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What's Happening with Apprendi: Florida's Response

by George E. Tragos and Peter A. Sartes

As you probably already know, the Supreme Court decision in *Apprendi v. New Jersey* which held that "any fact that increases the penalty of a crime beyond the prescribed statutory maximum must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt"[1] has instigated scores of appeals throughout the nation's courts. In Florida alone there have been 56 reported cases from the federal districts, Florida Supreme Court, and DCA's as of February 1, 2002 that allege an illegal indictment, an unconstitutional sentence, or a trial error.

This article is intended to identify the impact of the *Apprendi* decision on the Florida Federal Districts, the Florida Supreme Court and the Florida District Courts of Appeal, in order to provide a clearer focus on the current state of the law.

A recent issue of the *Criminal Law Bulletin* featured several articles contemplating the *Apprendi* decision. One of those articles identifies the affects of *Apprendi* on the various Federal Circuit Courts throughout the country.

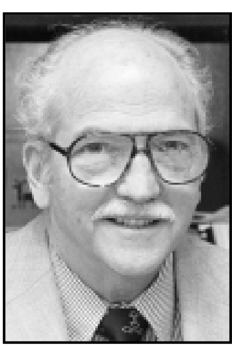
> The circuits are split regarding the proper way to apply rules of appellate review in cases where the statutory maximums exceed those authorized by the jury's verdict of conviction. Four circuits have affirmed sentences that exceeded the statutory maxima applicable to the offenses that were in fact charged and proved. Four circuits treat an *Apprendi* error as refuting the legality of the sentence or the over-

See "Aprendi," *page 18*

In Memoriam:

Robert T. Mann, Former Chief Judge, Second District Court of Appeal

by Susan W. Fox, Editor



The headlines gave just a glimpse into the life of an appellate judge and teacher of appellate law, Robert Trask Mann, who died February 26, 2002: **"Witty Judge, Legislator Mann Was An All-Time Favorite'"** (*Tampa Tribune*); **"Judge Robert Mann, Known For His Integrity"** (*St. Petersburg Times*).

The Gainesville Sun carried a column by Ron Cunningham: "**Mann's Law: Solutions Cause Problems**," stating "Bob Mann was an original—quick of wit; inclined to do the right thing, but ever mindful that our best intentions are apt to be undone by our own human capacity for error."

Who was this Mann?

Born in 1924, Mann began his public career in 1956 when he was elected to the Florida House of Representatives as a Democrat from Hillsbor-ough County. In the Legislature, he was known for his intellect

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Message from the Chair:

The Demise of Appellate Mediation: Fact or Fiction?

I naively assumed nothing dramatic would occur during my reign as the Appellate Practice Section chair. After all, appellate practice rarely engenders the type of controversy or change our sister sections routinely encounter. I assumed wrong. Appellate attorneys witnessed – albeit unknowingly – a fundamental change in our practice this past year.

Over the last ten years, appellate mediation slowly expanded in our state appellate courts. This year, two district courts of appeals suddenly disbanded their mediation programs. Another district instituted appellate mediation, but with a financial twist.

In short, appellate mediation is transforming.

The Beginning

Your first appellate mediation likely occurred in the federal appellate system. The Eleventh Circuit Court of Appeals has a long standing and much imitated appellate mediation program. The program's chief mediator, Lowell Garrett, is based in Atlanta. Other mediators are stationed in Miami and Tampa. The Eleventh Circuit mediators select cases for mediation, and conduct the entire process, including extending the time to file briefs. The court is unaware what cases have been sent to mediation, or the result of it. The court funds the program.

The Eleventh Circuit program has been wildly successful and a model for other mediation programs throughout the country. Lowell Garrett assigned three factors contributing to its success:

1. the quality of the mediators, who are respected by the appellate bar;
2. the court has consistently supported the efforts of the mediation center, because it believes mediation is an integral part of the appellate court process; and
3. the program has not been treated as a numbers game for the benefit of the court.

Garrett summed up the program's success by describing the court's philosophy: the program provides a forum for the parties to consider settlement, not just a process to clear the court's docket.

The Followers

With the success of the Eleventh Circuit program, state court appellate mediation soon followed. Yet these appellate mediation programs touted easing appellate court congestion.

In July 1996, the First District Court of Appeals piloted the first appellate mediation program approved by the Florida Supreme Court. The program was run through a separate mediation office. The mediators selected cases for mediation. The mediators were employees of the court and the program was funded by the court. Like its Eleventh Circuit counterpart, parties did not pay to participate in the program.

In early 1999, the Fourth District implemented appellate mediation. The program was run by two full-time state funded mediators. The clerk's office was minimally involved in the program. The mediators screened the cases for suitability and participation was mandatory once selected. The court was generally not made aware of cases elected for mediation.

An analysis was ultimately conducted to determine the efficacy of the Fourth District's program. The statistics revealed that judges more cost-effectively disposed of cases than mediators. In July 2001, the Fourth District voted to discontinue its appellate mediation program. However, the court agreed to monitor the Fifth District's pilot appellate mediation program. The First District has also discontinued appellate mediation.

The New Wave of Appellate Meditation

Beginning July of 2001, the Fifth District instituted its pilot program for civil appeals originating from the Ninth Judicial Circuit. Unlike its predecessors' programs, two judges certified in mediation select cases for mediation. Once selected, mediation is mandatory and must be completed within 45 days so that the appeal can move forward.

The Fifth District's program is unique because the mediators are not state funded court personnel; the cases are mediated by private mediators the parties choose from a list of qualified mediators. If the parties cannot agree, the court appoints one.

The program is set to expire at the end of this bar year, but will continue if successful. According to Judge Sharp of the Fifth District, the court has asked the Florida Supreme Court to extend the program for one year and will soon vote on whether to expand the pilot program to all circuits in the Fifth District. This expansion is needed to enlarge the pool of mediation cases, and to make a better informed evaluation of the pilot program.

Running a Successful Appellate Mediation Program

The experience of the various appellate courts is somewhat simplistic: appellate mediation success depends on the program's purpose. Court funded programs that seek to save a court money may not achieve this goal. Statistics disclose that appellate courts can more cost-effectively resolve appeals than state funded mediation. If money is the object, the future might be privately funded appellate mediation.

— Siohban H. Shea, Chair

A Short Primer on Class Action Appeals In Florida's State and Federal Courts

by John G. Crabtree

Class action appeals are like other appeals—only more so: more rules, more quirks, and (often) more at stake. This article is a short primer for the Florida appellate practitioner on some of the emerging and evolving topics in this area of procedural law.

Federal Class Certification Orders

Federal class certification orders are non-final and, until December 1, 1998, were rarely appealable. Now, however, Rule 23(f) of the Federal Rules of Civil Procedure provides that "[a] court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order."[1]

In *Prado-Steiman v. Bush*,[2] the Eleventh Circuit became one of the first courts to interpret Rule 23(f)—and established five *general* principles governing when panels in the circuit should accept jurisdiction of orders granting or denying certification of class actions. They are:

- First, "whether the district court's ruling is likely dispositive of the litigation by creating a 'death knell' for either plaintiff or defendant."
- Second, "whether the petitioner has shown a *substantial* weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion." The court explained that the "more the alleged error arises out of a mistake of law (as opposed to an improper application of the law to the facts), the more the case may be susceptible to interlocutory review, simply because such an error is more readily reviewable by this Court and does not require us to base our determination on an evolving factual record that may already have become incomplete."
- Third, whether the appeal will "permit the resolution of an unsettled legal issue that is "important to the particular litigation as well as important in itself."
- Fourth, whether the nature and status of the litigation before the district court militate in favor of an appeal.
- Fifth, whether the likelihood of future events makes immediate appellate review more or less appropriate, *e.g.*, a settlement between parties, the bankruptcy of either party, any future similar lawsuits, or a district court certification order expressly "conditional or subject to revision at a later stage in the case."

The court explained that it was not creating "any bright-line rules or rigid categories for accepting or denying Rule 23(f) petitions," emphasized that its authority to accept such petitions was highly discretionary, and noted that "there may well be special circumstances that lead [it] to grant or deny a Rule 23(f) petition even where some or all of the relevant factors point to a different result." The court also cautioned that all interlocutory appeals were "inherently 'disruptive, time-consuming, and expensive,'" and were thus "generally disfavored."[3]

Practitioners should be aware that a petition for leave to appeal a certification order is considered timely even if it is filed more than 10 days after the order, provided (a) the petitioner has timely moved for reconsideration of a class certification order; and (b) the petition is filed within 10 days of the reconsideration order.[4] The Eleventh Circuit has also suggested in *dicta*, however, that it would not grant a petition filed following successive timely motions for reconsideration, but that it *might* grant a petition filed after a ruling on an untimely motion for reconsideration if the order disposing of the motion "significantly change[d] the certification order."[5]

Class Certification Orders in Florida State Court

Since Florida Rule of Civil Procedure 1.220 is based upon Federal Rule 23, Florida's class action caselaw is largely consistent with the body of Rule 23 decisions.[6] This consistency is not absolute, however.

Unlike in federal practice, Florida permits interlocutory appeals of class certification orders as a matter of right.[7] The appeal times and briefing requirements of appeals from orders approving (or disapproving) class certification orders are the same as in other interlocutory appeals from orders entered before entry of a final judgment, *i.e.*, the notice of appeal must be filed within 30 days of the order, the appellant must prepare the record as an appendix to the initial brief, and the initial brief is due to be served within 15 days of filing the notice.

Another significant difference in Florida state court is that the filing of a motion for reconsideration of an

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order granting or denying a motion to certify a class does not toll the time for filing a notice of appeal from the underlying order. (Motions for reconsideration directed to interlocutory orders are not "authorized" motions under Rule 9.020(h)). There is, however, an argument that an order granting reconsideration and expanding or reducing a class definition—so that certain putative class members became actual class members (or vice versa)—would be appealable. There is less of an argument that an order granting a motion for reconsideration and limiting or increasing the legal scope of class litigation is subject to interlocutory review, *e.g.*, an order permitting a damages claim to be certified in addition to a previously certified injunctive relief claim that does not alter the class definition.

Federal Orders Approving or Disapproving Settlements.

Federal Rule 23(e), *i.e.*, "Dismissal or Compromise," provides that a "class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Caselaw provides that a district court may only approve a class action settlement that "is fair, adequate and reasonable and is not the product of collusion between the parties."[8]

As with appeals under Rule 23(f), the standard of review for a district court's order approving a settlement permits reversal only if there has been a clear abuse of discretion.[9] The appellate court reviews *de novo* the district court's *construction* of the settlement agreement, however—applying principles of general contract law and giving the terms of the agreement their "plain and ordinary meaning."[10]

The federal circuits are split on whether non-named class members have standing to appeal a settlement without first intervening. The majority rule is that standing does not exist without formal intervention. Following the majority rule, the Eleventh Circuit stated in *Guthrie v. Evans*: [11]

First, such individuals cannot represent the class absent the procedures provided for in Rule 23 of the Federal Rules of Civil Procedure. Second, class members who disagree with the course of a class action have available adequate procedures through which their individual interests can be protected. Third, class actions could become unmanageable and non-productive if each member could individually decide to appeal.

The appeal times and briefing requirements of appeals from orders approving (or disapproving) class action settlements are the same as in other final appeals.

Orders Approving or Disapproving Settlements in Florida State Court

Florida follows the majority rule that standing does not exist without formal intervention,[12] but also holds that class members may intervene after a judgment approving a settlement if the motion to intervene is filed within the time for the name class representatives to file a notice of appeal.[13]

Conclusion

Given the dynamic status of this area of law, even experienced appellate counsel should take little for granted—and conduct follow-up research on the procedural aspects of their appeals whenever class representation is at issue.

Endnotes:

1 An appeal does not stay proceedings in the district court unless the district court judge or the court of appeals so orders. Fed. R. Civ. P. Rule 23(f).
2 221 F.3d 1266, 1268 (11th Cir. 2000).
3 *Id.* at 1276 (*quoting Waste Mgm't Holdings v. Mowbray, 208 F.3d 288, 294* (1st Cir. 2000)).
4 *Shin v. Cobb County Board of Educ.*, 248 F.3d 1061 (11th Cir. 2001).
5 *Id.* at 1065 n.2.
6 *See, e.g., Broin v. Philip Morris Cos.,* 641 So. 2d 888, 889 (Fla. 3d DCA 1994); *see also Jenne v. Solomos*, 707 So. 2d 1203, 1203 (Fla. 4th DCA 1998) (order certifying class action subject to abuse of discretion standard of review).
7 Fla. R. App. P. 9.130(a)(3)(C)(vi).
8 *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977).
9 *Bennett v. Behring Corp.,* 737 F.2d 982, 987 (11th Cir.1984).
10 *Waters v. International Precious Metals Corp.*, 237 F.3d 1273, 1277 (11th Cir. 2001).
11 815 F.2d 626, 628 (11th Cir. 1987).
12 *Concerned Class Members v. Sailfish Point, Inc.*, 704 So. 2d 200 (Fla. 4th DCA 1998).
13 *Ramos v. Philip Morris Cos.,* 714 So. 2d 1146 (Fla. 3d DCA 1998).

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Supreme Court Discussion Open to Annual Meeting Attendees

The Supreme Court of Florida's open discussion with members of The Florida Bar is hosted each year by the Appellate Practice Section. The meeting with the Supreme Court Justices provides a rare opportunity to ask questions in an informal setting. Past discussions have included a broad range of questions and answers, including trends in constitutional law and theory, the merits of PCA decisions, the use of computer technology in the practice of law, and individual justice's experiences on the bench.

The Discussion with the Supreme Court is open to all attendees of The Florida Bar's Annual Meeting. Please come, ask questions of the Court and encourage others to join us. This year's discussion will be held on Thursday, June 20, 2002, from 3:30 p.m. to 4:30 p.m. at the Boca Raton Resort and Club.

Later Thursday night, the Appellate Practice Section hosts its annual dessert reception, at which the Adkins award and the Section's first Pro Bono Award will be presented. The reception features a cordial bar, large selection of desserts, and an ice cream bar for kids of all ages! We look forward to seeing you and your families at the annual meeting.

Top Ten Lapses of Professionalism in Appellate Practice

by The Honorable William D. Palmer
Judge of the Fifth District Court of Appeal

With apologies to David Letterman (whose top ten lists are much funnier than mine), I offer my comments on the top ten lapses of professionalism in appellate practice observed from the bench. Although the vast majority of lawyers who appear before our court are competent and professional, the lapses noted here occur often enough to justify comment.

1. Handling an appeal when not competent to do so.

Unfortunately, our court occasionally receives filings which reveal that the filing lawyer has not become adequately educated or familiarized with appellate rules and procedures. Rule 4-1.1 of the Rules Regulating the Florida Bar (the "Rules") states that a "lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Certainly a lawyer need not be a specialist in appellate practice in order to properly handle an appeal. In fact, the comment to Rule 4-1.1 notes that a lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. However, it is incumbent upon the lawyer to become educated and familiar with the rules, procedures, deadlines, and requirements of the appeal process in order to competently and professionally represent a client.

2. Failing to abide by court procedures and deadlines.

An attorney's failure to abide by court procedures and deadlines can not only be detrimental to the client's case, but can also constitute a violation of Rule 4-1.3 which requires that a lawyer act with reasonable diligence and promptness in representing a client. The comment thereto notes that "perhaps no professional shortcoming is more widely resented than procrastination." Although the court is generally liberal in granting reasonable extensions of time when requested for good cause (at least the first time requested in a case), certain lawyers repeatedly violate or ignore the deadlines imposed upon them. Lawyers should recognize that, in the most egregious of cases, the court can impose monetary sanctions on those who are guilty of repeat violations. Such repeated violations can also result in referrals to the Florida Bar for grievance proceedings.

3. **Making disparaging comments concerning the court or judges on the court**.

The Rules of Professional Conduct Preamble to Chapter 4 of the Rules provides that a lawyer should "demonstrate respect for the legal system and those who serve it, including judges, other lawyers, and public officials." The Oath of Admission to the Florida Bar calls on each lawyer to "maintain the respect due to courts of justice and judicial officers." The Creed of Professionalism further requires that lawyers uphold the dignity and esteem of the judicial system. Comments made to news media, letters forwarded to other lawyers, or motions filed with the court which attack the character, honesty, integrity, or intelligence of any judge constitute not only a lack of professionalism, but also a potentially grieveable offense. *See 5-H Corp. v. Padovano*, 708 So. 2d 244 (Fla. 1997)(referring an attorney to the Florida Bar for setting forth disparaging remarks in a motion for rehearing). Beyond the lapse of professionalism, such conduct is an act of bad judgment in the event that the lawyer intends to practice before the same judge or court in the future.

4. Directing discourteous comments or conduct toward opposing counsel or opposing party.

As noted above, the Preamble to Chapter 4 of the Rules includes "other lawyers" among the persons entitled to receive respect from lawyers. As the motto currently being promoted by the Orange County Bar Association states, "professionalism demands courtesy." Similarly, the Oath of Admission to the Florida Bar calls on all lawyers to abstain from all offensive personality, and the Creed of Professionalism calls on each lawyer to abstain from engaging in rude, disruptive, disrespectful, and abusive behavior and, at all times, to act with dignity, decency, and courtesy. The Ideals and Goals of Professionalism, aspirational guidelines adopted by the Board of Governors of the Florida Bar in 1990, similarly provide:

A lawyer should treat all persons with courtesy and respect and at all time abstain from rude, disruptive and disrespectful behavior. The lawyer should encourage the lawyer's clients and support personnel to do likewise even when confronted with rude, disruptive and disrespectful behavior.

While some lawyers may succumb to temptation and resort to discourteous conduct in the heat of battle during a hearing or trial, such situations should not arise in appellate proceedings, where oral arguments are scheduled well in advance and highly structured.

5. Failing to acknowledge or to disclose controlling principles of law.

Controlling case law which is contrary to a party's asserted positions on appeal must be disclosed forthrightly, perhaps coupled with either an attempt to distinguish the cases on their facts or an argument as to why the law as expressed in the cases should be changed. Candor towards the tribunal is mandated by Rule 4-3.3 which states that a lawyer shall not knowingly fail to disclose to the tribunal legal authority in the con-

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trolling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. Lawyers should understand that, given the work done by the court's law clerks, the reality of the situation is that adverse authority, even if not disclosed by the opposing party in the briefs, will likely be discovered in the research leading up to the clerk's preparation of the bench memorandum and, accordingly, will be known to the court. Under these circumstances, it is far more effective, as well as professional, for lawyers to attempt to distinguish away the controlling case law or to argue for a change in the law instead of simply ignoring the cases, thereby leaving the court with the impression that controlling authorities are being hidden or that counsel is being less than candid with the Court.

6. Requesting a rehearing for the sole purpose of trying to get the court to change a decision already made.

Florida Rule of Appellate Procedure 9.330 specifically provides that a motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended and shall not present issues not previously raised in the proceeding. Motions for rehearing which simply reargue what has already been argued in the original appeal are an improper waste of the client's money, and uniformly unsuccessful.

7. Failing to provide an adequate record for appellate review.

The appellant, having the burden of proof, is required to provide the court with a sufficient record to support the appeal. In the absence of a sufficient record, the trial court's ruling must be presumed correct. *See Chereskin v. Chereskin*, 790 So. 2d 496 (Fla. 5th DCA 2001); *Pedroni v. Pedroni*, 788 So. 2d 1138 (Fla. 5th DCA 2001). In certain circumstances, a lawyer's failure to provide an adequate record may violate the requirement of Rule 4-1.1 to provide competent representation.

8. Presenting arguments not presented or preserved below.

The role of the appellate court is to determine whether the trial court made an error as to an issue presented to it. Accordingly, a claim of error not raised or preserved at the trial level (unless fundamental) cannot prevail on appeal, since the trial cannot be found to have committed error by failing to rule on a issue not presented to it. *See Gonzalez v. Largen*, 790 So. 2d 497 (Fla. 5th DCA 2001). Rule 4-3.1 prohibits a lawyer from asserting an issue unless there is a basis for doing so which is not frivolous. Presenting issues which clearly have not been preserved below will, in certain circumstances, violate this rule.

9. Citing to matters outside the record.

The role of the appellate court is to make a legal determination based upon the record properly before it. It is improper and unprofessional for a lawyer to present matters to the appellate court which are not part of the record on appeal. Importantly, a deficiency in the record can not be cured by simply making the document an attachment or appendix to a brief, since putting a document in an appendix does not make the document part of the record. Instead, a motion to supplement the record can properly be utilized to add documents which were omitted from the record on appeal. In no event can a lawyer move to submit documents for appellate review which were not part of the record below. *See Altchiler v. State, Dep't of Prof'l Regulation*, 442 So. 2d 349 (Fla. 1st DCA 1983) (noting that it is fundamental that an appellate court reviews determinations of lower tribunals based on the records established in the lower tribunals, and publicly reprimanding an attorney and referring him to the Florida Bar for including an appendix to a brief which contained matters outside the record, after the attorney's previous brief was stricken and he was ordered to file an amended brief which conformed to the record below).

10. Improperly citing to the record.

When a record cite is made, the references must be accurate, not taken out of context, and not presented in a misleading fashion. Since the court's law clerks thoroughly review the record and check the record cites set forth in the parties' briefs, if a portion of the record is misstated or taken out of context so as to be misleading, that fact will be made readily apparent to the judges.

In closing, I note that other lapses occur beyond those set forth in this article but hopefully this list will be helpful to lawyers who are striving to maintain a professional appellate practice.

The comments contained in this article are those of the author alone, not of the Fifth District Court of Appeal. This article is submitted on behalf of the Professionalism Committee of the Orange County Bar Association, but does not necessarily reflect the views of the committee.

The Florida Bar
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The Quality of Your Life: How It Impacts You and Your Profession

First Amendment and the Supreme Court

High Class Editing

by Raymond T. (Tom) Elligett, Jr. & Amy Farrior

Long before Andy Griffith portrayed investigative lawyer Matlock, and before he was the television sheriff of Mayberry, he starred in the 1958 movie "No Time For Sergeants." The movie spawned a comedy career that included comedy albums.

On one of his records, Griffin remarks that a lot of people think opera is just a bunch of "hollerin'." "And it is," he continues, "but it's high class hollerin'."

Before the appellate brief writer is finished, he or she needs to perform the task of editing high class editing. Such editing encompasses several levels.

Editing for Clarity

When the brief approaches what you think is a final product, put it down for a few days. Then read it to see if you have assumed facts that you have not included in the statement of facts; facts your reader needs to know to understand your points.

To best edit for clarity, you must do something many lawyers deem a foreign concept: you must prepare the brief ahead of its due date. Giving your mind a rest, so you read the brief "fresh" is important - your audience (the judges and their clerks) will be reading it that way.

This is a good time to have a partner unfamiliar with the case read the brief. Also to send the draft to the trial counsel and the client to review. You would expect house counsel to review the brief, but non-lawyer clients may raise good points. To the extent they question why something is not in the draft, you can explain ahead of time (for example, a factual issue deemed to have been lost because they are the appellant).

To the extent you explain passages these readers find unclear, you may find yourself rewriting the brief by incorporating your explanations. One test is whether your brief reads the way you would explain the facts and argument in conversation, except cleaned up for verbal "ticks" we use.

Editing for Structure

Have you stated your case as simply as possible in a paragraph? Have you provided the readers with a road map of where the brief is going? The summary of the argument presents one opportunity for these efforts, but some writers like an opening paragraph before the facts.

If your brief has more than one issue, or more than one reason supporting an issue, have you placed your themes in the best order? We recommend the "Benatar" rule: put your best argument first ("Hit me with your best shot"). Because many readers will assume the brief is structured this way, putting weaker arguments first and hoping to build to a crescendo may miss the goal.

Some cases present closer calls than others. Should a strong damage argument go before a weaker liability argument that would be the larger win? Consider consulting with the client on these choices.

Do your facts and your argument flow logically? Or are you jumping around? Have you edited out unwanted repetition (there is nothing wrong with repeating your key points)? Do your paragraphs contain a single point?

Editing for Length

Review the overall length of the brief. Can you shorten it without detracting from your case? Edit out long sentences and "Faulkner-like" paragraphs. Others may disagree, but turning the page to a brief to see a paragraph that consumes the whole page hurts the eyes and the attitude of many readers. Edit out string cites.

Editing for Accuracy

Ensure that every factual allegation is supported by a record cite. Check the case cites (and Key Cite or Shepardize cases). Check quotes from the record and cases. Make sure you have quotes only around words taken from the record or an authority.

You must do more than run spell check - it will not pick up "trail" used for "trial." Check your grammar and usage. Have you used "which" where you should have used "that?" Have you used "that" where you could omit it?

If you have been working from a draft on your computer, print it and read the hard copy. You may pick up mistakes you miss on the screen. Reading the brief in print makes it easier to tell if you have a paragraph (or thought) out of place, and to ferret out those long sentences and paragraphs.

Editing for Legalese and Other Writing Pitfalls

Edit out the passive voice, except for those few instances where you want it. Instead of "the order was entered by the court," say "the court entered the order." Avoid overusing adverbs and adjectives, like "clearly," "simply," "obviously," and "certainly." Some believe any use of such terms is overuse; those who feel otherwise may, in time, see the light.

Write in the affirmative and reduce "nots." Instead of "the appellant is not correct," use "the appellant is wrong," or "the appellant misses the point."

Do you like to WRITE?
Write for *The Record!!!*

The Record relies on submission of articles by members of the Section. Please submit your articles on issues of interest to appellate practitioners to Susan Fox, Editor, P.O. Box 1531, Tampa, FL 33601, or e-mail to *SusanFox@ macfar.com.*

Avoid converting action verbs into nouns, a writing lapse known as nominalization (itself a nominalization). Instead of “the court found the defendant’s actions were in violation of the statute,” use “the court found the defendant’s actions violated the statute” (or “the court found the defendant violated the statute”).

Get rid of “moreover,” “it must be remembered that,” and “it is interesting to note,” and other such useless introductory words. When a writer says “it is important to note,” does that mean the material that came before was unimportant? If you need a transition phrase, use a real one like, “a separate rationale supports the court’s ruling.”

Jettison the words and phrases so many lawyers love and replace them with their simpler counterparts.

Replace	With
hereinafter	here
prior to	before
relate	tell
at the time when	when
during such time as	while
on the ground that	because

Watch attacking words like “frivolous,” “clearly erroneous,” and “fundamental error.” The later two phrases have specific meanings in appellate practice, so using them in another context could also cause confusion. Eliminate redundancies, like “past history” and “collaborate together.”

Editing for Completeness

Could the judge base an opinion on your brief with any further research of the record or authorities? Could someone who knows nothing about your brief read it and get your point? Or have you assumed things you know, but have failed to tell them - about the facts, the law, or how the law applies to the facts?

Editing - the final step

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Tom Elligett *and* ***Amy Farrior*** *are Board Certified Appellate Lawyers and shareholders in Schropp, Buell & Elligett, P.A., Tampa, Florida. Amy claims she is too young to remember Andy Griffith in “No Time For Sergeants,” or as the sheriff of Mayberry. Tom is too polite to call her on those claims (at least in print). For information on* Florida Appellate Practice *(2d Ed. 2001), written by Tom Elligett and Senior Judge John M. Scheb and published by Stetson University College of Law, visit* www.law.stetson .edu/cle.

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The Collateral Order Doctrine

by Paul A. Avron and Ilyse M. Homer

The collateral order doctrine is a judicially created doctrine which provides for appeals from orders which do not end the litigation on the merits but are conclusive and resolve important questions completely separate from the merits. The collateral order doctrine was first enunciated by the Supreme Court in 1949.

The doctrine is a departure from the general rule that courts of appeals only have subject matter jurisdiction over final orders of district courts. The final judgment rule[1] "descends from the Judiciary Act of 1789 where 'the First Congress establishes the principle that only 'final judgments and decrees' of the federal district courts may be reviewed on appeal.'"[2] A "final" order or judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[3] The final judgment rule is based upon sound policy concerns; it

> . . .emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of avoiding the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration.[4]

Notwithstanding the sound purposes for observing the final judgment rule, decisions from the United States Supreme Court have recognized a "narrow exception" thereto which has become to be known as the "collateral order doctrine." In *Cohen v. Beneficial Industrial Loan Corp.,*[5] the Supreme Court held that a "small class" of orders that did not end the litigation were nevertheless final and appealable pursuant to 28 U.S.C. § 1291. *Cohen* involved a shareholder's derivative action in which the district court declined to apply a state statute requiring the plaintiff to post security for costs. The defendant appealed the district court's order without awaiting final judgment on the merits of the action. The court of appeals ordered the district court to require that costs be posted. On further appeal, the Supreme Court held that the court of appeals properly assumed jurisdiction of the appeal pursuant to 28 U.S.C. § 1291 because the district court's order constituted a final determination of a claim "separable from, and collateral to" the merits of the underlying litigation, because it was "too important to be denied review" and because it was "too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated."[6] "Cohen did not establish new law; rather, it continued a tradition of giving § 1291 a 'practical rather than a technical construction.'"[7]

In *Digital Equipment Corp. v. Desktop Direct, Inc.,*[8] the Supreme Court stated that it has

> . . .repeatedly held that the statute [28 U.S.C. § 1291] entitles a party to appeal not only from a district court decision that ends the litigation on the merits and leaves nothing more for the court to do but execute judgment, but also from a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final. The latter category comprises only those district court decisions that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action. Immediate appeals from such orders, we have explained, do not go against the grain of § 1291, with its object of efficient administration of justice in the federal courts.[9]

In order for a collateral order to be reviewable pursuant to *Cohen*, it must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) be "effectively unreviewable on appeal from a final judgment."[10] The party seeking appellate review must establish that the order meets this three-part test.[11] The "effectively unreviewable" prong requires that the party seeking appellate review demonstrate the order in question affect "rights that will be irretrievably lost in the absence of an immediate appeal."[12]

Application of the collateral order doctrine does not turn on whether the underlying litigation will be expedited or whether an injustice will be righted by an immediate appeal.[13] The Supreme Court stated has "warned that the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, . . . by a prompt appellate court decision."[14] The collateral order doctrine is the exception to the general rule and should be construed as such.[15]

A party that would otherwise be entitled to appellate review of a collateral order need not take an immediate appeal of such an order to preserve the right to take such an appeal after entry of judgment on the merits of the underlying action.[16]

For examples of recent decisions from the Eleventh Circuit Court of Appeals which apply the collateral order doctrine, *see Carringer v. Tessmer*, 253 F.3d 1322 (11th Cir. 2001)(orders on standing questions not within collateral order doctrine); *Brent v. Ashley,* 247 F.3d 1294, 1289 n.3 (11th Cir. 2001)(order rejecting qualified immunity defense is within collateral order doctrine); *Crawford & Company v. Apfel,* 235 F.3d 1298, 1302-03 (11th Cir. 2000)(order finding court had subject matter jurisdiction and that plaintiffs could intervene in claimant's social security disability hearing within collateral

order doctrine); *S & Davis Intern., Inc. v. The Republic of Yemen,* 218 F.3d 1292, 1297-98 (11th Cir. 2000)(order denying motion to dismiss for lack of in personam jurisdiction not within collateral order doctrine); *see also Kaufman v. Checkers-Drive-In Restaurants, Inc.,* 122 F.3d 892, 894-95 nn. 4 and 5 (11th Cir. 1997)(surveying certain Supreme Court and Eleventh Circuit cases).

The principles of law set forth above should provide a useful guide for practitioners in making determinations as to whether or not particular orders fit within the collateral order doctrine first enunciated by the Supreme Court in *Cohen* and, if so, whether to seek immediate review of such orders.

***Paul A. Avron** and **Ilyse M. Homer** practice with Berger Singerman in Miami, Florida and specialize in bankruptcy law and appellate litigation.*

Endnotes:

[1] 28 U.S.C. § 1291; *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 203 (1999); *Van Cauwenberghe v. Biard,* 486 U.S. 517, 521 (1988). The same rule applies to appeals from bankruptcy courts to district courts. 28 U.S.C. § 158(a)(1). In bankruptcy appeals, the district court functions as an appellate court, with the court of appeals functioning as the second reviewing court. *In re Williams,* 216 F.3d 1295, 1296 (11th Cir. 2000); *In re Glados,* 83 F.3d 1360, 1362 (11th Cir. 1996).
[2] *Cunningham, supra,* note 1, 527 U.S. at 203 (quoting *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 798 (1989), quoting 1 Stat. 84)). *See also Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 374 (1981); *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 471 (1978)("The finality requirement in § 1291 evinces a legislative judgment that '[restricting] appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy.'")(quoting *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 170 (1974)).
[3] *Catlin v. United States,* 324 U.S. 229, 233 n.8 (1945).
[4] *Firestone Tire & Rubber Co., supra,* note 2, 449 U.S. at 374 (citations and internal quotation marks omitted).
[5] 337 U.S. 541 (1949).
[6] *Id.* at 546.
[7] *Firestone Tire & Rubber Co., supra,* note 2, 449 U.S. at 375 (quoting *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949)). Another exception to the final judgment rule is found in Eleventh Circuit case law referred to as the "Jettco" exception and provides for appellate review "when a series of court orders, considered together, terminate[s] the litigation as effectively as a formal order." *Construction Aggregates, Ltd. v. Forest Commodities Corp.,* 147 F.3d 1334, 1337 (11th Cir. 1998)(citing *Jettco Elec. Indus., Inc. v. Gardiner,* 473 F.2d 1228 (5th Cir. 1973)). *Jettco* is binding authority in the Eleventh Circuit. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc). Other exceptions to the final judgment rule are found in Fed. R. Civ. P. 54(b)(certification by district court that no just reason exists for delay and expressly directs judgment on fewer than all claims); 28 U.S.C. § 1292(b) (district court finds that order involves controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the underlying litigation) and *Forgay v. Conrad,* 47 U.S. (6 How.) 201, 12 L.Ed. 404 (1848)(order treated as final for purposes of appeal if it directs immediate delivery of property and subjects losing party to irreparable injury if appellate review must await final outcome of litigation)(cited in *Charter Co. v. Prudential Ins. Co. of America (In re Charter Co.),* 778 F.2d 617, 622 (11th Cir. 1985)).
[8] 511 U.S. 863 (1994).
[9] *Id.* at 867-68. The Supreme Court has "repeatedly stressed" that the "narrow exception" provided for in *Cohen* "should stay that way and never be allowed to swallow the general rule" against appeals of non-final orders. *See id.* at 868.
10 *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 276 (1988) (internal quotations marks omitted) (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978)); *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.,* 179 F.3d 1279, 1287 (11th Cir. 1999).
[11] *Kaufman v. Checkers,* 122 F.3d 892, 894 (11th Cir. 1997).
[12] *Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424, 430-31 (1985).
[13] *Digital Equipment Corp., supra,* note 8, 511 U.S. at 868.
[14] *Id.* (internal citation and quotation marks omitted).
[15] Note 9, *supra*. *See also Johnson v. Jones,* 515 U.S. 304, 309 (1995) ("Given [28 U.S.C. § 1291], interlocutory appeals -- appeals before the end of district court proceedings -- are the exception, not the rule.").
[16] *Singleton v. Apfel,* 231 F.3d 853, 856 (11th Cir. 2000)("However, the former Fifth Circuit addressed the similar question of whether appeals from collateral orders are permissive or mandatory and concluded that parties are not required to take interlocutory appeals under the penalty of forfeiting the option of right to review from a final judgment.")(citing *In re Chicken Antitrust Litigation, Etc.,* 669 F.2d 228, 236 (5th Cir. Unit B 1982)).

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by Jack Aiello, Chair Publications Committee

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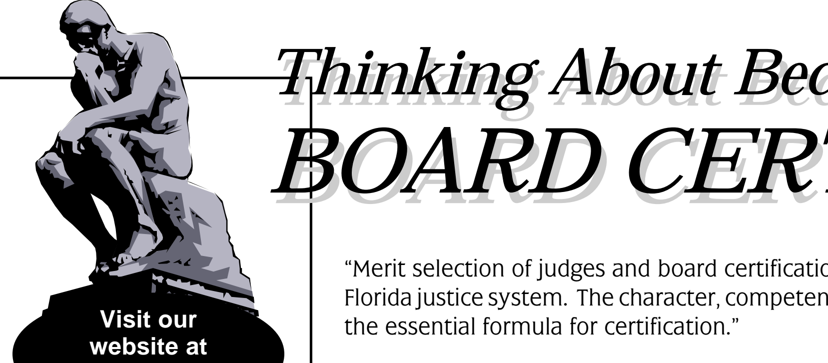

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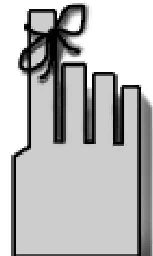

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Administrative Appeal Update

by Randall Reder

Standard of Review

In *Alderman v. Florida Plastering*, 27 Fla. L. Weekly D327a (Fla. 1st DCA Feb.6, 2002), the First District Court of Appeal discussed the standard of review in worker's compensation attorney fee appeals. The trial judge found the claimant's attorney's scheduled fee for his services under section 440.34(1), Florida Statutes would amount to $847 per hour which would be excessive in comparison to the customary fees of $150 to $300 per hour.

In *Mayes v. Florida Dept. of Children and Family Services*, 26 Fla. L. Weekly D2905 (Fla. 1st DCA Dec. 12, 2001), the appellate court reversed denial of a foster home license as not meeting the competent substantial evidence standard. The administrative law judge recommended denial of an application for a foster home license. The court noted the judge found the applicants had begun operating a foster home in 1995 and had five children living with them. One was a very active two- year-old who regularly climbed out of his crib and once climbed on the stove and turned on the burners. The Mayes bought a safety harness and attempted to use it twice, but the child wiggled out of it both times. Mrs. Mayes latched the child's door once while bathing another child, not as a means for punishment but as a precautionary safety matter.

Standing and Rule Challenges

In *Florida Board of Medicine v. Florida Academy of Cosmetic Surgery*, Inc., 27 Fla. L. Weekly D230 (Fla. 1st DCA Jan. 23, 2002), the First District Court of Appeal issued a fairly lengthy opinion on two major issues: standing and rule challenge analysis. The First DCA held that the Florida Nursing Association (FNA) and Florida Association of Nurse Anesthetists (FANA) had standing to challenge a proposed rule that required an anesthesiologist to be present for all level III office surgeries. The Florida Board of Medicine and Florida Society of Anesthesiologists (FSA) argued that FNA and FANA had failed to demonstrate that a substantial number of their members would be affected by the proposed rule. FNA and FANA had presented evidence that their membership included certified registered nurse anesthetists and testimony of several physicians that if the proposed rule were adopted, they would not employ CRNA's in level III office surgeries. The court determined this was competent substantial evidence to support the finding that FNA and FANA's members were substantially affected. The court then held that the Administrative Law Judge erred in finding a proposed rule and a rule were an invalid exercise of delegated legislative authority. The administrative law judge had held that the provisions of rule 64B8-9.009(4)(b) requiring physicians without staff privileges who perform level II office surgeries to have a transfer agreement with a licensed hospital within reasonable proximity and that portions of proposed rule 64B8-9.009(6)(b) requiring an anesthesiologist to be present at all level III office surgeries were an invalid exercise of delegated legislative authority for six reasons: 1) they exceeded the grant of the Board's rule making authority; 2) they enlarged, modified and contravened specific provisions of law; 3) they failed to establish adequate standards for agency decisions; 4) they were arbitrary and capricious; 5) they were not supported by competent substantial evidence, and 6) they restricted competition in violation of section 455.517. The court found that section 458.331(l)(v), which authorized the Board to establish rules for "transfer agreement," provided rulemaking authority, did not have to be more specific and did not enlarge, modify contravene specific provisions of the law. The court disagreed with the contentions that hospitals had discretion to enter into transfer agreements and that the proposed rule would make it economically impractical for patients to choose CRNAs to administer anesthesia rendered the rule and proposed rule arbitrary or capricious. The court then stated that although the proceeding before the administrative law judge was technically a de novo proceeding, it was in many respects similar to certiorari review in circuit court of quasi-judicial action. The court stated that it believed the legislature intended by using the term "competent substantial evidence" in section 120.52(8)(f) to limit the scope of review by the Administrative Law Judge. The court then concluded there was competent substantial evidence submitted to the Board supporting the rule and proposed rule, and that the Administrative Law Judge erred in reweighing the evidence. Finally, the court concluded there was no testimony that the rule concerning transfer agreements, which has been in place since 1994, had been used to control the medical practice of office surgeons and that the proposed rule requiring an anesthesiologist be present at level III office surgeries would not necessarily result in a monopoly.

Conclusions of Law and Interpretation of Administrative Rules over which Agency Has Substantive Jurisdiction

In *Barfield v. Dept. of Health, Board of Dentistry*, 27 Fla. L. Weekly D24 (Fla. 1st DCA Dec. 19, 2001), the First District Court of Appeal held that the Board of Dentistry erred in rejecting the administrative law judge's evidentiary conclusion that certain grading sheets were inadmissible hearsay. The Court based its decision on the 1999 amendment to section 120.57, which provides that an agency may reject or modify conclusions of law and interpretation of administrative rules "over which it has substantive jurisdiction." The Court reasoned the legislature implemented this change in response to Judge Benton's dissent in *Department of Children & Families v. Morman*, 715 So. 2d 1076 (Fla. 1st DCA 1998). Although the Court concluded the Board did not have "substantive jurisdiction" to reject the judge's evidentiary conclusion, it proceeded to review the merits of the decision and concluded the judge should have allowed the grading

continued, next page

sheets into evidence under the business records exception to the hearsay rule. The Court then specifically recommended the legislature adopt a specific appellate remedy for agencies to review administrative law judge's conclusions of law over which they do not have "substantive jurisdiction."

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APPRENDI

from page 1

> all fairness of the proceeding to [the] extent that any sentence that exceeds the applicable statutory maximum must be vacated, and such errors… must meet the requirement of both harmless error and plain error rules. [The Eleventh Circuit joins the Fourth, Seventh and Tenth which] disallow trial error claims under *Apprendi.* In contrast the Fifth… Sixth Eighth and Ninth [Circuits] recognize *Apprendi* errors, requiring the "clear cut, mechanical" application of the *Apprendi* rule to sentences imposed merit a remedy in every case.[2]

Florida Federal Districts

The roots of the *Apprendi* decision run much deeper than just the split in the Federal Circuits. The United States District Court for the Southern District of Florida held in *US v. Smith*[3] that where an indictment did not charge the amount of narcotics necessary to trigger the application of 21 USCS § 841 (b) (1) (A) (iii) and The US Sentencing Guidelines Manual §4B1.1 (1998), and there was no stipulation to the quantity of the drugs, the court had no basis for elevating the defendant's sentence. Thus, the court granted defendant's motion for a six level downward departure from 32 to 26 for a Criminal History Category VI which recalculated the defendant's sentence from life to a range of 120-150 months.[4]

More recently, the Florida Federal Districts have been presented with motions for relief and asked to decide how far and how quickly *Apprendi* will apply. The Northern District of Florida issued an opinion in *Bridges v. Vasquez*[5] regarding the retroactivity of the *Apprendi* decision. In their discussion, the Court identified the three groups of defendants that are most affected by *Apprendi*. They declared:

> When *Apprendi* was decided, there were many federal defendants… serving sentences that had been imposed in proceedings that did not anticipate…the holding in *Apprendi*.[6] [These] defendants fell into 3 categories:
>
> First… defendants [with] direct appeals pending [or with time left to file a direct appeal]… They are able to raise Apprendi issues on direct appeal [7]
>
> Second… defendants [who had not filed]… §2255 motion[s] or their first §2255 motion [is] still pending, thus affording those defendants the opportunity to assert… [arguments] that *Apprendi* should be… retroactive in cases on collateral review and that, when so applied, *Apprendi* affords them the right to relief. [8]
>
> Third…defendants [who had] lost their first §2255 motion [while] raising other claims [where §2255] was not, and is not at this time [available] as an avenue to raise an *Apprendi* issue because a "second or successive" [§2255 motion] may be filed only if " a panel of the appropriate court of appeals" certifies that the motion is based either on "newly discovered evidence" establishing innocence or "a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable". [9]*Apprendi* sets forth a new rule but that rule as of yet is not retroactive.[10]

The Northern District of Florida determined that the petitioner's *Apprendi* claims should be presented as a §2255 motion pending a retroactive decision. They continued their decision by stating that *Apprendi* claims could not be presented under 28 USCS §2241 since §2255 remedy was not inadequate or ineffective. If *Apprendi* applies retroactively, relief

Florida District Courts of Appeal

The DCA's, of course, have felt the brunt of appeals that the *Apprendi* decision has spurred. Amongst the decisions that have been handed down, questions of application have been left unanswered and exclusions are already appearing.

The Second District, in their decision in *McCoy v. Florida*,[21] left an essential question to be answered on a different day. Their decision states that courts may be precluded from sentencing a defendant as a prison releasee reoffender when a jury finding is not specific (PRR is inappropriate for burglary of an unoccupied dwelling but appropriate for an occupied dwelling). The Second District based their reasoning on the failure of a jury to make an express determination of the occupancy of the dwelling at the time of a burglary. This, they say, may preclude PRR sentencing under *Apprendi*. The Court, in clarification, states that this issue was not resolved because it was not at issue at the time. [22]

In addition, The Third District in *Robbinson v. Florida*,[23] determined that the question regarding whether the habitual offender statute is necessary for the protection of the public, is a discretionary sentencing judgment, not an adjudicatory fact within the meaning of *Apprendi*. For *Apprendi* to apply, the Court states, a fact that increases the penalty for a crime beyond the prescribed statutory maximum must exist.[24] The Third District concluded that the trial court's option under §775.084 (4)(c) to impose a non-habitual offender sentence is an option to stay within the ordinary statutory maximum, not to increase it. [25]

Furthermore, in *Sambito v. Florida*,[26] The Fourth District Court of Appeals issued a Per Curium opinion which determined that *Apprendi* does not require a finding beyond a reasonable doubt of the fact of a prior conviction.[27] Additionally, the State need not require such a finding for habitualization under § 775.084 Florida Statutes. It only requires a finding if the court concludes that habitualization is unnecessary if the other statutory requirements are met.[28]

And finally, The Fifth District Court of Appeals held in *Wright v. Florida*,[29] that nothing in *Apprendi* overrules the Florida Supreme court's holding in *Eutsey*[30]. The sentencing of a defendant as a habitual felony offender is independent of the question of guilt of the underlying substantive offense and does not require the full panoply of rights afforded a defendant in the trial of the offense.[31]

Conclusion

The *Apprendi* decision, will continue to shape and define sentences in Florida and throughout the nation's courts, but ask yourself this, has *Apprendi* really changed the way our judicial system works? For those of us in Florida, the *Apprendi* question has been previously considered throughout the State's case lavnÞndi. As The Fifth District concluded in *Taylor v. Florida*,[32] some *Apprendi* issues may be concise restatements of our

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ROBERT MANN
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and quick tongue. He frequently won floor debates with quick one-liners. A compilation of these, called *Mannerisms* was once published by a young admirer, Bob Graham.

Here are some examples: Mann sponsored a bill limiting gifts to lawmakers. A legislator denounced Mann for suggesting they could be "bought." "Gentlemen," Mann replied, "we're all agreed that no member of this chamber can be bought; however, the purpose of this bill is to assure the public that a legislator cannot be rented for the season."

A Republican legislator attempted to filibuster one of Mann's bills by suggesting minor changes that would stall passage. The member happened to be wearing a yellow shirt and striped red and black tie. Mann brought the House down when he informed the House members of a new bird in Florida, called the "yellow-bellied, striped-tie nitpicker."

Mann was a "LeRoy Collins Democrat" who stood for integration and equality during the 1960s. Mann lost a close election for House Speaker in 1966, but still was selected "Most Valuable Legislator" by the St. Petersburg Times. He then ran for Congress, but lost to Sam Gibbons by the narrowest of margins. In 1968, he was appointed by then Governor Claude Kirk to the Second District Court of Appeal, where he served until 1974, the last two years as Chief Judge.

This article is dedicated to Mann's career as appellate judge, during which his wit, wisdom, literacy, maverick tendencies, and brilliant mind became reflected in a body of law.

A Sampling of Judicial Mannerisms

Mann's first published opinion starts like a Faulkner novel, with Southern gothic tragedy flair and attention to detail. It sets a tone for the opinions to follow:

> The silk stocking set visited the lakeside home of Dr. Kenneth Jackson one evening at the dinner hour, entering through an unlocked door. The stockings were pulled down over their faces. Pork-pie hats hid their hair. One of the startled diners said that it was a joke. Demonstrating that the guns in their hands were real, the visitors told them that it was no joke. They were right. . . .[1]

Mann's opinions in criminal cases particularly reflected this fascination and wonderment at the human condition. He manifested this, as well as his love of stories with moral lessons in *Cobb v. State,*[2] in which a man set a companion on fire for being lazy. The defense tried to justify the act as having been provoked by the victim. Mann observed, "Whatever fires may in the next world consume those who spend Saturdays in sloth, the rights of Louis Banks and other free men protect them against premature ignition."

Mann's opinions became famous for his opening lines:

> The sign on the tavern said 'Dew Drop Inn' and the appellant did . . .[3]

> Everything is coming up thorns in Roseland Park.[4]

> If oratory comes, can reversal be far behind?[5]

> The order appealed from might be wrong, but it is not erroneous.[6]

> Some will see this as the predictable collision between the new morality and the old biology, but . . . sweet-and-sour sex is not new in life and law.[7]

> Pleasure mistaken for happiness is life's most persistent mirage.[8]

> Difference of opinion is said to underlie the sale of inferior land and the marriage of ugly women.[9]

Mann had a way of drawing colorful analogies to illustrate his reasoning. He said of a prosecutor's excessive persistence in asking jurors on voir dire if they understood the defendant could choose not to testify: "This was done in such a way as to remind one of the old story in which the first mate of a vessel became incensed when he read in the log a notation by the Captain that 'The First Mate was drunk today,' whereupon at the end of his watch the First Mate wrote in the log 'The Captain was sober today.' "[10]

Mann's opinions raised questions of social justice. In criticizing a profanity conviction, he stated, "If in Stalin's time, in the St. Petersburg which had by then become Leningrad (saints having fallen from grace in the Soviet Union), a citizen had been arrested for cursing the 'goddam war' and calling the visibly present police 'goddam pigs,' I could understand it. But Canney was arrested at a peace rally in St. Petersburg, Florida, and I cannot understand it."[11]

Mann was an early proponent for gender equality:

> Women have not been chattels for centuries, but men have been a long time admitting it. . . . Over a century has passed since William Ross Wallace wrote that 'the hand that rocks the cradle is the hand that rules the world.' The ceremonial incantation of this line against a rising tide of support for women's rights has, we suspect been prompted by the unspoken hope that the hand that rocks the cradle would not also rock the boat. But women began to demand a more direct involvement in the management of mankind's affairs than the nurture of the next generation provides, as important as that is.[12]

Mann could not resist the temptation to comment on the personalities involved in the disputes which found their way to his court.

> If James Henry Knight is an asset to society it does not appear of record in this proceeding. A multiple loser in the game of life . . .[13]

> The late John Reid Topping had a talent for spending which topped his ancestors' capacity to accumulate. . .[14]

> A trial judge whose patience matches Job's . . . underwent a chemical change as a result of hyperacidity of the lawyers involved.[15]

Mann was a student of language and a man of words. He would analyze the origin and meaning of words. In a profanity case, he offered these thoughts:

> "Goddam" is a word taken into the vocabulary, and infests our literature. It is a bi-partisan epithet: President Roosevelt applied it to a broken voting machine, and former

> Attorney General John Mitchell was quoted by the Associated Press on June 15, 1972, as using it. It transcends terrestrial boundaries: an astronaut on the moon used it, and I heard no clamor for his prosecution, though I recognize a delicate venue problem. The law seems to be that you can't use the phrase in St. Petersburg if it offends the police.[16]

His love of literature came, oddly enough, from his father, who had little formal education, but prided himself on being self-taught and well-read. Mann demonstrated the breadth of his literary scope with quotations from the Bible,

> I was . . . in prison, and ye visited me not. (Matthew 25:43) [17]

Methodist Hymns,

> Are ye able to remember, when a thief lifts up his eyes, that his pardoned soul is worthy of a place in Paradise? [18]

H. L. Mencken,

> Many euphemisms for Goddam have flourished . . . Goshdarn, goldarn, goshdad and Goshdang.[19]

Jonathan Swift,

> I was this forenoon with Mr. secretary at his office, and helped to hinder a man of his pardon, who is condemned for a rape. The under-secretary was willing to save him, upon an old notion that a woman cannot be ravished: but I told the secretary, he could not pardon him without a favourable report from the judge; besides, he was a fiddler, and consequently a rogue, and deserved hanging for something else; and so he shall swing.[20]

John Donne,

> Any man's death diminishes me.[21]

and John Stuart Mill,

> No one pretends that actions
> Should be as free as opinions.[22]

Mann sometimes attempted innovative changes in the law which fell flat when they reached the Supreme Court of Florida. He advocated eliminating the "'absolutely rigid line' separating invitees, licensees and trespassers," because "what is reasonable care . . . depends on all the circumstances of the case."[23] In reversing, the Supreme Court said : "Judge Robert Mann undertook to remove all distinctions of standing and degrees of care involving trespassers, licensees and invitees upon a property owner's premises. Judge Mann would simply apply a test of reasonableness under the circumstances in every situation. No other Florida court has ventured so far with such an over-simplification of a complex problem . . . ."[24] Thirty years later, one wonders why the concept that negligence is the failure to use reasonable care under the circumstances [25] would have seemed an oversimplification.

In *Smith v. State*,[26] Mann wrote an opinion reversing a conviction for rape. It reads as beautifully as anything ever penned by Justice Cardozo, his idol. It will make you laugh, it will make you cry. You will scratch your head in puzzlement over the jury's "binary thought process." But for all its erudition, you will know Mann was just flat off base, and the Supreme Court reversed in a terse no-nonsense fashion.

Mann was honest about his fallibility. He penned at least three opinions that began with the simple words "I erred . . ."[27]

Mann always tried to find meaning in the law. His ability to find meaning and explain it in a way that made sense to himself and others sometimes elevated mundane proceedings to a transcendent level. Perhaps the most well-known example of this ability was copied from a 1973 opinion onto plaques which were then hung in most of the courtrooms in Hillsborough County, where many remain today, as a reminder to trial judges:

> We receive the statutory law from the legislature and its interpretation from our Supreme Court, agreeing with some, disagreeing with some, following all, because our bondage to law is the price of our freedom.[28]

Mann Was No Island

After leaving the court in 1974, Mann taught Appellate Law and Constitutional Law at the University of Florida law school until his retirement in 1986, after which he continued to teach as a Professor Emeritus. Literally thousands of law students learned appellate law from "Judge Mann."

Mann found working with young people to be the most rewarding of his careers. Mann developed close relationships with his students and remained in touch with many of them after graduation. He often aided their careers with helpful advice, information, or letters of recommendation.

Rounding out his service in the legislative and judicial branches of government, Mann served the executive branch on the Public Service Commission from 1977 to 1980 under appointments by Governors Askew and Graham, and was Chair of the PSC in 1979-80. At the PSC, Mann continued his reputation for reform, ethics in government, and wisdom.

Mann was a Vice Chancellor of the Methodist Church, which he modestly translated to mean "Pro Bono Extraordinaire." He was a joyful scholar of theology, among many other subjects. Mann was a lifelong student himself, receiving three doctorate degrees as well as several honorary degrees.

Young lawyers who had the privilege of serving as Mann's law clerks and aides went on to have impressive careers. They include: Jon Mills, Dean of University of Florida College of Law; William Haddad, former Clerk of the Second District and a past winner of the Appellate Practice Section's Adkins Award; and F. Wallace Pope, founding partner of Johnson, Blakely, Pope, Bokor, Ruppel & Burns. The writer of this tribute also had the honor of serving as Mann's aide.

Judge Mann's career was supported and promoted by his wife, Dr. Elizabeth Mann, a librarian who became a professor of Library Science at Florida State University. Mann was proud of his children who followed their own dreams.

As we lament Mann's passing, we appreciate the gift of his life and the legacy of his words.

Susan W. Fox *is an appellate attorney with Macfarlane Ferguson & McMullen in Tampa. Fox is Board certified in appellate practice and is Editor in Chief of* The Record. *Fox was a student of Judge Mann's at the University of Florida College of Law, and served as his aide during*

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his tenure as Chair of the Public Service Commission.

Endnotes:

[1] *Cason v. State*, 211 So.2d 604 (Fla. 2d DCA1968)
[2] *Cobb v. State*, 214 So. 2d 372 (Fla. 2d DCA 1968)
[3] *New v. State,* 211 So.2d 35 (Fla. 2d DCA 1968)
[4] *Roark v. Weldon*, 232 So.2d, 216 (Fla. 2d DCA 1970)
[5] *Chavez v. State*, 215 So. 2d 750 (Fla. 2d DCA 1968)
[6] *Lindgren v. Lindgren*, 220 So. 2d 440(Fla. 2d DCA 1969)
[7] *B. v. F.*, 217 So.2d 599 (Fla. 2d DCA 1969)
[8] *Bernstein v. Bernstein,* 220 So. 2d 429 (Fla.2d DCA 1969)
[9] *Crane v. Simpson*, 213 So. 2d 299 (Fla. 2d DCA. 1968)
[10] *McGee v. State*, 304 So. 2d 142 (Fla. 2d DCA 1974)
[11] *Canney v. State*, 298 So. 2d 495 (Fla. 2d DCA 1973)
[12] *Federal Deposit Ins. Corp. v. Playford*, 217 So. 2d 584 (Fla. 2d DCA 1969)
[13] *Knight v. State*, 217 So. 2d 124 (Fla. 2d DCA 1968)
[14] *First Nat. Bank of Belleair Bluffs v. Maricopa Corp.*, 230 So.2d 191 (Fla. 2d DCA 1970)
[15] *State Farm Mut. Auto. Ins. Co. v. Herrin*, 230 So. 2d 709 (Fla. 2d DCA 1969)
[16] *Canney v. State*, 298 So. 2d 495 (Fla. 2d DCA 1973)
[17] *Knight v. State*, 217 So.2d 124 (Fla.2d DCA 1968)
[18] *Smith v. State,* 239 So. 2d 284 (Fla. 2d DCA 1970)
[19] *Canney v. State*, 298 So. 2d 495 (Fla. 2d DCA 1973)
[20] *Smith v. State,* 239 So. 2d 284 (Fla. 2d DCA 1970). 'Jonathan Swift: 1 Journal to Stella 319—320 (July 25, 1711) (ed. Williams 1948)
[21] *State v. Eitel* 227 So.2d 489 (Fla. 1969)
[22] *Id.*
[23] *Camp v. Gulf Counties Gas Co.*, 265 So. 2d 730 (Fla. 2d DCA 1972)
[24] *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973)
[25] See Fla. Std. Jury Instr. (Civ.) 4.1.
[26] *Smith v. State,* 239 So. 2d 284 (Fla. 2d DCA 1970)
[27] *Gulf American Fire & Cas. Co. v. Singleton*, 265 So. 2d 720 (Fla. 2d DCA 1972); *Johnson v. Rinesmith*, 238 So. 2d 659 (Fla. 2d DCA 1969); *State v. Fulkerson*, 300 So. 2d 275 (Fla. 2d DCA 1973)
[28] *Johnson v. Johnson*, 284 So. 2d 231 (Fla. 2d DCA 1973)

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