



The Record

JOURNAL • OF • THE • APPELLATE • PRACTICE • SECTION

www.flabarappellate.org

Volume XVI, No. 1

THE FLORIDA BAR

Summer 2006

INSIDE

Judge Kerry Evander Joins the Fifth District Court of Appeal.....	5
The First Annual Appellate Justice Conference	6
An Annual Meeting Tradition with the Florida Supreme Court	8
2006 Adkins Award and Pro Bono Award Winners	10
The Section's Rock 'N Roll Bash.....	11
Thanks to the Sponsors of the 2006 Annual Dessert Reception	12

2006 Adkins Award and Pro Bono Award Winners

page 10

Criminal Law Update

by Roberta G. Mandel¹

The Florida Supreme Court accepted the recommendation of the Florida Bar Code and Rules of Evidence Committee with regard to the adoption of an amendment to Florida Statute 90.104(1)(b). See, *In Re: Amendments to the Florida Evidence Code-Section 90.104*, 2005 Fla. L. Weekly S701 (Fla. October 20, 2005). The amendment eliminates the need for a trial objection in order to preserve an evidentiary issue for appeal when the trial judge makes a definitive ruling on the admissibility of the evidence. The amendment is consistent with the Florida Supreme Court's prior decision holding that once a trial court makes an unequivocal ruling admitting evidence over a motion in limine, the subsequent introduction of that evidence does not constitute a waiver of the error for appellate review. It was the position of a number of committee members who practice criminal law that the amendment would reduce the number of motions filed under Florida Rule Criminal

Procedure 3.850. The change eliminated the problem of inadvertent waiver that precluded an appellate court's consideration of an erroneous ruling at trial. The Florida Supreme Court held that it was effective on the date it became law.

In *State v. Barnum*, 30 Fla. L. Weekly S637 (Fla. September 20, 2005), the Florida Supreme Court rejected the State's argument that the Court's earlier decision in *Thompson v. State*, 695 So.2d 691 (Fla. 1997), had been altered by subsequent decisions of the Court. The Court reiterated that the issue presented in *Thompson* was "whether knowledge of the victim's status as a law enforcement officer is an element of attempted murder of a law enforcement officer under subsection (3) of section 784.07, Florida Statutes (1993)." *Thompson*, 695 So.2d at 692. There, the Court held that knowledge of the victim's

See "Passing the Torch," page 2

Message from the Chair

by Susan W. Fox



Welcome to the 2006 year of Appellate Practice Section! Having had a great strategic planning session at the Section's Retreat this summer, I am excited to begin my year as Section Chair.

As we begin the year, it is an appropriate time to discuss the Section's goals for the coming year. Our foremost objective

is to carry on the Section's traditions of excellence.. Our publications and CLE programs have always been among the very best that The Florida Bar has to offer. With Caryn Bellus chairing the Publications Committee, Jack Reiter as Editor of *The Record*, and Betsy Gallagher chairing CLEs, we hope to meet, and perhaps exceed, the high standards set by their predecessors. With Celene Humphries as Programs Chair, we can all count on continuing the excellence and fun for our signature programs we

See "Chair's Message," page 4

CRIMINAL LAW UPDATE

from page 1

status as a law enforcement officer is a necessary element of the offense. The Court in Thompson determined that knowledge was an element of a violation of section 784.07(3), but refused to classify section 784.07(3) of the Florida Statutes (1993) as either a substantive offense or a sentencing enhancement. See, Thompson, 695 So.2d at 693. Contrary to the State's position, the Florida Supreme Court held that the Court's decisions in Merritt v. State, 712 So.2d 384 (Fla. 1998), and Mills v. State, 822 So.2d 1284 (Fla. 2002), did not modify the Thompson holding, and the decision in Thompson remained controlling authority. Thompson requires that a jury determine if the defendant had knowledge of the victim's status as a law enforcement officer.

In Sult v. State, 906 So. 2d 1013 (Fla. 2005), the Florida Supreme Court reviewed a decision certified by the Second District Court of Appeal to be of great public importance:

IS CHAPTER 843.085 VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES AND OF THE STATE OF FLORIDA IN THAT IT CRIMINALIZES WHAT COULD BE INNOCENT CONDUCT, SPECIFICALLY THE WEARING OF PARAPHERNALIA THAT CAN BE PURCHASED THROUGH COMMERCIAL CHANNELS BY THE PUBLIC AND COULD BE MISCONSTRUED AS INDICIA OF AUTHORITY?

The facts reveal that Kimberly Sult entered a convenience store in St. Petersburg wearing a black T-shirt on which was printed a large star and five-inch letters spelling the word "SHERIFF." The star was the official sheriff's five-point star and contained the official sheriff's seal and the words "Pinellas County Sheriff's Office." Sult was also wearing denim shorts and sandals. At trial, Detective Frank Davis identified the T-shirt Sult had been wearing as an official shirt of the Pinellas County Sheriff's Office and testified that the shirt was used in emergency response situations.

Two officers of the Pinellas County Sheriff's Office noticed Sult enter the store. The officers approached Sult and asked, "Do you work for us?" Sult re-

plied, "Yes," and opened her wallet. In Sult's wallet, the officers saw a Pinellas County Sheriff's Office identification card clipped to her wallet. One of the officers believed that Sult was in violation of their office policy by wearing only part of a uniform. Several minutes later, the officers discovered that Sult was not an employee of the sheriff's office. She had previously been employed by the Pinellas County Sheriff's Office as a criminal justice specialist and as a detention deputy recruit.

When she left her employment with the sheriff's office in October 2000, she did not return her identification card. Sult purchased the T-shirt at Americana Uniforms, a store open to the public. Sult testified that when she purchased the T-shirt, she was not in uniform and was not asked for identification. It was further demonstrated at trial that other indicia of law enforcement authority are commercially sold to the public. Sult was charged and ultimately convicted of violating section 843.085(1), Florida Statutes (2001). During the trial, Sult challenged the constitutionality of section 843.085, asserting that the statute was vague or overbroad and that the statute violated substantive due process and equal protection. The trial court rejected Sult's arguments.

The trial court first found that the statute did not violate substantive due process. The court also applied a rational basis test and found that the statute was rationally related to the Legislature's legitimate interest in protecting the citizenry. The trial court further found that the statute was not unconstitutionally vague or overbroad. The court reasoned that the statute was not vague because it gives adequate notice of what conduct is prohibited and persons of common intelligence would not have to guess at its meaning or differ as to its application. The statute was not overbroad because no constitutionally protected guarantees of free speech or free association were affected.

The Second District Court of Appeal held that the statute was not overbroad or vague and did not violate substantive due process. The district court considered these challenges in light of the Legislature's purpose in enacting the statute to prevent individuals from committing crimes while posing as police officers.

The Florida Supreme Court, however, answered the certified question

in the affirmative and held that Section 843.085 is unconstitutionally overbroad, vague, and violates substantive due process.

The Florida Supreme Court pointed out that Section 843.085(1), Florida Statutes, makes it a crime for an individual to exhibit, wear, or display any indicia of authority, or any colorable imitation thereof, of any federal, state, county, or municipal law enforcement agency or to display in any manner or combinations the word or words "police," "patrolman," "agent," "sheriff," "deputy," "trooper," "highway patrol," "Wildlife Officer," "Marine Patrol Officer," "state attorney," "public defender," "marshal," "constable," or "bailiff," which could deceive a reasonable person into believing that such item is authorized by any of the agencies described. The statute has no intent-to-deceive element but, rather, requires only a general intent. Thus, an individual wearing a shirt containing one of the specified words, even in combination with other words, is subject to prosecution under the statute.

The Florida Supreme Court reasoned that the word "police" on a shirt could mean support for the police, as has been widely seen on clothing in support of the New York Police Department following September 11, 2001. The word "police" on a shirt also could be used to express a negative opinion about police conduct if used in combination with a depiction of police committing a wrong in a traffic arrest. The word "sheriff" could have a political meaning when worn at a political rally involving a campaign for sheriff. The words could be on costumes and have a frivolous meaning, as pointed out by the Third District.

The Court held that with no specific intent-to-deceive element, the section extends its prohibitions to innocent wearing and displaying of specified words. The reach of the statute is not tailored toward the legitimate public purpose of prohibiting conduct intended to deceive the public into believing law enforcement impersonators. The "could deceive a reasonable person" element of section 843.085(1), in conjunction with the prohibition of a display in any manner or combination of the words listed in the statute, results in a virtually boundless and uncertain restriction on expression. Thus, the Court held that section 843.085(1) is overbroad because it reaches a substantial amount of constitutionally protected conduct.

The Court additionally found section

843.085(1) to be vague and in violation of substantive due process. Section 843.085(1), because of its imprecision, the Court noted, fails to give fair notice of what conduct is prohibited. The Court reasoned that the statute fails to delineate when the displaying or wearing of the prohibited words will subject the person to prosecution, thus inviting arbitrary and discriminatory enforcement and making entirely innocent activities subject to prosecution.

In *Hughes v. State*, 901 So.2d 837 (Fla. 2005), the Florida Supreme Court considered whether the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to defendants whose convictions already were final when that case was decided. In *Apprendi*, the Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Florida Supreme Court held that *Apprendi* does not apply retroactively.

In *Crain v. State*, 2005 Fla. App. LEXIS 18290 (Fla. 5th DCA November 18, 2005), the Fifth District Court of Appeal recently considered en banc whether an arrest affidavit to secure a warrant for violation of probation is valid if it is verified under Section 92.525, Florida Statutes (2003), but not sworn to before a person authorized to administer oaths.

The Court found that the arrest affidavit was defective because it was not properly sworn to before a person authorized to administer oaths. Nevertheless, the Court reasoned that the good faith exception applied and that the trial judge should not have dismissed the warrant. The Court reasoned that it is the execution of the arrest warrant that is the operative event that sets the revocation process in motion to toll the running of the probationary period, not the filing of the affidavit. Therefore, the Court reasoned that Crain must be held accountable for his violations because it was undisputed that the warrant was issued prior to the expiration of the probationary period.

The appellate court held that the trial court had jurisdiction to proceed with the violation of probation proceedings and denied Crain's petition for writ of prohibition.

The Third District Court of Appeal recently held that the trial court did not err by refusing to allow defense

counsel to withdraw due to a conflict of interest. The Court in *Johnson v. State*, 2005 Fla. App. LEXIS 19205 (Fla. 3d DCA December 7, 2005), found that Johnson failed to demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Thus, under *Cuyler v. State*, 446 U.S. 335, 348 (1980), Johnson's conflict of interest claim failed. The Court reiterated that generally a conflict of interest issue arises when counsel represents two defendants on the same matter or when the witness being called is a victim in the case. In *Johnson*, defense counsel represented the witness for a probation violation in a completely unrelated matter and the witness was not a victim in the case before the Court. The Court additionally found that the defendant failed to identify specific evidence in the record that suggested that his interests were compromised. Thus, the Third District held that Jackson failed to demonstrate that an actual conflict of interest existed.

In *ALH v. State*, 2005 Fla. App. LEXIS 18817 (Fla. 4th DCA November 30, 2005), the Fourth District reversed a juvenile defendant's grand theft auto conviction. The Defendant claimed that her stepfather gave her permission to use the van that the State claimed she stole. Defense counsel intended to call the stepfather at trial, but the State objected as he was not on defense counsel's witness list. Defense counsel explained that when she saw the stepfather's last name on the witness list, she did not realize that the name referred to defendant's mother, not the stepfather. During the proffer, the stepfather confirmed that he had, in fact, given the defendant permission to drive the van on the day in question. The Fourth District held that the trial court's inquiry into the prejudice analysis fell short and led to the erroneous imposition of the most severe sanction—striking the defense's only witness. The Court reasoned that such a severe sanction should only be imposed in the most extreme cases.

In *State v. Perez-Garcia*, 30 Fla. L. Weekly D2397 (Fla. 3d DCA October 12, 2005), the State appealed an order granting a motion to suppress evidence of possession by appellee, Perez-Garcia, of illegal drugs and driving with a suspended driver's license, the fruits of a stop conducted in Monroe County by a Florida State Highway Patrol Trooper. The trooper initiated the stop after he observed Perez-Garcia driving his

vehicle with an inoperative left-rear brake light. The trial court concluded that because the vehicle had a functioning right and center stop lamp, the stop was illegal. The Third District reversed the decision of the trial court. The Court reasoned that the defendant's vehicle was being driven in an "unsafe condition" within the meaning of Fla. Statute 316.610. The Court noted that the correct test to be applied was whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop. Thus, the fact that the defendant's vehicle violated the statute, the officer was authorized to investigate. The suppression order was therefore, reversed.

In *Freeman v. Department of Highway Safety and Motor Vehicles*, 30 Fla. L. Weekly D2103 (Fla. 5th DCA September 2, 2005), the appellant driver sought review of two orders from the Circuit Court which upheld a decision by appellee, the Florida Department of Highway and Motor Vehicles, to cancel her driver's license due to her refusal to have her picture taken without her veil, which she wore for religious purposes. On appeal, the court found that there was no violation of the Florida Religious Freedom Restoration Act of 1998. Although the driver, who practiced the Islamic religion, showed that she was sincere in claiming that the unveiling was against her religious beliefs, the Court found that she failed to show that the Department had substantially burdened her free exercise of religion. Further, there was no equal protection violation, according to the Court, as there was no evidence that the Department ever made any exception to the "fullface" photo requirement of Section 322.14 (1)(a), Florida Statutes (2003).

Endnotes

¹ Roberta Mandel is associated with the Miami office of Stephens, Lynn, Klein, LaCava, Hoffman & Puya, P.A. Ms. Mandel handles litigation and appellate work in a wide variety of fields ranging from general liability and complex commercial issues to medical/legal malpractice and employment law disputes as well as insurance coverage and governmental regulatory matters. Ms. Mandel also handles criminal trial and appellate litigation. She served as an Assistant Attorney General for the State of Florida for over fifteen years and has successfully argued more than 500 appeals in the state and federal court systems. She is on the Board of Directors of Miami-Dade FAWL. She was recently appointed to the Executive Council of the Appellate Practice Section of the Florida Bar and is an appointed member of the Appellate Court Rules Committee of the Florida Bar.

CHAIR'S MESSAGE

from page 1

sponsor at the annual meeting the Conversation with the Court and Dessert Reception.

But every organization needs new goals and initiatives from time to time. In our case, the new goals were established at our Retreat in May. A key goal is to continue our efforts to reach out to new members, especially government lawyers who handle 60% of all appeals, but who, due to time or budgetary constraints, do not attend The Florida Bar midyear or annual meetings and thus find it difficult to become involved in the Section. Starting with North and Central Florida, the Section will explore the feasibility of hosting local section meetings. The North Florida meeting is scheduled for noon on Thursday, September 21, at the Doubletree Hotel Inn in downtown Tallahassee and is open to members and nonmembers, but is particularly designed to reach out to government lawyers. Judge Padovano of the First District Court of Appeal will discuss the DCA Workload and Assessment Committee, and Marianne Trussell, Chair of our Government Lawyers Committee, will invite their active participation. Chris Carlyle and Angela Flowers are organizing a similar local gathering in Central Florida. While some local bars already have an appellate practice section that meets on a regular basis and coor-

dinates with the local district court of appeal, if your local bar association does not and you would like the Section's help in establishing a local group, please let me know.

A second goal is to create web-based discussion groups in specific appellate subject matter areas, such as: civil, criminal, family, land use, juvenile dependency, etc. Lucretia Pitts agreed to chair a committee to organize this initiative. We'll need everyone's participation in these discussion groups to make this endeavor a success, but the effort will be worthwhile considering the vast resource of knowledge you'll be able to access. Stay tuned to our website (www.flabarappellate.org) to look for these and other upgrades being developed by Henry Gyden, Chair of the Website Committee.

A third area of special concern in the coming year, with so many issues events in the legislative public arena affecting appellate practice, is to increase the section's public advocacy. with regard to issues important to appellate practitioners. Tom Warner has agreed to chair this committee. Currently, the committee is working on the Section's response to and comments for the DCA Workload and Assessment Committee. Other issues to be addressed by this committee include electronic e-filing procedures, rule-making powers of the Supreme Court, pay raises for judges and court personnel, and issues involving the JNCs. If you have an issue you want the committee to address, please do

not hesitate to contact me or Tom Warner.

On the fiscal front, the Section will attempt to better secure its financial future and independence by affiliating with an appropriate non-Bar organization, probably a 501(c)3 corporation, whose finances would be independent of The Florida Bar. Tony Musto agreed to chair this initiative.

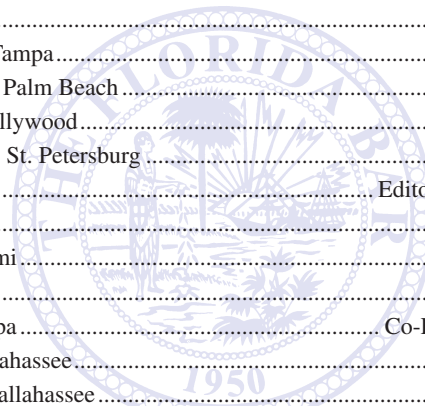
Some of the initiatives coming to fruition this year were begun by last year's chair, Tom Hall, in whose footsteps I am honored to walk. These initiatives include the outreach to government lawyers, which has long been one of Tom's goals for the Section, and the establishment of financial independence. However, the biggest project being carried over is publication of the Self Represented Litigant Handbook. As I write this message, the final chapters of the handbook are being edited and assembled by Dorothy Easley who has been spearheading this monumental project.

Finally, recognizing a discussion at the Retreat to the effect we each became involved in the Section when we were personally recruited and made to feel welcome at a Section meeting, a Hospitality Committee to be chaired by Barbara Eagan and John Crabtree will endeavor to make sure that each member who attends a meeting is given a meaningful opportunity to serve on a Section committee. At the midyear and annual meetings, the Section will sweeten the invitation by offering free pastries for new members or new attendees to the committee meetings, and will help steer the new recruit to the right committee meeting.

As I look forward with anticipation to the exciting work to be done this year, I feel also trepidation because it seems like times are tough and getting tougher for many appellate lawyers. The data presented so far by the DCA Assessment Committee indicates appellate filings are down in all but criminal and postconviction matters. The reasons for the reduction in filings is a subject I hope to explore in the coming year.

I thank you for the privilege of serving as Chair and welcome each of you to contact me at any time with questions or concerns at susanfox@flappeal.com.

THE APPELLATE PRACTICE SECTION OF THE FLORIDA BAR PREPARES AND PUBLISHES THIS JOURNAL



Susan W. Fox, Tampa.....	Chair
Steven L. Brannock, Tampa.....	Chair-Elect
Siobhan Helene Shea, Palm Beach.....	Vice-Chair
Dorothy F. Easley, Hollywood.....	Secretary
Matthew J. Conigliaro, St. Petersburg.....	Treasurer
Jack R. Reiter, Miami.....	Editor-in-Chief, The Record
Alina Alonso, Miami.....	Assistant Editor
Roberta Mandel, Miami.....	Assistant Editor
Lucretia Pitts, Miami.....	Assistant Editor
Betsy Gallagher, Tampa.....	Co-Editor, Summer Edition
Austin Newberry, Tallahassee.....	Program Administrator
Danella Montenieri, Tallahassee.....	Layout/Art Design

Unless expressly stated otherwise, The Record's articles reflect only the opinions and ideas of The Record's authors.

Judge Kerry Evander Joins The Fifth District Court of Appeal

by Christopher V. Carlyle¹

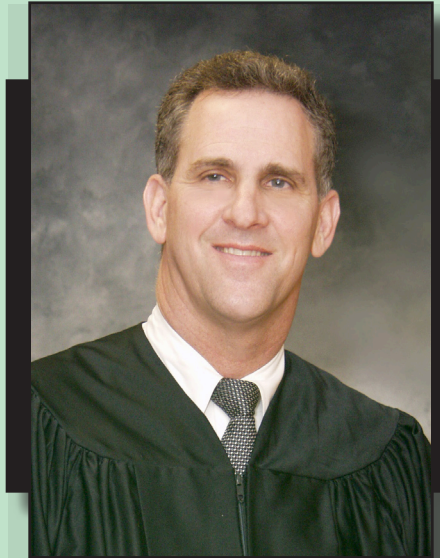
The Brevard County Circuit has lost one of its longest serving and most popular judges to the Fifth District Court of Appeal. Judge Kerry I. Evander, who had served as a circuit judge in the 18th Judicial Circuit for 13 years, was appointed to the Fifth District Court of Appeal in July. Judge Evander assumed the position after Judge Winifred Sharp's retirement created an opening on the bench. "I'm thrilled for the opportunity," Judge Evander said.

Judge Evander served as a Brevard County Court judge for roughly four years before moving to the circuit bench. In that position, he presided over criminal, civil, family, dependency, and probate cases. He served in the leadership positions of Family Administrative Judge, Administrative Judge, and in his last year as Chief Judge.

Judge Evander will obviously be missed on the circuit bench - for eight consecutive years he received the highest rating in the Brevard County Bar Association's judicial poll. He received the Governor/Florida Supreme Court Award for outstanding child advocacy in 2000, and was the recipient of the Williams/Johnson Outstanding Jurist Award in 1998.

Judge Evander has called Brevard County home for many years, though his early years were far less settled. His father worked for the State Department, and Judge Evander traveled with his family throughout the world, including stops in Belgium, Brazil, Laos, and Hawaii. "I attended 10 different schools by the twelfth grade," Judge Evander said. Judge Evander graduated from high school in Virginia, and moved to Brevard County after college.

Judge Evander attended the Air Force Academy for two years before transferring to the University of Florida to study political science. He then attended UF law school which "I enjoyed more than undergraduate school," said Judge Evander. "It was a unique experience in that the law school was really a small school within a much larger one." Judge Evander excelled in law school, graduating in



the top five percent of his class, serving as the managing editor of the Florida Law Review, and also being named to the Order of the Coif.

Upon graduation, Judge Evander joined a firm in Melbourne where he practiced commercial litigation, local government law, as well as some appellate work. After practicing law for several years, Judge Evander accepted a position teaching trial practice and pre-trial practice at the Mississippi School of Law in Jackson, Mississippi. While he enjoyed the experience, "it was during that period of time that I realized that I wanted to become a judge."

He returned to Brevard County in 1987, and was appointed to the county bench two years later. "I really enjoyed my time on the county bench," he said. "It truly is the 'people's court'. I would say that 80% of my cases were criminal, and I presided over many, many jury trials." Judge Evander also enjoyed his many years as a circuit court judge though he eventually turned his eye to the appellate bench. While sitting as a circuit court judge, Judge Evander had several opportunities to sit on cases at the Fifth District Court of Appeal. "I had very positive experiences sit-

ting with the Fifth District Court of Appeal," he said. "I was always very impressed with the caliber of judges at this Court."

Judge Evander joined the Court on July 5, 2006. Judge Evander wasted no time in getting his feet wet - he heard oral arguments on his first day. When asked about any advice he would offer to attorneys practicing before the appellate court, Judge Evander stated that "the most important thing for any attorney before this Court, or any court, is to maintain your credibility. In your briefs and at oral argument, never make representations to the Court that are less than 100% accurate. Being very candid with the Court is extremely important."

Judge Evander has been married for 26 years, and has four children. For many years he has been involved in youth sports activities, and has coached many of his children's teams. He is also very involved with the First United Methodist Church where he has been a member for more than 20 years. Judge Evander has been active with the Vasser B. Carlton American Inn of Court.

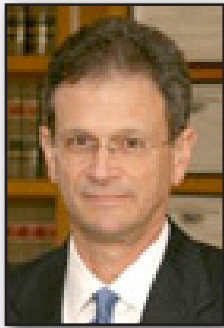
Though he has only been on the appellate bench for a short time, Judge Evander has already learned many things. "Though I was a trial judge for 17 years, I have already dealt with issues in my first month here that I never encountered before," Judge Evander said. "The appellate bench is challenging, and I find myself constantly learning." Though he will undoubtedly be missed on the circuit bench, Judge Kerry Evander is ready to face the challenges of the Fifth District Court of Appeal.

Endnotes

¹ Christopher V. Carlyle is board certified in appellate practice and has an extensive background in appellate as well as commercial litigation. Prior to joining The Carlyle Appellate Law Firm, he practiced a wide range of commercial litigation with Holland and Knight, LLP and McLin & Burnsed, P.A. Mr. Carlyle is admitted to practice in Florida state and federal courts, the U.S. Circuit Court of Appeals for the Eleventh Circuit, and the United States Supreme Court.

The First Annual Appellate Justice Conference

By Chief Judge Charles Kahn¹ and Celene Humphries²



Judge Charles Kahn



Celene Humphries

As of the writing of this article, Florida is the only state to host a conference of judges and appellate lawyers addressing concepts of appellate justice. Approximately sixty people gathered during the June meeting of The Florida Bar to discuss Florida's District Courts of Appeal. The topic for discussion was the role of the District Court of Appeal decision.

The inspiration for this June meeting was an event that took place only a few months before. On November 4, 2005, about 185 distinguished people gathered in Washington, D.C., to participate in the 2005 National Conference on Appellate Justice. The conference was ambitious, spanning three days. It focused on emerging trends and issues relating to appellate courts, and stressed the need for collaboration between appellate judges and those with a stake in the work those judges do. The American Academy of Appellate Lawyers led the charge in organizing the invitation-only conference. Arthur J. England, Jr., a former Florida Supreme Court Justice and a past president of the American Academy of Appellate Lawyers, was one of the moving forces in this effort.

Ten of Florida's own judges, appellate lawyers, and academicians participated in this national conference. Three attending judges returned home, inspired to encourage similar dialogue amongst Florida ap-

pellate judges and the stakeholders. First District Chief Judge Charles J. Kahn, Jr., Fourth District Judge Martha C. Warner and First District Judge Peter Webster approached the chair of The Florida Bar's Appellate Practice Section, Tom Hall, regarding a joint effort to bring this

kind of open dialogue to our state.

Within a few months, the Conference of District Court of Appeal Judges and The Florida Bar's Appellate Practice Section, joined forces and created a steering committee that consisted almost equally of Florida District Court judges and



Justice Pariente and Celene Humphries



Chief Judge Charles J. Kahn, Jr., Judge James J. Barton, II, and Louis K. Rosenbloum



Judge Larry Klein, Justice Raoul Cantero, and John Mills

Florida appellate attorneys: Chief Judge Kahn, Judge Warner, Judge Webster, Tom Hall, John Crabtree, Celene Humphries and Harvey Sepler.

Jane Curran of The Florida Bar Foundation and Jack Harkness, Jr., of The Florida Bar moved quickly to support this initiative. With the help of Margaret Horvath, formerly with the Office of State Courts Administrator, planning was quickly underway for Florida's First Annual Appellate Justice Conference.

Intent on promoting a productive exchange, the steering committee invited a broad mixture of distinguished participants whose professional careers have centered on appellate justice. Invited jurists included Supreme Court justices, District Court judges, trial court judges, administrative judges and a general magistrate. The committee also invited thirty appellate attorneys practicing in a wide variety of areas, including civil, criminal, administrative, family, and juvenile from both the private and public sectors.

The conference began with Judge Martha C. Warner, giving the conference participants an overview of the District Court mission, jurisdiction and workload. Then, four speakers tackled two topics. Judge Peter Webster sparred with John

Mills, Mills and Carlin, P.A. regarding various roles served by a District Court decision. Judge Larry A. Klein, Fourth District, and Rodolfo Sorondo, Jr., Holland and Knight, then participated in a panel discussion addressing different appellate opinion formats for achieving a particular purpose.

Breakout discussions of the conference participants followed each presentation. Judges and appellate attorneys from diverse practice areas and appellate districts were separated into eight groups. Staff attorneys and law clerks from the

Fourth District worked with the discussion facilitators for each group to summarize the discussions.

This process was an essential element of the conference. The conference's primary goal was to foster open dialogue regarding the administration of justice in Florida's appellate courts. The ideas generated during the table discussions will be presented in an article to be published in The Florida Bar Journal.

From its conception, the steering committee anticipated that this collaborative event would occur annually. The overwhelming expression of interest has fueled that effort and has prompted this year's steering committee to work towards broadening the number of participants invited to next year's conference. The goal will remain the same- encouraging dialogue between appellate advocates and judicial officers regarding appellate justice in Florida.

Endnotes

¹ Judge Kahn is Chief Judge of the First District Court of Appeal, and has served on the court since 1991. He is currently president of the Stafford Inn of Court and chair of the District Court of Appeal Budget Commission. He is an adjunct professor of Professional Responsibility at the Florida State University College of Law.

² Celene Humphries is a Florida Bar board certified appellate practitioner with Swope, Rodante P.A. She is currently a member of the Executive Council of The Florida Bar Appellate Practice Section and The Florida Bar Appellate Rules Committee. She is also a past Chair of the Hillsborough County Bar Association Appellate Practice Section.



**Are drugs or alcohol
causing a problem in your life?
Are you overcome by
depression?**

**Completely confidential
help is available.**
(Ch. 397.482-486, F.S. 2002)

**Call Florida Lawyers
Assistance, Inc.
1-800-282-8981**

An Annual Meeting Tradition with the Florida Supreme Court

By Celene Humphries¹

Continuing what has become a wonderful tradition at the mid-year Bar Convention, the Appellate Practice Section once again joined forces with the Young Lawyers Division to present the Discussion with the Florida Supreme Court and the Final Round of the Robert Orseck Moot Court Competition. This year, we were fortunate to have five justices from the Florida Supreme Court participate in this event: Chief Justice Pariente, incoming Chief Justice Lewis, and Justices Quince, Cantero, and Bell. The Section thanks each of you for volunteering your time despite your demanding schedules.

Teams from nine of Florida's law schools competed in the Robert Orseck Moot Court Competition during the first two days of the convention.² The competition required the teams to appear before the Florida Supreme Court on a certified question from the First District Court of Appeal. The question was based on a case recently decided by the United States Supreme Court, *Georgia v. Randolph*, 126 S. Ct. 1515 (2006). The fictional certified question asked, "[W]hether it was reasonable for the police to conclude that the consent to conduct a warrantless search of a residence given by one occupant is valid as against a second occupant who is absent from the scene in the face of the refusal of a third occupant who is physically present at the scene?" The facts presented to the participants also required the Florida Supreme Court to determine whether it was reasonable for the police to conclude that the co-occupant had authority to consent to the search of the area containing the drugs on which the petitioner's conviction was based.

Two teams from Florida Coastal School of Law met in the final round on Thursday afternoon. The winning team consisted of Lawrence Perrone, Emilia Walker, and Grant Zacharias. The first-runner-up team consisted of Sunny Awla, Eileen Lacivita, and Jared Potter. Professor Alexander Moody coached both Florida Coastal teams.

At the conclusion of the preliminary round of the competition, Lawrence Perrone was also designated the best overall oralist. The justices could not decide which oralist to designate as the best oralist in the final round, so they presented the honor to both Lawrence Perrone and Emilia Walker.

Immediately following the announcement of the Robert Orseck Moot Court Competition winners, the Supreme Court entertained questions from the audience. As always, this was a lively and interesting discussion.

The Supreme Court's certified questions and certified conflict jurisdiction dominated the discussion. Many of the justices agreed that, when certifying a question under Rule 9.030(a)(2)(A)(iv), Florida Rule of Appellate Procedure, district courts should explain why they believe the Supreme Court should address the question. One justice explained that an opinion which merely states that the question is one of great public

importance is not very helpful. Justice Quince added that, when she first got to the Court, she thought the only issue when reviewing certified question cases was whether to grant oral argument. Eight years later, she now believes that whether to accept jurisdiction is also an issue.

The justices acknowledged that a pending change to appellate Rule 9.120(d) would require parties to submit jurisdictional briefs regarding certified questions. Interestingly, they seemed more interested in knowing why the district court chose to certify the question rather than the parties' stated basis. The justices did not indicate whether the Supreme Court would approve this rule change.

Regarding certified conflict, one justice said that qualifying language, such as "to the extent conflict exists," does not help the Supreme Court determine whether the decision at hand is "in direct conflict with decisions of other district courts of appeal," as required by rule 9.030(a)(2)(A)(vi).



Florida Supreme Court Justices and Participants
in the 2006 Robert Orseck Moot Court Competition

Another justice added that law clerks in that justice's chambers draft a jurisdictional memorandum in every case in which certified conflict jurisdiction is claimed.

Tom Hall, the Clerk of the Florida Supreme Court, addressed attempts to secure the Supreme Court's conflict jurisdiction where the district court decision does not certify conflict. Such attempts are usually unsuccessful. Last year, parties in more than 900 cases attempted to meet the demanding conflict jurisdiction test found in Rule 9.030(a)(2)(A)(iv). Under this test, parties must demonstrate that the conflict is both express and direct. The Supreme Court granted only

about six percent of these jurisdictional requests. One justice counseled that parties asserting uncertified conflict jurisdiction must remember that, if it takes ten pages in the jurisdictional brief to explain the conflict jurisdiction, the conflict probably does not exist.

Both events have benefited from the collaboration. The students who worked their way to the final round of the competition present their arguments before an audience of experienced appellate lawyers. The lawyers enjoy the excitement of a moot court competition, followed by a stimulating open forum discussion with justices from the Florida Supreme Court.

Together, these events demonstrate the uniqueness of appellate practice and remind us why we do this work.

Endnotes

¹ Celene Humphries is a Florida Bar board certified appellate practitioner with Swope, Rodante P.A.

² The teams came from Barry University School of Law, Florida Coastal School of Law, Florida International University College of Law, Florida State University College of Law, Nova Southeastern University Law Center, St. Thomas University School of Law, Stetson University College of Law, Levin College of Law at the University of Florida, and University of Miami School of Law. To round out the competition to an even number of teams, the school that won the competition last year, Florida Coastal, was asked to field a second team.

APPELLATE PRACTICE CERTIFICATION



The Board of Legal Specialization and Education
and the Criminal Appellate Certification Committee
are pleased to announce the following attorneys are now Board Certified
as of June 1, 2006:

Congratulations!

Michael R. Ufferman, Tallahassee
Richard C. Valuntas, West Palm Beach

2006 Adkins Award and Pro Bono Award Winners

By Celene Humphries¹

Each year, the Appellate Practice Section presents two prestigious awards to members of the section. This year's recipients received their awards in a room packed with cheering rock stars. "Elvis," "Madonna," "Cher" and many others attended the Section's Annual Dessert Reception and cheered with approval as the Section's highest honors were bestowed upon Raymond T. "Tom" Elligett, Jr., and Alan I. Mishael.²

Tom Hall, the Chair of the Appellate Practice Section, presented the James C. Adkins Award to Tom Elligett. The section named this award for Florida Supreme Court Justice James Adkins, who passed away in 1994. Justice Adkins served on the Supreme Court for eighteen years in the 1970s and

1980s, and was the Chief Justice during the mid-1970s. The Section annually presents this award to a member of The Florida Bar who has significantly contributed to the field of appellate practice in Florida.

Tom Elligett exemplifies the kind of lawyer who deserves to be recognized by such an award. Tom practices with Schropp, Buell & Elligett, P.A., in Tampa. He has been board-certified by The Florida Bar in Appellate Practice since 1994, the first year the Appellate Board Certification Examination was given, and has twice had his certification renewed. He lectured at the first two appellate certification review courses given by The Florida Bar. In June 2005, The Florida Bar Board of Legal Specialization and Education

recognized Tom's contributions to the field of appellate practice by naming him as the inaugural winner of the Justice Harry Lee Anstead Award: The Florida Bar's Board-Certified Lawyer of the Year.

Since 1989, Tom has taught appellate practice as an adjunct professor at Stetson University College of Law. Stetson recently selected Tom as the 2006 recipient of the Distinguished Service Award. This award is presented to a non-alumnus of Stetson in recognition of significant, meritorious, and continuing contributions that have benefited the law school.

Tom also co-authored a book on appellate practice, titled *Florida Appellate Practice and Advocacy*, which will soon be published in its Fifth Edition.



Tom Hall presents the 2006 Adkins Award and Pro Bono Awards to Raymond T. "Tom" Elligett and Alan I. Mishael.

Tom has been a member of The Florida Bar Appellate Practice Section since 1993, and previously served as its Chair. At the local level, he is a member of the Hillsborough County Bar Association Appellate Practice Section and served twice as that section's chair. At the national level, he is a member in the Appellate Practice Committee of the American Bar Association.

On behalf of the Section, Tom Hall presented the Pro Bono Award to Alan I. Mishael. This award recognizes appellate practitioners who represent people or groups which otherwise could not afford such representation.

Alan Mishael represents that ideal. Through trial and appellate litigation, and statutory reform, Alan has worked for more than a decade to improve the lives of children in state care.

In 1995, while a partner at Shutts & Bowen in Miami, Alan spearheaded federal civil rights litigation involving immigrant children in state care, culminating in statewide administrative rules mandating equal treatment, limiting the authority of the state to transfer alien children abroad, and affirmatively obligating the state to provide representation to eligible dependent children in securing permanent

residency for them from the INS.

After opening his own practice in 1998, Alan was appointed to represent a foreign-born, quadriplegic infant. At his own expense, Alan flew in a foreign physician to furnish expert testimony that, if repatriated, the indigent child would lack the specialized care he needed. The court determined in detailed factual findings that it lacked jurisdiction. Alan secured an emergency stay from the appellate court, briefed and argued the appeal, and secured reversal. Alan then handled the proceedings on remand which resulted in the child's adoption in the United States.

In 2002, Alan handled the principal briefing and argument supporting affirmance in *DCF v. J. C.*, 847 So. 2d 487 (Fla.3d DCA 2002), which upheld a juvenile judge's authority to temporarily restore, over the Department of Children and Family's separation of powers objection, a disrupted pre-adoptive placement pending the court's review of what the government proposed instead. In 2004, the Florida Legislature enacted, and Governor Bush signed, legislation that Alan authored restricting DCF's authority to unilaterally remove children from pre-adoptive

homes and authorizing DCF's adoptive consent to be waived when unreasonably withheld. Two years earlier, Alan had drafted a revision to Chapter 63 which provided statutory authority for open adoption agreements involving adult biological relatives.

A founding member of Florida's Children First, a statewide child advocacy organization, Alan's tenacious and analytical work on countless pro bono cases and legislative initiatives demonstrates a commitment to public service that has helped change Florida law for the better and consistent with the highest traditions of the Florida Bar.

The Appellate Practice Section congratulates both of you and thanks you for giving so much to the field of appellate practice in Florida.

Endnotes

¹ Celene Humphries is a Florida Bar board certified appellate practitioner with Swope, Rodante P.A. She is currently a member of the Executive Council of The Florida Bar Appellate Practice Section and The Florida Bar Appellate Rules Committee. She is also a past Chair of the Hillsborough County Bar Association Appellate Practice Section.

² This year's Annual Dessert Reception was a rock 'n roll celebration.

The Section's Rock 'N Roll Bash

By Celene Humphries

Rock music filled the Addison Ballroom at the Boca Raton Resort and Club. The entrance fee into this year's Annual Dessert Reception was adorning a nametag reflecting your true rock identity. A table at the entrance was covered with nametags of rock musicians from the past six decades.

The few guests who dared to sneak past the table, entering without a nametag, were politely escorted back so that they could happily assume their rock persona.

Inside, rock posters were scattered about and "appellate musicians" wore flashing guitar necklaces and rock

star glasses. Included with this article are a few photographs of some of the more famous stars in attendance.

You might be wondering, "What's next?" How about a disco ball?

Guys, you can still find white polyester suits at Goodwill.



John Mills, John Wheeler, and Tom Hall

**Plane fare to Boca Raton
- \$200.**

**Registration fee for The
Florida Bar Annual Meeting -
\$140.**

**Seeing an appellate judge
proudly wear Elvis gold-
rimmed, oversized glasses
and a nametag identifying
himself as Jimi Hendrix-
priceless.**



Chief Judge Gerald Cope, Jr., Judge Chris Altenbernd, Judge Altenbernd's daughter, and Judge David Monaco

**THE FLORIDA BAR APPELLATE PRACTICE SECTION
WISHES TO THANK THE FOLLOWING
SPONSORS OF THE 2006 ANNUAL DESSERT RECEPTION**

Platinum Sponsor

Carlton Fields

Gold Sponsors

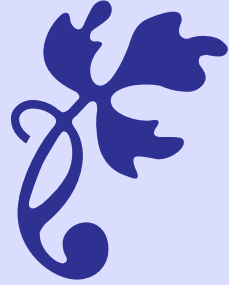
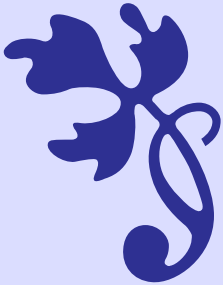
Burlington & Rockenbach, P.A.
Falk Waas Hernandez Cortina Solomon & Bonner, P.A.
The Florida Appellate Alliance, L.L.P.

Silver Sponsors

Adorno & Yoss, L.L.P.
Bunnell Woulfe Kirschbaum Keller McIntyre Gregoire & Klein, P.A.
Coker Schickel Sorenson & Daniel, P.A.
Fowler White Boggs Banker, P.A.
Fox & Loquasto, P.A.
Greenburg Traurig, P.A.
Gunster Yoakley & Stewart, P.A.
Kubicki Draper, P.A.
Kynes Markman & Felman, P.A.
Swope Rodante, P.A.

Bronze Sponsors

Sale & Kuehne, P.A.
Schropp Buell & Elligett, PA.
Shook Hardy & Bacon, L.L.P.



**The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300**

PRESORTED
FIRST CLASS
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43