the title "Madam Justice Barkett" but simply "Justice Barkett." Later, the other members of the Court dropped the "Mister" from their titles, and this change was formalized by altering all name plates on the justices' suites in the Supreme Court Building. The use of the unadorned title "justice" is consistent with the Court's recently adopted policy of avoiding gender-specific language wherever possible. *See Report of the Florida Supreme Court Gender Bias Study Commission*, 42 Fla. L. Rev. 803 (1990).

[167] Letter from Justice Parker Lee McDonald, Florida Supreme Court to Allen Morris, Clerk-Emeritus/Historian, Florida House of Representatives (Nov. 2, 1992) (on file with author).

[168] Morris, *supra* note 160, at 122-24.

[169] *Id.* at 113-14.

[170] The present Clerk is Sid White, and the Chief Deputy Clerk is Debbie Casseaux.

[171] Fla. Const. art. V, § 3(c).

[172] Most docketing matters currently are controlled by Kathy Belton and Barbara Maxwell.

[173] Most aspects of death penalty cases presently are supervised by Tanya Carroll.

[174] The scheduling of oral argument is supervised by the Calendar Clerk, who presently is Sara Gainey.

[175] The release of opinions is controlled by the Opinion Clerk, who presently is Janie Bentley.

[176] Other members of the Clerk's staff who assist in these functions are Betsy Hill, who circulates court files, and Sonny McAllister, who moves materials between the Clerk's office and the justices.

[177] Some of the information used here was compiled by former Supreme Court Librarian Brian Polley.

[178] The treaty ceding Florida bound both the United States and the future state government to honor matters already finalized under Spanish law. Thus, a large number of early court cases actually rested on an interpretation of Spanish law. *Apalachicola Land & Dev. Co. v. McRae*, 98 So. 505, 524-25 (Fla. 1923).

[179] *See Five Carloads of Book Cases for Tallahassee*, *Weekly True Democrat*, Oct. 3, 1913.

[180] The present librarian is Joan Cannon. Her staff are Jo Dowling, Joyce Elder, Jo Smyly, and Linda Cole.

[181] The present State Courts Administrator is Ken Palmer.

[182] The present Deputy Administrator for Legal Affairs and Education is Dee Beranek.

[183] The present Deputy Administrator for Information Systems and Program Support is Peggy Horvath.

[184] The present Marshal is Wilson Barnes.

[185] *See* Fla. Const. art. V, § 3(c).

The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

BULK RATE
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43