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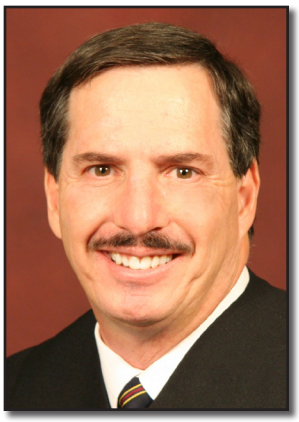
Getting To Know Judge Jay P. Cohen

By Barbara Green[1]

Judge Jay P. Cohen, the newest member of the Fifth District Court of Appeal, brings to his position years of wide-ranging experience in the law, as well as an engaging sense of humor.



Judge Jay P. Cohen

After four years as an assistant State Attorney in Sarasota and Orlando, and several years in private practice handling family, commercial, personal injury and criminal cases (including over 100 jury trials and 200 non-jury trials), Judge Cohen was appointed to the County Court bench by Governor Martinez in 1990. In 1994, Governor Chiles appointed him to the Circuit Court, where he served for almost fourteen years. After serving in the Domestic Relations / Juvenile Division in Osceola County and the Criminal and Domestic Relations Divisions in Orange County, Judge Cohen became Administrative Judge of the Criminal Division in January 2002. He has also served as Administrative Judge of the Civil Division and the Appellate Division. Judge Cohen said that the work of an administrative judge in the Appellate Division -- making sure staff memos are timely and that conflicts within the circuit are addressed -- is far different from that of a District Court of Appeal judge. Indeed, he believes his experiences trying cases as a Circuit Judge and sitting as an associate appellate judge were more useful in preparing him for his current position.

During his time as a Circuit Court Judge, he found that appellate lawyers could be very helpful to the trial of a case, particularly in the "critical" area of preservation of issues for appeal. He notes that trial lawyers," in the heat of battle, sometimes can't see the forest from the trees." And, he observed, appellate lawyers are helpful to the trial judge, as well: "Good lawyering always makes a trial judge better."

Most lawyers who practice in the Fifth DCA are familiar with the Ninth Judicial Circuit web site, possibly the most informative of all the Circuit Courts' sites. Judge Cohen was instrumental in setting up the site, working with the court administrator, whom he praises highly and to whom he gives most of the credit. But he has no intention of getting involved with technology issues on the Fifth DCA for now. He is more concerned with learning his new job as an appellate judge.

When asked if he is enjoying serving

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Judge Dorian K. Damoorgian Joins the Fourth District Court of Appeal

By Jonathan M. Streisfeld[1]

Sitting down with The Honorable Dorian K. Damoorgian to discuss his appointment to the Fourth District Court of Appeal, it was immediately apparent that he is humbled by the honor of serving as an appellate judge and at that same time very excited about the opportunity to be one of the select few that are charged with the responsibility of serving as an appellate judge. He noted that the district court is the court of last resort for most cases, heightening the importance of the work that is performed at the district court.

Judge Damoorgian started working as an appellate judge on January 2, 2008. There was no investiture or robing ceremony. When asked by Chief Judge George A. Shahood about when he was prepared to start working, Judge Damoorgian responded as soon as possible. He executed the necessary paperwork, mailed it in, and reported for duty.

Although he had only been on the bench for a few weeks when this article was written, Judge Damoorgian has quickly gained an appreciation for the vast knowledge of his counterparts on the appellate bench. He had been told by others that the judges on the Fourth District are very collegial and has quickly found that to be the case. He noted that all of the judges have a strong appreciation for the impact that the court's decisions have on peoples' lives.

When asked about the different challenges associated with his new position, having been elevated from the Broward County Circuit Court, Judge Damoorgian noted that he did not realize the large number of emergency motions and petitions for original writs that must be addressed by the court on a daily basis.

Those that practiced before Judge Damoorgian at the circuit court level can attest to the fact that he was one of the most hardworking and prepared judges in the courthouse. He would go out of his way to schedule important hearings even if that meant squeezing in early morning hearings prior to his daily motion calendar. He prided himself in having taken the time to review each parties' filings and supporting legal authority prior to each hearing. It was apparent when you arrived in his courtroom that he was prepared. Those that appear before him at the district court level should expect the same level of preparation and knowledge of the appellate record and relevant case law.

Judge Damoorgian

Judge Damoorgian's enjoyment of the academic nature of the appellate process was a strong drawing point for seeking appointment to the district court. When asked about what the bench and bar should expect from opinions that he authors, he said they will be concise, definitive statements of the law because that is what trial judges and lawyers need from the appellate courts. He will strive to draft or take part in opinions that bring clarity to the law.

Judge Damoorgian was appointed as a circuit court judge in the Seventeenth Judicial Circuit in and for Broward County in 1999 by then Governor Jeb Bush. When asked about the benefit of his having served as a trial judge for a number of years, he pointed to his experience with how trial courtrooms operate, greatly aiding his review of the record. Judge Damoorgian was first assigned to the division which handled domestic violence, dependency, and juvenile cases. He then moved to the felony criminal court and most recently was assigned to the civil division. Those assignments give him a background in a range of issues that will come before him at the district court.

In the Fall of 2007, Judge Damoorgian was appointed as the administrative judge for the civil division. The formation of a business court for complex cases was a major goal that he hoped to accomplish in that position. Shortly before he was appointed to the Fourth District, he along with other circuit court judges completed the framework for the business court, which is now up and running. He also served on the circuit court's staff attorney, jury, and courthouse planning committees during his time as a circuit court judge. He is currently serving on the Fourth District's diversity training team assisting with the implementation of training mandated for all judges by the Supreme Court of Florida.

From 1980 to 1999, Judge Damoorgian was in private practice. Although a former classmate tempted him to begin his legal career in California, his first position was with a firm in Miami known as Manners, Amoon, and Whatley. He moved to a Broward County based practice in 1984. He mainly handled commercial litigation and transactional matters.

While he was born in Hoboken, New Jersey in 1955, he moved to Miami, Florida with his family as a child. His father owned a hardware store. He attended Southwest Miami Senior High School, later receiving his undergraduate degree in 1977 from American University and his law degree from Cumberland School of Law, Samford University in 1980.

Judge Damoorgian is married with two children, one son who is sophomore in college and a daughter who is in high school. His wife works as a substitute teacher for kindergarten classes at an elementary school in Broward County.

(Endnotes)

1 Jonathan M. Streisfeld is a partner with The Kopelwitz Ostrow Firm, P.A. in Fort Lauderdale, focusing his practice in civil appellate matters, primarily in the commercial litigation and family law arenas, and commercial litigation. Prior to joining his current firm, Mr. Streisfeld was a partner with Brinkley, Morgan, Solomon, Tatum, Stanley, Lunny & Crosby, LLP. He is admitted to practice in Florida state and federal courts and the U.S. Court of Appeals for the Eleventh Circuit.

Message from the Chair
Appellate Pro Bono

By Steven L. Brannock

Someday those grandchildren will be at your knee, looking up with wide eyes, and they'll be asking you to regale them once again with stories of your favorite appellate victories (we can dream, can't we?). Chances are, if you are like any of the senior lawyers I've talked to, at least one of your favorite stories will be a pro bono case.

There is something about a good pro bono case that creates good memories and good stories. Perhaps it was the fact that you were operating out of your comfort zone. Maybe you learned something about a side of life you had not thought much about before. Maybe it was the thrill of an appellate decision going your way in a case that all your colleagues told you was bound for defeat. Maybe it was the grateful thank you note you got at the end of the case, the one that is still in your desk drawer after all these years.

Yes, there are lots of good reasons to do pro bono work. We all get the calls and the unsolicited emails. We hear the stories from the bench about the huge number of pro se appeals where a party cannot afford a lawyer. We all know that the demand for legal assistance far outstrips the supply.

I'm pleased to report that the Appellate Section is doing its part, and more, to address this problem. This year, the section is very proud of the completion of its most ambitious and important project to date, the Pro Se Appellate Handbook. Starting from an idea nurtured by Tom Hall, Clerk of the Florida Supreme Court, the Handbook is designed to guide pro se appellants through the maze of the appellate court system.

Although in a perfect world, every litigant would be represented on appeal, the unfortunate fact is that thousands of litigants are unrepresented in our appellate courts. Most, if not all, of these litigants need help with the basics. What do I file, when and where must I file it? What goes in my brief? In the past, pro se litigants have directed these questions to appellate and trial court clerk's who had little in the way of resources to offer much guidance.

The pro se handbook will change all that. A comprehensive guide to the appellate process, the handbook will be available at law libraries, prison libraries, and clerks' offices around the state. The handbook is also available on the web and accessible by anyone with access to the internet. Through a generous grant of the Florida Bar Foundation, the handbook is being translated into Spanish and Creole French and is being made ADA compliant. Thus, the handbook will be accessible by virtually any pro se litigant in Florida. To see or print out the handbook, simply go to the Section's website, www.flabarappellate.org.

The handbook is the product of hundreds of hours of work by members of the Section. Dorothy F. Easley served as Chair of the subcommittee in charge of its production and served as Editor-in-Chief, assisted by Kimberly Jones as Vice Chair and Co-Editors Caryn L. Bellus, Susan W. Fox, Siobhan Helene Shea and Committee Liaisons Tom Hall and Harvey Sepler. The list of authors and other contributors is too numerous to name here. Members of the Section have performed an important service with this project and our hope is that it will be a model for other sections working to serve the needs of the unrepresented.

As great as this project is, however, offering a handbook to the unrepresented still pales in comparison to having an experienced appellate lawyer to handle the appeal. This is where you come in. Perhaps you did not have the opportunity to work on the handbook. Perhaps you were too busy or were not a member or you had not heard about the project. Now is the time to atone.

The section has a pro bono subcommittee chaired by Tony Musto. The subcommittee has a liaison in each appellate district as well as the Florida Supreme Court. If you have an interest in doing pro bono appellate work or serving on the pro bono subcommittee, you can call Tony at 954.336.8575 or simply email me at steve.brannock@hklaw.com or our section liaison Carolyn Shovlain at cshovlain@flabar.org and we will put you in touch with the right folks. The subcommittee is working to pair up the demand for pro bono services with appellate lawyers ready to assist. Alternatively, just call the clerk of your local appellate court and let them know of your interest. These clerks keep a list of interested lawyers and may call you when an appropriate case comes along.

You have heard all the public service reasons to take a pro bono case; I do not need to repeat them here. On appeal, there is at least one more good reason – the appellate court is making law, and the court needs the assistance of a good lawyer on both sides to help it do its job properly. By briefing the side of the case that would otherwise go unrepresented, you perform a valuable public service to the court and to every litigant and judge behind you who is looking at your case as precedent.

There are also plenty of selfish reasons to undertake pro bono service. First, is the experience you will get. Second, you will also get the opportunity to write, perhaps in the unaccustomed position of first chair.

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JUDGE COHEN
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as an appellate judge, he responds enthusiastically, "I am absolutely enjoying it! Having more than 10 seconds to make a decision is wonderful!" He finds the academic aspect of the job the most exciting. It is what he "always wanted to do." Although his prior legal experience gave him the opportunity to explore many areas of the law, and he has not yet been confronted with anything entirely new, he is finding "new twists and turns," as he has the time to delve more deeply into the law.

Judge Cohen appreciates the collegiality of his colleagues on the court, referring to them as a "tremendous group of people" who have been "very open and helpful." Without exception, they have made it clear that they are willing to assist him as he settles in to his new post. He has especially warm words for Judge Alan Lawson. Their friendship spans many years. Judge Cohen was already on the Circuit Court bench when Judge Lawson was appointed to that court, and enjoyed many conversations with Judge Lawson on "a lot of issues." Now, he finds Judge Lawson is of great assistance to him in his new role, and he has great respect for him.

Since joining the appellate court, Judge Cohen has been impressed with the quality of the briefs, and has found that most lawyers have done a good job in oral argument as well. Asked if he had any advice for lawyers about writing briefs, he responded that they should "avoid adjectives" and hyperbole because they are "not helpful" and can be counter-productive. Briefs should state the facts in the appropriate light, and not ignore the jury's findings. He appreciates briefs that "get to the heart of the issue" and attorneys who choose and focus on their best issues, although he acknowledged that can sometimes be a difficult task. At oral arguments, Judge Cohen truly wants attorneys to answer the questions. He asks questions "because they are issues I have questions about."

Although he had "excellent" clerks to work with in the Circuit Court, he shared them with other judges, so the clerk situation in the DCA feels like a luxury. He is still learning how to make the best use of their skills. He writes his own opinions and intends to continue to do so. At this point, he is also reading the entire record in each case. He believes that as he gains experience, he may focus more on the salient portions of the record although he may continue to read the entire record if he finds it helpful. That is a lot of work, but Judge Cohen has a history of working hard.

Born in Chicago in 1952, Judge Cohen moved to Florida at the age of 14 and attended high school in South Florida. He worked as a delivery boy at an Italian restaurant, working his way up to cook. He also sold hot dogs at the Orange Bowl for the Miami Dolphins games, "when they were an expansion team as apparently they are again."

Judge Cohen attended the University of Florida as an undergraduate and a law student. There, he served as a member of the Appellate Advocacy Board of Editors, taught legal research and writing, helped establish a student legal services program, was involved in the student bar association, and worked as a law clerk.

Judge Cohen also met his wife, Christine Bilodeau, in law school. After working for some time in Sarasota, he followed her to Orlando after she graduated. Ms. Bilodeau now works as an administrative law clerk for Judge Anne Conway in the United States District Court for the Middle District of Florida. Their daughter, Amy, is a sophomore at the University of North Florida, and their son, Douglas, is a freshman at the University of Florida.

A strong believer in community service, Judge Cohen received the Pro Bono Award of Excellence from the Orange County Bar Association for his work with the Guardian Ad Litem Program representing abandoned, abused and neglected children. During his career, he chaired or served as a member of several committees for the Orange County Bar Association, including the Criminal Law Committee, the Law Week Committee, and the Judicial Relations Committee. He initiated the implementation of the Judicial Election Campaign Processes Committee, a project encouraging ethical conduct in judicial campaigns.

Although being a judge limits the kinds of things he can do, Judge Cohen remains involved in the community. He is active in the Justice Teaching program. He teaches at Howard Elementary, and is involved in other community and judicial activities. He has taught at the Statewide Conference of Circuit Court Judges and the Florida Advanced Judicial Studies Program, and has authored materials on evidence, sentencing and criminal rules. Currently, he is Vice Chair of the Florida Bar Criminal Rules Committee.

Judge Cohen's sense of humor was evident when he was asked if he had anything he wanted to say to appellate lawyers. "Don't file any appeals in the Fifth," he joked. "We have plenty to do." He then turned serious, modestly asserting, "I haven't been here long enough to think I have more wisdom than the members of your organization. Their briefs and advocacy have been excellent." Right now, Judge Cohen is concentrating on writing opinions, trying to be very careful as he does so. He feels "blessed" in his career, and he wants to do the job of an appellate judge well.

(Endnotes)

1 Barbara Green is a sole practitioner in Miami, Florida, concentrating on appeals and litigation support. She presents the caselaw updates for the meetings of the Miami-Dade Justice Association, available online at www.caselawupdate.com. She currently serves on the Supreme Court Committee on Standard Jury Instructions -- Contract and Business Cases. Her publications include Barbara Green, Cracking the Code: Interpreting and Enforcing the Appellate Court's Decision and Mandate, 32 Stet. L. Rev. (Winter, 2003).

Board Certification in Appellate Practice: A Rewarding Endeavor

By Duane A. Daiker [1]

The Florida Bar Board of Legal Specialization and Education is charged with the serious undertaking of certifying members of the Bar as specialists in particular practice areas. Currently there are 22 different specialty areas, including Appellate Practice. Achieving board certification is a remarkable professional achievement that is an objective indication of a lawyer's knowledge, skills, experience and ethics. Only lawyers who have been certified by the Florida Bar can market themselves as "experts" or "specialists" in a particular area of practice.

Appellate Practice has been a recognized specialty since 1993. Certified appellate specialists are a relatively rare group, currently numbering only 154 members of the Florida Bar. By comparison, there are 1,098 Florida lawyers currently certified in Civil Trial Practice.

In order to obtain certification, you must demonstrate special competence and experience in the area of appellate practice. This is demonstrated through a lengthy and detailed application process involving review of your appellate work product and practice history, judicial and peer review, and a substantive examination.

As a threshold matter, you must have been practicing law for a minimum of five years, and you must have had primary responsibility for the preparation of the briefs in at least 25 appellate matters, and participated in at least five oral arguments. You must also demonstrate that you are engaged in appellate practice for at least 30% of your professional time within the three years preceding the application.

The quality of your appellate advocacy is also gauged by the Committee. You must submit a copy of your briefs from your last two appellate matters. This is an interesting requirement because it prevents you from picking and choosing your best work product over your career. Your performance is further evaluated through peer review. You are required to submit at least six professional references, including two appellate judges. Each of your references are sent detailed questionnaires regarding their knowledge of your appellate skills, work history and ethics. The Committee may also expand the peer review beyond the named references.

Appellate certification also requires 45 hours of Continuing Legal Education (CLE) credits in the three years preceding the application. These courses have to be offered at an intermediate or advanced level on appellate topics—so not all CLE counts. The Bar staff is very helpful in this regard, and will work with you to ensure you can meet this requirement, but it takes some effort to accumulate the right courses within the three year timeframe. When you are a year or two from applying, it is good advice to begin taking all the advanced appellate CLE that you can find. Although it is not technically required, nearly everyone seeking certification attends the Board Certification Exam Review Course offered by the Florida Bar once a year in late January or early February. This course occurs too late to be considered part of your required CLE in the year you are applying for certification, but it is an excellent review for the final hurdle—the certification exam.

Once your application is accepted and approved by the Committee, you must sit for the certification exam. The exam is administered over the course of a full day, and consists of multiple choice and short and long essay questions. The exam covers the full range of appellate knowledge, including civil, criminal, and administrative appeals, in both state and federal court. Many applicants for certification find a need to learn the specifics of appellate practice in areas they do not normally practice to properly prepare for the exam. Even a commercial appellate lawyer needs to be prepared to discuss criminal appeals and issues relating to post-conviction relief in an essay question! The official pass ratio for the 2007 exam was 57%.

If you obtain a passing score on the exam, you have achieved board certification, and have the right to call yourself an appellate specialist. You may then advertise your expertise, and you may include the Florida Bar's board certification artwork in your marketing materials. The Bar also offers a variety of marketing materials for certified lawyers, such as handouts that explain the meaning of board certification to help educate prospective clients. Board certified lawyers are also listed separately in the Florida Bar Journal directory issue, and on the Florida Bar's website, so other lawyers can easily identify appellate specialists. This objective indication of your special competence helps to distinguish you from other members of the Bar, and can be an excellent marketing tool.

Keep in mind, however, that the application process is very involved, and it can take several years of planning to be prepared to meet all of the various requirements. Even the process of filling out the application is extremely time consuming because it requires the compilation of large amounts of historical data about your appellate cases. As a first step, you need to download the application and related rules and instructions from the Florida Bar's website to fully familiarize yourself with the application process.

My informal poll of board certified appellate specialists confirms that obtaining board certification is well worth the effort. In fact, the practitioners I interviewed all spoke very highly of the process, and believed that the experience of applying for certification, undertaking the intense CLE requirements, and studying for the certification exam, made them better appellate lawyers. If you are serious about concentrating your professional time in appellate practice, I strongly recommend working toward board certification.

(Endnotes)

1 Duane A. Daiker is a partner in the Tampa office of Shumaker, Loop & Kendrick, LLP. He handles a variety of appellate and commercial litigation matters in state and federal court. Mr. Daiker was recently certified as an appellate specialist by the Florida Bar.

Seven Qualities For Beginning Appellate Attorneys

Submitted by Mary E. Adkins[1]

Perhaps you know a trial lawyer who insists on doing his own appeal because he wants to get into appellate law. Or, perhaps you know a law student who wants to become an appellate lawyer. What qualities do you advise this person to develop? There are many, but here I set forth seven basic ones.

First—even before those stellar writing skills we all laud—a successful appellate lawyer needs to have cold-eyed judgment. She must understand what is really an appealable issue and what is not. In the words of former Florida appellate specialist Tracy Carlin, a successful appellate attorney should avoid falling into the "ABYSS"—**A**ttorneys **B**elieving **Y**our own **SS**ssssstuff.

Second, a successful appellate attorney must possess the ability to think and analyze clearly. As I try to instill in my first-year law students, clear legal writing can only come from clear thinking. Especially when there are multiple, complex or intertwining issues, the ability to think logically and clearly helps.

Third, a successful appellate attorney should possess a better-than-usual ability to concentrate. Because briefs may be long and complex documents, you will yearn for large chunks of time to research and write them. But, failing that, you will need the ability to pick up quickly where you left off. Some people can change horses easily several times a day. Others are more like a large ship, taking a long time to switch directions. Because researching and writing a brief take time, the appellate attorney must know which type he or she is and learn how to accommodate such needs.

Fourth, at the center of the qualities a good appellate attorney needs, is good writing and research skills. Judges read many, many briefs, and would probably tell you that not enough of them are really well done. A well-written brief should use vivid language and just the right word or phrase. A brief that does not break basic punctuation, grammar, and spelling rules has a better chance at avoiding distractions that undermine the substantive argument. And a brief that is well-researched, hits all the pertinent law and successfully addresses both your arguments and the opposition's—well, that brief may win the appeal for your client.

The fifth major quality for a successful appellate attorney is the ability to think on his or her feet. Like a trial, an oral argument requires the concentration of a cat on the hunt and reflexes to match. Fortunately, for those of us who do not feel this is our natural strong suit, confidence and the ability to think on our feet are immensely enhanced by preparation, preparation, preparation.

Sixth, a good appellate attorney. will have a good set of ears. When preparing for oral argument, you may have a plan, but you must be prepared to abandon it in order to address the judges' concerns. You must listen to them closely to understand what they are REALLY concerned about. Once you figure this out, you must be ready to address their concerns, not just your own.

Which brings us to the seventh (but never the last) essential quality of the successful appellate attorney: Humility and a willingness to prepare.

As I have the privilege of telling my students each spring semester, do not be arrogant and think you can wing the oral argument. Especially when you are new at it practice, practice, practice. If you can, swallow your nerves and get some colleagues to play moot court with you.

And do it more than once. Bribe them if you have to. A lesson on what could happen otherwise can be found in an April 2008 case decided by the Fifth Circuit Court of Appeals. The Fifth Circuit dedicated part of its opinion to criticizing the unpreparedness and unprofessional conduct in oral argument of one of the attorneys in *Hartz v. Administrators of Tulane Educational Fund*.[2] So my final piece of advice is this: Hand a copy of this opinion to your friend, colleague or student who wishes to be an appellate attorney to remind them of the importance of preparation and professionalism.

(Endnotes)

1 Ms. Adkins is a Legal Skills Professor/Legal Research & Writing. She joined the University of Florida as Adjunct lecturer in 2005 and was named Legal Skills Professor in 2006. She also served as the Senior Executive Editor, Florida Law Review, 1991. Before joining the faculty, she worked in private practice at Holland & Knight, 1992-1994. Jones, Carter & Drylie, P.A., 1994-1998. Solo Practice, 1999-2001. Cameron, Hodges, Coleman, LaPointe & Wright, 2001-2004

2 Hartz v. Administrators of Tulane Educ. Fund, No. 07-30506 2008 WL 1766886, (5th Cir. Apr. 16, 2008).

APPELLATE JOINDER: THE PRACTICE AND PROCEDURE AND AN APPARENT EXCEPTION TO THE 30-DAY WINDOW FOR SEEKING REVIEW.

By Jonathan M. Streisfeld[1]

The phone rings. A colleague has referred a prospective client to you to a handle an appeal. You ask when the order was rendered, but the 30-day window to appeal has already expired. You ask whether the opposing party timely appealed, which may permit a cross appeal. No such luck. Is there any other way to perfect an appeal? Perhaps.

If the case is a multi-party case, with either two or more plaintiffs or defendants, and a party that was aligned with the prospective client filed a notice of appeal, Florida Rule of Appellate Procedure 9.360(a) provides for joinder in the appeal: "A party to the cause in the lower tribunal who desires to join in a proceeding as a petitioner or appellant shall file a notice to that effect within 10 days of service of the petition or notice or within the time prescribed by rule 9.110(b), whichever is later."

A plain reading of the rule reveals a "filing" requirement, not a "service" requirement, meaning that it is imperative that you focus on someone delivering the joinder notice to the court by a date certain as opposed to simply mailing, faxing, or hand delivering the document to the opposing counsel or party. Therefore, if a window exists for the client to join the appeal, file the notice before the window closes. Thus, perfecting joinder is distinguishable from the requirement to serve a notice of cross appeal which, pursuant to Florida Rule of Appellate Procedure 9.420, need only be mailed, faxed, or hand delivered by the deadline and filed with the court thereafter.

Even if the time period afforded by Rule 9.360(a) has expired, the 10-day period is not jurisdictional. In *Super Transport, Inc. v. Department of Insurance*, 773 So. 2d 590, 591-92 (Fla. 1st DCA 2000), the First District applied the following standard to a late joinder notice: "whether the opposing party can show it was substantially prejudiced by the delay." The court adopted the standard applied in *Westfield Ins. Co. v. Sloan*, 671 So. 2d 881 (Fla. 5th DCA 1996), which addressed an amended notice of appeal. There are no reported decisions contradicting *Super Transport.*

By explicit reference to Rule

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Florida Coastal Wins Jessup Regional Moot Court Competition

On February 24, 2008, Florida Coastal School of Law won the Jessup International Law Moot Court Competition's Southeast Super-Regional and earned the right to advance to the International Rounds in Washington, D.C. Coached by Professor Chris Roederer, the Florida Coastal team consists of oralists Valarie Linnen and Rick Lasseter, and brief writers Rick Marshall, Marika Sevin, and Coral Williams. Valarie Linnen received the Best Advocate Award and the team received a Best Brief Award.

There were a total of 22 teams in the Southeast Regional. In the preliminary rounds at the Southeast Regional in Miami, Coastal defeated teams from Vanderbilt, Georgia State, and St. Thomas University. In the out-rounds, the team then went on to defeat teams from Florida International University and the University of Georgia before defeating the University of Alabama in the finals.

Jessup is the largest moot court competition with nearly every American law school and over 500 law schools world-wide competing. The finalists from each of six American Super-Regionals are joined later this spring in the International Rounds by 90 national champions from around the world.

This marks the third year in a row that Florida Coastal has won the Jessup Southeast Regional and advanced to the International Rounds. Professor Roederer is a past world champion, coaching a team from South Africa to the International Jessup Championship in 2002. Last year, Florida Coastal finished the competition in top ten teams in the world. In 2006, Florida Coastal finished in the top 21 teams in the world. Previously, team members Lasseter, Linnen, and Marshall won the 2007 Robert Orseck Memorial Moot Court Competition as judged by the Florida Supreme Court.

APPELLATE JOINDER
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9.110(b), it is clear that Rule 9.360 is intended to apply to appeals of final orders, but is it available for interlocutory appeals? One reported decision, applying former Florida Appellate Rule 3.11(b), indicates that a party may join in an interlocutory appeal. *See Green v. Peters*, 140 So. 2d 601 (Fla. 2d DCA 1962). However, Rule 9.360(a)'s explicit reference to Rule 9.110(b), which governs appeals from final orders, suggests that Rule 9.360(a) no longer applies to interlocutory appeals. As a result, the potential client cannot rely on joinder to save his appeal if the underlying order was non-final. Nevertheless, given the lack of clear precedent holding otherwise, a notice of joinder to an interlocutory appeal may yet be received favorably by an appellate court. The Committee Notes to Rule 9.360, which state that "[t]his rule is intended as a simplification of the former rules with no substantial change in practice," arguably support such joinder.

You may also be presented with circumstances requiring the need to join in a notice of cross-appeal. Typically, this will occur where the potential client was a co-plaintiff or co-defendant, but did not file his own notice of appeal or notice of cross appeal. No reported decisions address whether the propriety of filing a notice of joinder to a notice of cross-appeal. However, given the case law holding that the time limits for perfecting a cross-appeal or joinder are not jurisdictional, *Florida Fish & Wildlife Conservation Com'n v. McGill,* 823 So. 2d 236, 238 (Fla. 2d DCA 2002) (cross-appeal); *Super Transport*, 773 So. 2d at 591-92 (joinder), it would appear that a notice of joinder could be filed in response to a notice of cross-appeal. Of course, this filing could also be made more directly as a notice of cross-appeal, relying on *McGill*. The *Super Transport* "substantially prejudiced by the delay" standard applies in both contexts. 773 So. 2d at 592.

Assuming that joinder is timely perfected (or otherwise recognized by the appellate court through a late-filed notice of joinder), the party that joins the case is held to the same requirements as the appellant that timely appealed. As Judge Philip J. Padovano observes in §11.9 *Florida Appellate Practice* (West 2007-08 ed.), the party joining the appeal must file a brief and otherwise comply with the appellate rules. Nothing precludes filing a joint brief with other appellants or adopting another party's brief. *See Tri-County Produce Distribs., Inc. v. Ne. Prod. Credit Ass'n*, 147 So. 2d 587, 588 (Fla. 1st DCA 1962) (applying former Fla. App. R. 3.11(b)). Remember that, if your potential client intends to adopt another party's brief, your client must do so within the deadline for serving the adopted brief. Otherwise, the party will not be considered to have filed a brief. Any party that has not appealed or joined an appeal is, technically, an appellee who is prohibited from attacking the appealed order's validity. *See, e.g., Premier Indus. v. Mead*, 595 So. 2d 122, 124-25 (Fla. 1st DCA 1992).

Once joinder has been perfected, the initial appellant's decision to voluntarily dismiss the appeal does not affect the joining party's appellate rights. This is made explicit by Rule 9.350(b), which further provides that a notice of voluntary dismissal "shall not be effective until 10 days after filing the notice of appeal or until 10 days after the time prescribed by rule 9.110(b), whichever is later." As the Committee Notes explain, "[t]his limitation [exists] so that an opposing party desiring to have adverse rulings reviewed by a cross-appeal cannot be trapped by a voluntary dismissal by the appellant after the appeal time has run, but before an appellee has filed the notice of joinder or cross-appeal."

What if a potential client (who was not a party before the lower tribunal) desires to intervene in an appellate proceeding because of a common interest in, or because the client believes it will be affected by, the appellate outcome. May a notice of joinder be used to intervene and thereby achieve party status? The answer is no, leaving the potential client with limited rights to be heard at the appellate level. Joinder is distinguishable from intervention, the latter of which is rarely permitted at the appellate level. As such, with one noted exception addressed below involving class actions, one cannot be made a formal party to a proceeding for the first time on appeal. *See Tallahassee Democrat, Inc. v. O'Grady*, 421 So. 2d 58 (Fla. 1st DCA 1982). As Judge Padovano notes, a new or prospective litigant on appeal generally can do no more than file an amicus curiae brief. Padovano, at §11.14. This emphasizes the importance of seeking intervenor status before the lower tribunal.

The rare exception where intervention has been allowed for the first time on appeal involves class actions where class members have an objection to an order affecting their interests and there is no right to opt out. *See Barnhill v. Fla. Microsoft Anti-Trust Litig.*, 905 So. 2d 195 (Fla. 3d DCA 2005). In *Barnhill*, the Third District noted that the trial court had erroneously denied the objecting class members' motion to intervene in the trial court proceedings.

Finally, it should be noted that joinder is only available if another party aligned with your prospective client timely appealed under Rule 9.110. Joinder is not available where there is only one party on each side of the case. In that case, look for an opportunity to cross-appeal, even if your ten days has expired. If the deadline under Rule 9.360(a) has expired, consider attempting to join in the appeal anyway; let the opposing party attempt to show that it is substantially prejudiced by the untimely notice of joinder.

(Endnotes)

1 *The author is a Partner with The Kopelowitz Ostrow Firm, P.A. in Fort Lauderdale, Florida, a member of the Appellate Practice Section's Executive Council, and Vice Chair of the Section's Website Committee. Special thanks to Michael M. Giel of McGuire Woods LLP, Jacksonville, Florida, for assistance in editing this article.*

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Editor's Column: The Problem with Preservation of Error

By Jack R. Reiter[1]

As appellate practitioners, we fully understand the significance of preserving error for later appellate review. Whether through the presentation of a specific piece of evidence or the contemporaneous objection, few things are as frustrating as the realization that a potentially dispositive appellate argument has been waived because it was not raised below. But for those appellate practitioners who have also litigated or have worked closely with trial lawyers during trial, there is a tension between trial strategy and appellate preservation that is always present and must be balanced. Questions facing the trial lawyer, such as whether to object and the form of a specific objection – are much more easily evaluated when the attorneys are no longer "in the heat of battle", at which time it may be too late to satisfy the contemporaneous requirement. Some objections, however, pose great risk of underscoring points before the jury that the trial attorney does not want emphasized.

Conceptually, preserving error is practical. The underlying goal is to eliminate the need for appellate review altogether by giving the lower tribunal an opportunity to address and correct error when it occurs. As the Florida Supreme Court observed:

> The contemporaneous objection requirement goes to the heart of the common law tradition and the adversary system. It affords an opportunity for correction and avoidance in the trial court in various ways: it gives the adversary the opportunity either to avoid the challenged action or to present a reasoned defense of the trial court's action; and it provides the trial court with the alternative of altering or modifying a decision or of ordering a more fully developed record for review.[2]

Similarly, as the First District Court of Appeal stated, ". . . in the absence of jurisdictional or fundamental error, it is axiomatic that it is the function of the appellate court to review errors allegedly committed by trial courts, not to entertain for the first time on appeal issues which the complaining party could have, and should have, but did not, present to the trial court."[3] But that which seems practical and necessary in hindsight (which is of course "20/20") presents an entirely different situation to trial counsel who, like the trial judge, must address issues as they arise, often immediately and without opportunity for research, brief-writing, and the intense analysis that typically accompanies appellate review.

This may lead some to suggest that preserving error poses an inherent problem in its execution. Although it is practical and necessary, many would argue that it is inherently unforgiving because it deprives a litigant of review of an issue that may justify reversal but will not even be addressed because the appellant failed to raise it before the lower tribunal. This seems to elevate form over substance and is arguably inconsistent with the overriding principle that cases should be decided on their merits.[4] This is particularly significant when it may be apparent, based upon other rulings by the trial court, that a specific objection would be overruled or evidence excluded, although such circumstances may allow review of a matter that would otherwise be deemed unpreserved when it is clear that the essence of a specific argument has been made below[5] or a proffer of evidence would be deemed futile.[6]

The Florida Supreme Court recently streamlined the preservation process to some degree through *In re Amendments to The Florida Evidence Code-Section 90.104*, 914 So. 2d 940

continued, next page

(Fla. 2005). As established by the amendment:

> If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Eliminating unnecessary continuing objections and efforts to present evidence that the trial judge already addressed *in limine* or at a prior point in trial will likely ease the burden on litigants and the trial court and expedite trial proceedings. Regardless, trial practitioners must remain cognizant of the fact that objections must be made and arguments advanced--even when doing so may seem strategically impractical or unwise—because it is ultimately necessary to preserve the issue for review.

This also presents a good justification to a client for appellate counsel to accompany trial counsel to lower court proceedings whenever possible: to allow trial counsel to focus on the presentation of evidence and obtaining a successful result, while appellate counsel serves the vital role of focusing on the big picture and providing crucial litigation support – including preserving error for future review. Although this may not solve all of the difficulties that may arise in balancing trial strategy with preserving error for review, it may help to allay the inherent difficulty in preserving error.

(Endnotes)

1 Jack R. Reiter is a partner at Adorno & Yoss LLP and serves as Chair of the Appellate Practice Department. He is Board Certified in Appellate Practice and AV-rated by Martindale-Hubbell. In addition to serving as Editor of The Record, he is the current Chair of the Dade County Bar Association Appellate Court Committee and former Chair of the Florida Bar Appellate Court Committee, 2005-2006. He is also a member of the Appellate Certification Committee. He has published and lectured on preservation of error, common law writs, non-final orders, and additional topics relating to appellate practice and procedure.

2 *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010, 1017 (Fla. 2000).

3 *Abrams v. Paul*, 453 So.2d 826, 827 (Fla. 1st DCA 1983); *See Lipsig v. Ramlawi*, 760 So.2d 170, 192-93 (Fla. 3d DCA 2000) (noting general principle that court declines to address issue not preserved for appellate review).

4 See *Joe-Lin, Inc. v. LRG Restaurant Group, Inc.*, 696 So. 2d 539 (Fla. 5th DCA 1997) (noting that "Florida courts have a strong public policy to decide cases on their merits.").

5 *Williams v. State*, 414 So. 22d 509 (Fla. 1982) (holding that objection is preserved if its essence is clear).

6 *O'Shea v. O'Shea*, 585 So. 2d 405 (Fla. 1st DCA 1991) (holding that an evidentiary proffer is unnecessary if it is established that it will be a futile act, the evidence sought to be introduced is rejected as a class, or if the court indicates a proffer is not necessary).

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