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INSIDE:

What I Learned From My History
Professor..... 3

New Bright Line to Preserve the
Right to a New Trial 4

Judicial Profiles:

Judge Charles J. Kahn, Jr..... 5

Judge Peter Webster 9

Judge Kevin Emas..... 11

Judge Burton Conner..... 12

Inside the Fifth District Court of
Appeal..... 15

An Appellate Watershed Moment Awaits

By Matthew J. Conigliaro



M. CONIGLIARO

I have bad news. Whether you are new to appellate practice or a seasoned veteran, you are about to become an old-timer. Aged. One of *them*. Someone who remembers a different world, where work took real effort. Where experience counted. Where

not just anyone could do this job well.

The appellate landscape will soon see the dawn of a new age. Contrary to many reports, however, the highlight will not be the electronic filing of briefs. To be sure, e-filing will be a welcome advance. Copying and mailing stacks of briefs burdens clients and counsel and wastes paper, time, and money. The true revolution—the watershed moment that awaits the appellate bar—will be the use of an electronically filed record on appeal.

Allow me to use the experiences of some appellate law clerks to help put this moment in perspective. I once shared the same experiences, and they still occur today.

When the briefs in a case are submitted to an appellate court, law clerks dutifully line them up against the record on appeal prepared by the trial court clerk's office. The record is neatly divided into bound and paginated volumes and is accompa-

nied by an index that lists every filing. Law clerks verify each record citation against the actual record and inform the court whether the citations support the advocates' contentions.

To many law clerks, the use of accurate record citations in an appellate brief is an unremarkable feat. Open the record, examine its contents, and cite to the appropriate pages. It seems so simple. By comparison, citations not supported by the record make counsel seem inexcusably sloppy, or lazy, or worse.

But in making such judgments, appellate law clerks often assume that the parties work from copies of the same record that the court uses. Not true. Unless you happen to represent certain indigent defendants who receive a copy of the record at public expense, practitioners receive only a copy of the clerk's index. Many former appellate law clerks have set their sails for appellate practices, only to ask upon arriving, "So where's the record?" Today, if you want a copy of the record on appeal, you must create it yourself.

Of course, you could buy a copy of the record, page for page, but this is usually not a viable option. Clients are unlikely to pay for copies of documents that their trial counsel should have already received in the case. Appellate attorneys could also dip into their own pockets for reproduction costs, but, for obvious reasons, that

See "Watershed" next page

is highly unusual.

What normally happens now is that the appellate practitioner attempts to reproduce the record based on the index provided by the clerk and the file provided by trial counsel. Unfortunately, this task is fraught with difficulties. A few examples may sound familiar to appellate veterans.

Your copy of your client's key pleading is two pages shorter than the version reflected in the record—it turns out that your copy, though signed, was not the one that was ultimately filed. Your version of a pleading is half the size of the document reflected in the index—it turns out opposing counsel decided not to serve exhibits to the document because the parties exchanged such items earlier in the litigation. A 100-page hearing transcript appears as part of the paginated record, but your version is 103 pages—it turns out that pages at the front and back were discarded before

being filed. A critical filing in opposition to a summary judgment motion is mislabeled "Motion for Summary Judgment" in the index. The record reflects a notice of filing but is unclear whether the materials that originally accompanied that notice still do so.

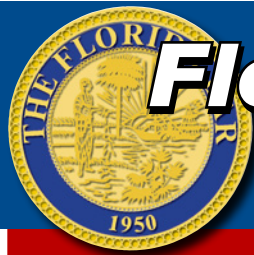
Today, solving such problems may require a visit to the clerk's office and an examination of the actual record. Such visits can be expensive, inefficient, and impractical, especially when the courthouse is not nearby. Moreover, while appellate specialists do their best to spot and resolve record issues, some attorneys may not even notice the problems, and as a result their citations may suffer despite the best of intentions.

Thankfully, the electronic filing of documents will lead to electronic records on appeal. Appellate counsel will be able to download the record on appeal in PDF format. Eventually there will be no need for any paper documents to be exchanged—the

record will consist of electronic files, and counsel and the court will have access to the identical materials. It will be a watershed moment for appellate practice.

Future generations of appellate lawyers will not even fathom the frustrating and time-consuming problems that formerly plagued those who just needed to know what was in the record. Only those who practiced before electronic filing took hold will remember. Us. The old timers.

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Message from the Outgoing Chair

What I Learned From My History Professor

My last two columns were about what I had learned in my fiction-writing class. One would think that by now I had gotten my college reminiscences out of the way. But this legislative session's unprecedented proposals aimed at the judiciary demand some reflection on history.

In the 1930s, Congress enacted many laws designed to jump-start the economy and implement President Franklin D. Roosevelt's New Deal, such as minimum wage laws. In a series of cases, however (many of them 5-4 decisions), the United States Supreme Court struck down many of these laws. Frustrated at the apparent destruction of his New Deal programs, President Roosevelt proposed to add one new member of the Court for each member over seventy, up to a maximum of six. A change in the number of justices would not have required a constitutional amendment, but Congress rejected that proposal. Eventually, Roosevelt had his way, however, as the older justices retired or died and he was able to appoint replacements (Justice Roberts's "switch in time that saved nine" also had something to do with it).

Flash forward to 2010. Last year, the Florida Supreme Court struck from the ballot a legislatively proposed amendment to the Florida Constitution, which competed with a citizen's initiative amendment,

already on the ballot, which would require legislative districts to be contiguous and logically designed. The following session (2011), the House of Representatives passed a constitutional amendment that would have split the Florida Supreme Court into



Raoul Cantero, Immediate Past Chair
2010-2011

two divisions, civil and criminal, and would have added three members to the Court. The Senate, however, lead by several courageous and principled senators, correctly rejected the proposal as unnecessary. The judiciary dodged a bullet.

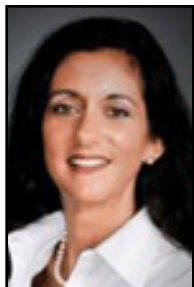
But the legislature is shooting with a machine gun. Although some proposals failed—such as another amendment that would have required appellate judges to be retained in office by a 60% vote rather than a majority—others passed. The legis-

lature has proposed constitutional amendments that would allow it to repeal Florida rules of court by a simple majority vote, instead of the current two-thirds required. Another proposal would require Florida Senate approval of Supreme Court justices—after nomination by the JNC and appointment by the Governor. Both of these proposals passed in the legislature by the required 60% vote, and will now be on the ballot.

Not since I can remember has the judiciary been under such a virulent attack, and never before have the appellate courts been so much the focus. It is not often that proposed or enacted legislation directly affects appellate practitioners. But the time is here. Between now and the ballot amendments next year, appellate practitioners will be able to educate the public about these amendments and state their views. Personally, I believe we should leave well enough alone. Florida is an example of an appointments process that works. JNCs are designed to vet candidates so that whomever the Governor appoints will make a good judge. I have been a member of a JNC. Although the process is imperfect, I believe it is better than the alternatives. The proposed amendment will not improve the system; it will only inject more politics into it. But whatever your position, make your voice known.

New Bright Line to Preserve the Right to a New Trial

By Julia Luyster, Esq.



J. LUYSTER

In December, the Florida Supreme Court decided *Companioni v. City of Tampa*,¹ which held that when a party objects to attorney misconduct during trial, and the objection is sustained, the party must *also*

move for a mistrial in order to preserve the issue for a trial court's review of a motion for new trial. A party may no longer preserve the right to a new trial by waiting until after the verdict to move for a mistrial based upon attorney misconduct.² If the issue is not preserved with a timely motion for mistrial, then the conduct in a civil case must pass the fundamental error analysis in *Murphy v. International Robotic Systems, Inc.*³

The *Companioni* case went before the Florida Supreme Court for review from the Second District Court of Appeal's decision in *City of Tampa v. Companioni*,⁴ which was in express and direct conflict with the Third and Fifth Districts' decisions in *State v. Benton*,⁵ *Sears Roebuck & Co. v. Jackson*,⁶ and *State v. Fritz*.⁷ In the underlying *Companioni* case, Ramiro Companioni sued the City of Tampa for injuries he sustained in a motor vehicle accident with a City truck.⁸ Throughout the trial of the case, the City objected to several occasions of misconduct by Companioni's attorney.⁹ The trial court sustained the objections, but the City never moved for a mistrial.¹⁰

The jury returned a verdict for Companioni and final judgment was entered.¹¹ Thereafter, the City moved for a new trial.¹² As part of its motion, the City argued opposing counsel

had engaged in misconduct during the trial.¹³ The trial court denied the motion for new trial on the grounds that the City had not moved for a mistrial, and that the conduct did not meet the *Murphy*¹⁴ fundamental error test in that the misconduct was not so extreme so as to undermine the public's confidence in the judicial system.¹⁵

The City appealed the denial of its motion for new trial. The Second District Court of Appeal held that the trial court erred in that it did not need to consider the *Murphy* fundamental error standard because the City had objected to the misconduct during trial.¹⁶ The Second District reasoned that a motion for mistrial was only necessary to preserve the right to appellate review, but was not a prerequisite for moving for a new trial on that basis.¹⁷

In this respect, the Second District's decision was contrary to the Third and Fifth Districts.

In the Third and the Fifth Districts, a party was required to move for a mistrial after an objection to attorney misconduct was sustained in order to preserve the issue for purposes of a new trial motion.¹⁸

In a nutshell, *Companioni* adopts the Third and Fifth Districts' approach. Post verdict motions for mistrial no longer preserve the right to a new trial based upon attorney misconduct.¹⁹ Further, although not expressly stated, it may be argued that a curative instruction is no longer sufficient or necessary to preserve the issue for the trial court's review at the motion for new trial posture.²⁰ Thus, *Companioni* concluded that the procedure for preserving the issue for appellate review and the procedure for preserving the issue for the trial

court's review are the same.²¹ The Supreme Court reached this decision while considering a trial court's discretion and concerns about judicial economy.²² *Companioni* finds that it is "more efficient to alert the trial judge at the earliest possible point in the proceedings that an error may be incurable."²³

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Endnotes:

1 51 So. 3d 452 (Fla. 2010).

2 *Id.*

3 766 So. 2d 1010, 1027-32 (Fla. 2000).

4 26 So. 3d 598 (Fla. 2d DCA 2009).

5 662 So. 2d 1364 (Fla. 3d DCA 1995).

6 433 So. 2d 1319 (Fla. 3d DCA 1983).

7 652 So. 2d 1243 (Fla. 5th DCA 1995).

8 26 So. 3d 598 (Fla. 2d DCA 2009).

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 766 So. 2d 1010, 1027-32 (Fla. 2000).

15 51 So. 3d 452 (Fla. 2010).

16 *Id.*

17 *Id.*

18 *Benton*, 662 So. 2d at 1365; *Fritz*, 652 So. 2d at 1244; *Sears*, 433 So. 2d at 1321.

19 51 So. 3d 452 (Fla. 2010).

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

JUDICIAL PROFILES

What Motivates a Judge to Continue to Serve? **Insights from an Interview with Judge Charles J. Kahn, Jr.**

By Patrick J. McGinley



Judge Charles J. Kahn

Surely each of you is aware that a state court lawsuit can sometimes be transferred to federal court, but has it ever occurred to you that the same might happen to your *judge*? On February 25, 2011, the Chief Judge of the United States District Court of the Northern District of Florida, with the approval of all the Judges of the Northern District, signed an order proclaiming that Florida's First District Court of Appeal Judge "Charles J. Kahn, Jr. be, and he is hereby, appointed as full-time United States Magistrate Judge, with his official station being designated as Pensacola, Florida." With that stroke of the pen, one of Tallahassee's longest-serving judges became one of Pensacola's newest.

Of course, this was not a hostile take-over of state courts by federal authorities. To the contrary, Judge Kahn applied for and was appointed to his new bench. Certainly it is not unusual to see a judge holding one bench aspire to another. Yet consider Judge Kahn's case: as of February 2011, Judge Kahn had 20 years of experience on the First DCA. In last November's statewide election, the people of Florida voted to retain Judge Kahn on the DCA for at least another 6 years. He certainly had no need to start job hunting. At age

59, His Honor could serve his 6-year elected term on the DCA, and then continue to serve or consider retirement at a typical retirement age of 65. Alternatively, no one could fault His Honor for considering an early retirement now after having dedicated 20 years of his life to public service. We can all name some recent instances of early-retiring state appellate judges who now enjoy a successful private practice. Yet Judge Kahn shunned that option and accepted an 8-year appointment to a federal bench. Federal law and procedure, in many ways, looks nothing like the state law and procedure Judge Kahn has applied and interpreted for two decades. What motivated him to continue his life of public service, and to do so by packing up himself and his family and moving 3 hours west on Florida's Interstate 10 to master an entirely new court system?

The only way to find out was to ask Judge Kahn. Honestly, I never doubted that he would grant the interview. Anyone who has appeared before Judge Kahn reaches the same conclusion I have: he is a humble and approachable man. But would Judge Charles J. Kahn, Jr. share the personal details that would reveal what drives his continuing desire for public service?

Dr. and Mrs. Charles J. Kahn, Sr.

Perhaps the earliest influence on most men is their parents, and so I asked Judge Charles J. Kahn, Jr. about Dr. and Mrs. Charles J. Kahn,

Sr. His Honor's description of his father came forth with the quickness of a son who is proud of his dad. His dad, and his dad's dad, and his dad's dad's dad were "Pensacola natives" as Judge Kahn describes them. Was this my first hint at the answer as to why Judge Kahn might leave Tallahassee for Pensacola?

Judge Kahn's dad was a Pensacola doctor. Dr. Charles J. Kahn Sr. was an internist of yesteryear, keeping a small and personalized practice, treating his patients from cradle to grave, and knowing his patient's families as well as he knew his medicine. "We lost Dr. Kahn Sr. about 5 years ago," Judge Kahn Jr. mentioned briefly, before quickly pointing out that his mother is in perfect health. Mrs. Charles J. Kahn, Sr. was a housewife, a community volunteer, and to both Judge Kahn and my knowledge, perhaps the first woman to have served as the President of a Synagogue. I pointed out to Judge Kahn that he himself has served as President of Temple Beth El in Pensacola, which honor the Judge quickly dismissed with the comment, "there's always a shortage of people to serve at religious posts." It seems Judge Kahn will honor his mother with the strengths of her achievements, but will deny himself the same honor even for doing a similar public service. My impression of Judge Kahn being a humble man was right, but perhaps that humility runs deeper than I thought. Was this deep humility another piece to solving the puzzle of what drives Judge Kahn to continue a life of public service?

JUDICIAL PROFILES

The Kahn Family

Many a man chooses his career with the needs of his family in mind, and so I wanted to know more about Judge Kahn's family. A picture speaks a thousand words. Was I rude to ask a sitting federal judge for casual pictures of himself, his wife, his children and his grandchildren? The humble and approachable Judge Kahn took no offense and was happy to oblige. He sent the pictures in a pre-interview email to me with a few sentences included about his family "written to save you time." Note how he wrote as if my time were somehow more valuable than his.

This email taught me that Judge Kahn has been married for more than 33 years to Janet S. Kahn. Mrs. Kahn graduated from Penn State in 1976, moved to Gainesville, and has been a Floridian ever since. She is a full-time member of the faculty of The Florida State University, where she teaches and has a clinical practice in Speech Language Pathology. Mrs. Kahn's clinic assists hearing-impaired children (from birth to 10 years old) with assistance in receiving and using Cochlear implants. Temporarily, Judge Kahn "lived from a suitcase" as he split his time between working in Pensacola and living with his wife in Tallahassee until her retirement in May 2011 will allow the two of them to make an orderly move to Pensacola.

Judge Kahn's younger daughter is Sally, an FSU grad, who earned her M.S. from Vanderbilt University and who practices Speech Language Pathology in Alabama. Judge Kahn's oldest daughter is Julia, an FSU grad, who is married to Scott Reisinger of Merrill Lynch. Scott and Julia have two daughters, Tula, age 3, and Alice,

age 1. With Judge Kahn's daughter Julia making Judge Kahn a proud grandpa, did Judge Kahn give up the First DCA for a bench closer to his grandchildren?

"Living farther from my two grandchildren was perhaps the hardest part of the decision for me and my wife in accepting this position in Pensacola," Judge Kahn told me. Three-year-old Tula and 1-year-old Alice are in Jacksonville. Although His Honor did not describe the trip, if you have ever made the 6 hour drive down rural Interstate 10 one-way from Pensacola to Jacksonville, you know that the exits are few and far between, the road is straight and flat, the radio stations go in and out of reception, the billboards are non-existent, each barren passing mile looks identical to the last, and the only convenient food along the way is served from a drive-thru window. I can tell from Judge Kahn's loving descriptions of Tula and Alice that he will soon be making this a regular commute. So despite Judge Kahn's deep roots in Pensacola, his move there comes with sacrifices.

An Appellate Judge at Heart

Perhaps another sacrifice comes with the change from state appellate

practice to federal trial practice, considering how much Judge Kahn loved appellate practice. Objective facts and statistics about Judge Kahn seem to only support that conclusion. Judge Kahn served as a Judge on the District Court of Appeal from June 1991 to February 2011 and was its Chief Judge from 2005-2007. Throughout that time he was very involved with our Appellate Practice Section of The Florida Bar and never hesitated to participate as an uncompensated lecturer at appellate Continuing Legal Education seminars. He was a Master of the First District Appellate American Inn of Court and serves as its President through June 2011. It seems no volunteer appellate task was too mundane or tedious for Judge Kahn, perhaps best shown by his service as Chair of the Florida District Court of Appeal Budget Commission. (Can you imagine having to sit around discussing courthouse budgets all day?)

As I interviewed Judge Kahn, I got no inkling of a lack of love for his new federal trial work. Nevertheless, Judge Kahn mentioned to me that he will always think of himself as an appellate judge. Judge Kahn told me he already misses fondly his former fellow appellate judges and DCA staff and feels extremely warm

sentiments toward all of them. When asked what he will miss most about Tallahassee, he said it is the extremely high quality of its bench and bar, which he can compare to all others around the state from having been in a statewide practice from 1979 through 1991. After 20 years in Tallahassee, many members of the Tallahassee bench and bar became Judge Kahn's close personal friends and golfing partners.

So despite the pres-



The Kahn family

JUDICIAL PROFILES

tige and importance of Judge Kahn's new federal bench, I can see that accepting this position came with some personal sacrifices. Honestly I did not understand why Judge Kahn would make those personal sacrifices until I asked what I thought might be a mundane question.

A Judge's Judge

I asked Judge Kahn what motivated him back in 1991 to leave private practice and become a judge. With Judge Kahn's usual humility, he answered that we can skip that question if I like because it was a long answer. I am glad I declined that invitation, because the answer he gave me made me understand why Judge Kahn continues his life of public service at a time when so many appellate judges are returning to a lucrative private practice.

Back in 1989-1990, Judge Kahn was in private practice as a partner with Levin, Middlebrooks, Mabie, Thomas, Mayes and Mitchell, P.A. in Pensacola. He was embroiled in some complex litigation in Walton County. It involved a Walton County development called Seaside and the St. Joe Company, a corporation which even today still owns more than

600,000 acres in Florida. The Honorable Judge Clyde Wells presided over this case and was an inspiration to Judge Kahn. Perhaps you can remember those rare individuals in your life that have inspired you to greatness. Judge Clyde Wells was just such an inspiration to Judge Kahn. It was quite unexpected when a plane crash took Judge Wells' life. That unexpectedness caused Judge Kahn to reflect upon his own life. It seems to have awakened in Judge Kahn this call to public service that continues to drive Judge Kahn today.

Judge Kahn is far too humble a man to analogize himself to Judge Wells, and indeed he did not. I hope Judge Kahn will excuse me, then, when I conclude on my own that Judge Kahn's acceptance of his latest position in public service was the natural manifestation of a heart dedicated to serving the public. If you want to explore the mindset of a true public servant, you need not look any further than Judge Charles J. Kahn, Jr. Tallahassee suffers a great loss with Judge Kahn's departure, and Pensacola has a great gain. I am jealous of the Pensacola lawyers who will get to practice before him, and I am honored to have been a litigant at Judge Kahn's final oral argument at the First District Court of Appeal. I know that when I think about what makes a great appellate judge, Judge Kahn will always come to mind.

Words of Advice

Naturally, I would not let this interview of Judge Kahn end before getting my fair share of good advice on becoming a better appellate lawyer. I now pass some of those words of wisdom on to you. Yes, just some. I kept some of that wisdom just for myself. Judge Kahn may be a public servant, but I am not.



Granddaughter Tula Age 3, Judge Kahn and Granddaughter Alice Age 1

Writing a Great Appellate Brief

I asked Judge Kahn, if he could only give one piece of advice on how a good appellate brief writer can become a great brief writer, what would that one piece of advice be? His Honor cited to the "focused development of each point on appeal," to which I asked for further elaboration. Apparently further elaboration was the opposite of what Judge Kahn meant. A good brief becomes a great brief when artfully-chosen words lead succinctly to a firm conclusion. Or at least I think that is what Judge Kahn meant. I lack the skill to paraphrase him concisely.

Making Oral Arguments More Effective

I asked Judge Kahn for one piece of advice for making oral arguments more effective. He responded to always remember the importance of a conversational tone. An effective oral argument is a conversation between the judge's panel and the attorney.

Effect of Technology Upon Appellate Practice

I asked Judge Kahn for his opinion, after 20 years on the appellate bench,



Judge Kahn and his wife Janet in their yard in Tallahassee

JUDICIAL PROFILES

as to whether technology improved appellate advocacy or stood in the way of making effective appellate arguments. I cited to video oral argument technology and to the First DCA's pioneering use of paperless brief submissions as some technological examples.

Judge Kahn answered that he sees the strengths and weaknesses in video oral argument. He did not deny the advantage of reduced travel expenses and efficient use of resources, but also commented that current video technology does not perfectly reproduce the triangular relationship between the judge's panel, the appellant's counsel, and the appellee's counsel. He notes it also cannot duplicate the judge coming off the bench and shaking counsels' hands.

Judge Kahn sees the benefits of the 1st DCA's new eDCA attorney website and its iDCA companion site for judicial access. By now it is no secret that Judge Kahn, Judge Paul M. Hawkes, and Clerk of Court Jon Wheeler won the Davis Productivity Award for eliminating costly delays in the worker's compensation appeals process. Since 1989, the Davis Productivity Award program has publicly recognized and rewarded state employees and work units whose work significantly and measurably increases productivity and promotes innovation to improve the delivery of state services and save money for Florida taxpayers and businesses. Judge Kahn and I discussed how the cost savings to sole practitioners is enormous due to paperless appellate brief filings. Clearly the cost savings is not just for the state, but also for the practitioner. Judge Kahn attributes the success of eDCA and iDCA to his and his fellow appellate judges' "willingness to listen to and implement the changes suggested by our customers, the attorneys and

litigants." Note how this humble Judge analogizes his role as being like customer service.

Comparing the Federal Bench to the State Appeals Court Bench

When asked to compare the federal bench to his former post, Judge Kahn was a bit reluctant to make this comparison, stating that he feels he has not been on the federal bench long enough to fairly compare and contrast. Yet due to his affable nature, I convinced him to answer the following.

Standard of Review on Appeal

I mentioned how, in most cases, an appellate judge could not grant relief unless the issue had been properly raised below and was properly preserved for appeal. A trial judge's standard is often different. A trial judge can reject testimony and evidence if it is not credible and sometimes can grant discretionary relief as long as doing so is not an abuse of discretion. I asked, now that his trial bench requires a different standard, does Judge Kahn feel the appellate standard was a blessing or a curse? Judge Kahn was quick to respond that "the 'pre-knowable' standard is absolutely necessary for principled adjudication at the appellate level." He added that "the law becomes unmanageable" without it. It seems Judge Kahn would not be in favor of any change to the law of limited appellate review and preservation of error.

Collaborative Judging Versus Autonomous Judging

As an appellate judge, Judge Kahn decided most cases as part of a 3-judge panel, but now, the decision is all his own. So I asked Judge Kahn:

Do you prefer the autonomy, or do you miss the collaborative process? For the first time in our interview, Judge Kahn did not have an answer. He attributed this to his belief that he has not been on the federal bench long enough to tell. I attribute this to his deep humility. I mentioned his recently-published federal decision that I read on WestLaw. I tried to compliment its thoroughness and deep understanding of an area of the federal law that Judge Kahn certainly had not examined during his 20 year career as a state appellate judge. Despite the fact that only he and I were sharing this conversation, Judge Kahn was not willing to accept praise for his well-reasoned decision.

This should not have surprised me. Our humble Judge Kahn does not seek out praise or notoriety or lucre. This penultimate public servant only seeks out opportunities to serve. And I have no doubt that, for the next 8 years or more, he will humbly and dutifully serve Pensacola as a fair and accurate United States Magistrate Judge. I wish him great success on his new bench.



P. MCGINLEY

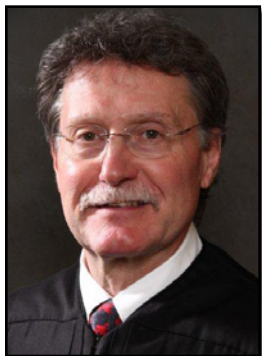
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JUDICIAL PROFILES

Florida's Lucky Break: The Service of Judge Peter Webster

By Courtney Brewer



Judge Peter D. Webster

Judge Peter D. Webster explains many of the stages in his legal career as the product of “dumb luck.” Readers might disagree after reviewing his many achievements and considering the thought and effort he has put into both being a judge and improving the legal profession. But it is difficult to argue with his follow-up that one simply cannot plan a career in the law; you just work as hard as you can and it happens. If you could plan one, though, you would probably like for it to look a lot like Judge Webster’s. In June, Judge Webster left the First District Court of Appeal after nearly twenty years of service on its bench (and twenty-five years total as a judge) to join the Tallahassee office of Carlton Fields. At a time when much is uncertain for the future of Florida’s judiciary, the loss of a judge like Judge Webster, who champions the rule of law and professionalism, seems like a stroke of bad luck for Florida courts.

The first person in either of his parent’s families to graduate from college (at Georgetown University, no less), Judge Webster received a full scholarship to Duke University School of Law. He earned his J.D., with distinction, in 1974. The Massachusetts native thereafter settled in Jacksonville, Florida, where he clerked for Judge Gerald Tjoflat, then on the U.S. District Court. Judge Tjo-

flat has long had at least one Duke Law graduate on his clerk staff; with the assistance of a partner in the firm at which he clerked during his second summer of law school, Judge Webster became one of those Duke Law grads privileged to serve in Judge Tjoflat’s chambers. He credits Judge Tjoflat with providing inspiration and motivation for the legal and judicial career that was to follow.

After his one-year clerkship, Judge Webster went to work at Bedell, Bedell, Dittmar, Smith & Zehmer (and its successors), a natural (and, the Judge would say, lucky) fit for him, since he wanted to practice litigation. Upon learning of Judge Webster’s interest in litigation, Judge Tjoflat advised him that “if they’d have him, there was only one place to go and that was the Bedell firm.” Practicing complex civil litigation, with a smattering of appellate and white collar criminal defense work thrown in, Judge Webster eventually became a shareholder in the firm.

On another “lucky” day, while he was hard at work in the firm’s library, a colleague suggested he consider applying for one of two open circuit judge positions in Jacksonville. He took the suggestion to heart and in 1986, Peter Webster became Judge Webster. Just after his appointment, Judge Webster was informed by the Chief Judge of the Fourth Judicial Circuit that he would be assigned to the juvenile section. When Judge Webster advised that he didn’t have a background in juvenile law, the Chief responded, “you’ll learn.” And he did, studying juvenile law over the course of the next six weeks in preparation for what was to come.

Although there was much he enjoyed about serving at the trial court level, Judge Webster admits to a certain knack for and enjoyment of research and writing. (Though the rest of humankind might raise its eyebrows at this confession, readers of the Record will likely share his appreciation.) When positions opened at the First District Court of Appeal, he applied, and was appointed by Governor Lawton Chiles in 1991. Judge Webster, his wife (now of 22 years), Michele, and her preteen daughter made the move to Tallahassee.

Judge Webster advises that an appellate judge must adapt to the collegial process the collective decision-making of appellate panels requires. This feature of the court presented perhaps the biggest learning curve for the Judge; he was no longer captain of the ship in each case he worked on as he had been at the trial court. He also misses the interaction with lawyers he enjoyed at the trial court, noting that he doesn’t get to see 20-30 lawyers, as he would have in one typical day as a trial judge, over the course of six months at the First District.

Still, the position of appellate judge suits him better. He has had plenty of opportunities to enjoy the researching and writing part of the process. A review of but a few of the 398 opinions that a Westlaw search shows Judge Webster to have authored reveals a writing style that is clear and values getting to the point. These opinions begin with a concise sentence explaining quickly what the case is about. They do not expend extra space or effort waxing poetically about the subject at hand, but are well-written and a good read nevertheless. Judge

JUDICIAL PROFILES

Webster explains that the writing process comes naturally to him — he simply sits down and writes opinions from scratch, rather than drafting version after version. After completing his draft, complete with citations that he personally cite checked (preferring book rather than electronic sources in his research process), his law clerks thoroughly review the draft for substance and form.

In his spare time, Judge Webster is quite active in a number of professional organizations. Many of these organizations focus on professionalism in the practice of law, from the various Inns of Court in which he has participated and held leadership positions through the years (including the First District Appellate American Inn of Court), to the American Judicature Society, the oldest non-partisan organization in the country dedicated to improving the administration of justice. His commitment to professionalism in the legal community does not stop at his extracurricular activities. He has written several law review and bar journal articles on topics related to the improvement of the legal profession and the judiciary, including his most recent article, *Ethics and Professionalism on Appeal*.¹ Just about every day he sees some professionalism problem in those practicing before him: as he puts it, judges see the “least desirable elements of humanity.” Judge Webster notes that as in all walks of life, some attorneys simply were not “raised right” and bring their particularly egregious lack of manners to the appellate practice world. These lawyers tiptoe around the ethics laws, but it is clear that making money is more important to them than what they should be focused on: improving society and providing competent representation to their clients. (For some

particularly heinous examples, check out Judge Webster’s article — from curse words in a motion for rehearing to calling the trial judge’s fact-finding “baloney,” this article shows the true depths of appellate practice.)

Now Judge Webster will get to put to use all that he’s learned and observed on the other side of the bench as he returns to private practice this summer. He is looking forward to practicing with the group at Carlton Fields, as well as all of the appellate attorneys he’s had the privilege of serving as a member of the executive council of the Florida Bar’s Appellate Practice and Advocacy section nearly every year since its formation in 1994. He is conscious of the fact that he now has a significantly better understanding of what captures a judge’s attention, a trade secret he was unwilling to divulge with the author (even when she promised to keep it to herself).

While Judge Webster’s future is looking rosy, he is not as upbeat about the future of Florida’s third branch of government. Commenting on the current legislative proposals for the court system, Judge Webster notes that he has never seen an attack on the judiciary quite like this one. As President-Elect of the American Judicature Society, where he has the opportunity to discuss such matters with attorneys around the United States, he can attest that Florida’s court system is not the only one facing this assault. None of the proposals, he maintains, have any hope of making our judiciary better — instead they seemingly seek to make the courts a “minion” of the other branches. Subservient to the other branches and special interest groups, he explains that our judiciary stands to lose the critical independence on which our system counts.

In one of his law review articles, *Statutory Construction in Florida:*

In Search of a Principled Approach,² he, along with his co-authors, Sylvia Walbolt and Christine Davis, recommends that judges facing the myriad rules of statutory interpretation remember to respect the legislature’s role in drafting the statute at issue. But he rejects the suggestion that courts have shown a lack of respect to the other two branches similar to that being shown by the legislature for the courts today. Most judges, he notes, take their jobs very seriously and are simply trying to do the right thing when they write their opinions. That being said, he continues, courts must bear in mind that when they review a statute, it is the product of a co-equal branch of government.

As he summed up, good judges want their decisions to fold in with the fabric of the law. The corpus of the law is a fabric that should lie flat — tears and snarls in the fabric result in a muddying of the law, creating bad precedent or ambiguity in an area requiring clarity. In Judge Webster’s case, we were the beneficiaries of the “dumb luck” that brought him, a jurist who embodies so many of the qualities we hope to see in the members of our judiciary, to the First District.

Courtney Brewer has been a Deputy Solicitor General for the State of Florida since the fall of 2007. Before joining the SG’s office, she was a clerk for Justice Charles Wells at the Florida Supreme Court. Like Judge Webster, she is an alum of Duke Law.

Endnotes:

1 Judge Peter D. Webster, *Ethics and Professionalism on Appeal*, 85 FLA. B. J. 16 (Jan. 2011).

2 Peter D. Webster, Sylvia H. Walbolt & Christine R. Davis, *Statutory Construction in Florida: In Search of a Principled Approach*, 9 FLA. COASTAL L. REV. 435 (2008).

JUDICIAL PROFILES

Judge Kevin Emas

By Patricia Wallace¹



Judge Peter D. Webster

On November 24, 2010, Governor Charlie Crist appointed Judge Kevin Emas to the Third District Court of Appeal. Prior to his elevation, Judge Emas served as a judge in the county and circuit courts of Miami-Dade County. After fifteen years on the bench, Judge Emas might be expected to know the law. He does, of course, but he is not a close-minded braggart. On the contrary, Judge Emas finds that he still has much to learn about the law. He believes that the most important trait for an appellate jurist is the willingness to set aside your ego and approach each case with a mind open to persuasion. Colleagues and practitioners alike attest that these are not mere words: despite his unusually powerful intellect, Judge Emas is approachable, open-minded, and hard working.

Born into the *Perry Mason* generation in St. Louis, Missouri, Kevin Emas moved to Hollywood, Florida, in 1970. He studied at the University of Florida, where he was a member of Florida Blue Key and Omicron Delta Kappa Honorary. While at UF, Emas stepped into an unforeseen leadership role that revealed his courage and sense of fairness. During a remembrance of Kristallnacht-- a pogrom against Jews throughout Germany and parts of Austria in November 1938-- a group of UF students staged an anti-Semitic event on the front

lawn of Judge Emas' fraternity house. Needless to say, tensions ran high and national media attention focused on the college town. Emas, who was president of Tau Epsilon Phi fraternity at the time, became a spokesman of reason and led the call for the establishment of an educational program to help end anti-Semitism at the University. For this work, the United States Jaycees selected Emas as an Outstanding Young Man of America. After graduating from UF with honors, Emas returned to South Florida to attend the University of Miami School of Law. There he served as an editor of the *University of Miami Law Review*, and was a member of both the Law School Honor Court and the Order of Barristers. Following law school, Emas became an assistant public defender and then entered private practice. In 1996, Governor Lawton Chiles tapped Emas to serve on the Miami-Dade County Court. Five years later, Governor Jeb Bush appointed him to the Circuit Court for the Eleventh Judicial Circuit.

Judge Emas views his service on the bench as the highest calling within the legal profession. Nonetheless, he answers another significant calling: that of teacher and guide to judges, law students, and even middle school and high school students. Judge Emas' commitment to advance the education of judges is renowned throughout the state and even the nation. In Florida, he is recognized as one of the most involved, talented, and dedicated teachers of the judiciary. His career is marked by service on the faculty of the National Judicial College and the Florida Judicial College. He has served as Faculty Chair for Florida's College of Advanced

Judicial Studies. These various positions, however, hardly illustrate the depth of his understanding and commitment to judicial education. Judge Emas does not simply rove the state teaching at various seminars. Rather, he masters new topics, constantly updates his notes on familiar topics, and designs courses essential to the development of capable and knowledgeable judges. He is widely recognized as a go-to judge on a number of complex issues, including the difficult and nuanced area of death penalty cases. According to Judge Linda Ann Wells, the Chief Judge-Elect of the Third District Court of Appeal, Judge Emas' many, many years of commitment to judicial education not only prepares judges but also "elevates all Bar members."

Judge Emas' advice for practitioners? Be prepared. Practitioners should anticipate an active bench and understand that judges can be persuaded at oral argument. Judge Emas certainly will be thoroughly prepared, well versed in the record, and incisively knowledgeable of the law.



P. WALLACE

Patricia Wallace is an attorney with Mathews Wallace LLP, based in Fort Lauderdale. Her practice focuses on complex commercial litigation, probate litigation, and appeals. She is also a mediator

with Blue Sky Mediations. She has published on numerous topics, including electronic technology, jurisdiction, admissibility of evidence, and freedom of speech.

JUDICIAL PROFILES

An Interview with Judge Burton Conner

by Mark Miller¹



Judge Burton Conner

Judge Burton Conner had the unusual opportunity to interview with two governors before Governor Rick Scott appointed him, on February 14, 2011, to the Fourth DCA.

Judge Conner confessed to friends, family, and members of the 19th Circuit Bar at a celebration of that appointment why he was a bit relieved when our just-departed governor punted the appointment process to our new governor.

The morning of the Governor Crist interview, “I got up, showered, shaved and went to get my suit. When I pulled my suit coat off the hanger, there were no pants there,” Judge Conner recalled as the attorneys burst into gales of laughter. “I can’t even begin to tell you how that felt.” He interviewed that morning with the governor’s staff in his jeans, but secured a pair of slacks for the afternoon interview with the governor. But the pants misfire did not end his tumult for the day.

“It was my birthday – and one of my daughters called to wish me a happy birthday. She knew I had the interview with the governor, but had thought it would have been over when she called me. I quickly stopped the cellphone from ringing and apologized profusely. My daughter, however, was very persistent. Three minutes later, she called again! I simply told Governor Crist, ‘This is not my day for interviews.’”

Sharing that self-effacing story with hundreds of friends and fellow Bar members demonstrated one of the many values Judge Conner learned from his mother – humility.

Growing Up: “I have an Overdeveloped Sense of Responsibility”

His mother, Barbara Conner, raised Judge Conner and his four siblings – two sisters, two brothers, Burton the second-youngest – in Bradenton. “My mother was a school lunchroom manager. We didn’t come from money.” His mother could not give him money but she gave him something much more valuable – a strong work ethic. Because of that upbringing, Judge Conner explained, “I have an overdeveloped sense of responsibility. I’m someone who will work and keep working until I get the job done.” Judge Conner explained that all members of his family agree that Conner knew how he would apply that work ethic from the earliest days of his life -- “my earliest recollection is that ever since I was five or six years old, I knew I wanted to be a lawyer. That is something everyone in my family remembers.”

That work ethic sustained Judge Conner through both Duke University as an undergraduate and the University of Florida as a law student. He graduated both schools with honors, even though he took a year off when he was 21, and he and his wife had their first child. “My first child was born the day I turned 21. My mom used to say that I became a man and became a dad on the same day.”

His ‘overdeveloped’ work ethic enabled Judge Conner to graduate UF Law in 2.5 years. He refused to

take summers off. During that time in Gainesville, he interned in the Public Defender’s Office, working with long-time Eighth Circuit Public Defender Rick Parker – “a phenomenal influence,” in Judge Conner’s words. After graduation, Judge Conner knocked on all the legal doors where he grew up in Bradenton and the surrounding area, but could not find a position. Instead, he landed at the 19th Circuit Public Defender’s Office when Elton Schwarz, the public defender at the time, hired him. It was 1978.

His year in the 19th Circuit Public Defender’s Office took him to Okeechobee once a week to represent individuals charged with crime in that small county, and from there he drew the attention of well-known local attorney, Tom Conely. “Tom needed a litigator as he was getting out of litigation,” Judge Conner said. Judge Conner fit the bill. After five years working for Conely, Conely encouraged Conner to apply for a county-court position. Judge F. Shields McManus, now a circuit judge in St. Lucie County, recalled serving on the Judicial Nominating Commission that nominated Conner. “He was the best candidate . . . he was still a young lawyer, but his demeanor was serious and humble. It bespoke of maturity beyond his years.” Governor Bob Graham affirmed Tom Conely and the JNC’s confidence by appointing Judge Conner to the Bench.

After serving a full four-year term on the Bench, Judge Conner surprisingly lost a contested election in 1988. Undaunted by the setback, he started his own solo practice. “I did civil litigation, family, probate, transactional work – everything except for personal injury.”

JUDICIAL PROFILES

Governor Chiles Appoints Judge Conner to the Circuit Bench

Following nearly a decade of solo practice, Judge Conner found himself appointed for a second time to the judiciary, this time by Governor Lawton Chiles. Chiles appointed Judge Conner to the circuit bench. Judge Conner's varied background in private practice gave him an interesting perspective on the problems that were brought to him by the litigants, and by the system.

From the beginning of this tenure at the circuit court, he began honing skills that would serve him well on the appellate bench. "I had some very good early experiences as a circuit judge with collaborative decision-making. I was a juvenile judge in St. Lucie County, and that exposed me to the Executive Roundtable. In St. Lucie County, there is a roundtable of the CEOs of the various entities or agencies who have either a statutory responsibility or funding pot of money to work with children. Once a month those CEOs attend the roundtable to talk about the children of St. Lucie and collaboratively problem-solve. The superintendent, the police chiefs, county commissioners, sheriff, Healthy Start officials, Health Department executives, school board members, Department of Juvenile Justice administrators and Department of Children and Families administrators – all working together to solve issues with children."

These different people achieved great success in the community. "We came up with a truancy night court program; I've been doing that for ten years. The program was very successful. We did it two nights a week; the parents came in every month and we monitored a case for six months or so, working with the parents to make sure they got their kids to school. The single-moms, holding down two or three jobs and leaving for one of those

jobs at 5:30 a.m., understandably found it tough to get their children to school. Many times, we turned the problem around, and at the night court we would give the hard-working mother a hand, when we had success. It was a very collaborative effort with a cross-section of the community. A diversity of experience and talent coming together to problem solve. And I continued with that program even after I left the juvenile bench because I found it so rewarding."

Collaborative problem-solving became a theme of Judge Conner's tenure on the Circuit bench. "In 2001, I was asked to become involved with the Supreme Court ADR [Alternative Dispute Resolution] Rules and Policy Committee. I'm up for re-appointment to the committee and I suggested a life sentence – I think it's that good. We work with the best people involved in mediation and arbitration; recommending to the Supreme Court the rules which should apply to mediation – in family court, civil court, juvenile court, etc. That led me into working with the statewide mortgage mediation program that we initiated a few years ago. This involved twenty men and women from across the state, with very diverse backgrounds, figuring out what we were going to do

about the mortgage crisis the state began experiencing a few years ago." These successful efforts at collaborative problem-solving persuaded Judge Conner that he should apply for appointment to the Fourth DCA: an appellate court representing the most logical place in the court system for collaborative decision-making. He had no expectations that he'd gain appointment, and Governor Scott surprised him when he called on Valentine's Day in February to let Judge Conner know he was the pick. Governor Scott told Conner: "I'll be watching you very closely because you are my very first judicial appointment."

On His Appointment to the Fourth DCA

For inspiration in his new role, Judge Conner looks to another judge who progressed from the county court to the appellate courts: former Florida Supreme Court Justice Major Harding. "Major Harding stands out in my mind as someone I want to pattern myself after, partly because he was both a county and circuit judge before becoming a member of the Florida Supreme Court. I think that progression is a very good one. I will be a much better appellate judge because I had a significant amount of time as a county

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JUDICIAL PROFILES

judge, and even more significant period of time as a circuit judge.”

Judge Conner sees his new role as part of a team effort. Once again, he is in the role of working with a group – this time two other appellate judges on a panel, along with the staff of the Fourth DCA – to productively resolve problems. Conner emphasized that

despite his many accomplishments, he knows he has to earn respect each day – not simply expect it. “I feel strongly that it’s important as a judge that I earn respect, not demand it. I feel it’s important to earn it.” That thought again demonstrates the humility Judge Conner learned from his mother.

Although the judges must earn respect, Judge Conner believes the judicial branch deserves respect as an entity that is perhaps the most important of the three branches of government. “The executive branch has the power of the militia. The legislature has the power of the purse. But if I’m a judge in a courtroom and I order something, what power do I have? The power of the judicial branch comes from people believing they should do the right thing. They believe in doing what’s right – the law should be about making sure we come up with the right decision when people have disputes. That’s the beauty of our system.” At the same time, the courts – and the other branches -- must have respect for the law, particularly our state and federal Constitutions. “We must be careful with tampering with the Constitution. We don’t want the winds to blow and change it too easily.”

If an appellate litigator is looking for a tip on how to prepare for the state’s newest appellate judge, that practitioner should consider one of Judge Conner’s favorite expressions: “be careful what you ask for.” That expression has proven true during his years on the bench, and he expects more of the same on the appellate court. So when you finish up your brief or oral argument and ask for the remedy or result you prefer, make sure you have thought through the implications of that remedy – for both your client and the law.

Conclusion

Even after a long and very successful legal career, Judge Conner remains humble, hard-working, and passionate about the law. No wonder Governor Scott appointed him to the Fourth District Court of Appeal.

Mark Miller of the Appellate Law Office of Mark Miller, P.A. is a solo appellate attorney in Stuart, Florida. This is Mark’s first article for the Record.

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Inside the Fifth District Court of Appeal

by Roy D. Wasson, Shannon McLin Carlyle, & Bretton C. Albrecht

Introduction

The Fifth District Court of Appeal is the youngest of Florida's five intermediate appellate courts. Located on South Beach Street in Daytona, the courthouse overlooks the Atlantic Intracoastal Waterway, better known there as the Halifax River. The tranquil setting provides a perfect backdrop for the court and its ten judges as they work to administer justice in accordance with the rule of law.

History and Jurisdiction of the Fifth District

Sufficient controversy surrounded the creation of the Fifth District Court of Appeal that Governor Graham sought an advisory opinion from the Florida Supreme Court concerning the constitutionality of the new district. Three of the seven justices declined to join in the majority's opinion that the new court was constitutional or to otherwise render an opinion on the issue. See *In re Advisory Opinion to the Governor Request of June 29, 1979*, 374 So. 2d 959 (Fla. 1979) [hereinafter "*Advisory Opinion*"]. The Governor did not state why he was concerned about the court's constitutionality, but one apparent issue was that the boundaries of the new district as enacted by the Legislature were not the same as those recommended by the Supreme Court.

The Supreme Court had, in a certification to the Legislature of the need for additional judgeships, "also recommended the creation of a fifth appellate district that would encompass the fifth, seventh, ninth, tenth, and eighteenth judicial circuits." *Advisory Opinion*, 374 So. 2d at 963. However, in the legislation that passed, "[t]he fifth appellate district created by the



The Fifth District Court of Appeal Building in Daytona FL

legislature included the fifth, seventh, ninth, and eighteenth judicial circuits, as recommended by the court, but omitted the tenth judicial circuit which had also been recommended." *Advisory Opinion*, 374 So. 2d at 963.

The exclusion of the tenth circuit from the Fifth District was the culmination of the familiar political wrangling, as was the Legislature's decision on where to locate the new court headquarters. Orlando and Daytona Beach vied with other communities for the honor of serving as the Fifth's District's hometown, and the sheer power of Volusia County's legislative delegation won the fight. So strong was House Speaker Hyatt Brown in his quest for the court to be situated in his hometown of Daytona Beach, that he earned the nickname "The Hyattollah." He was aided by Daytona Senator Edgar Dunn and Majority Leader Sam Bell. See Robert D. Shar, Jr. * John Van Gieson, *How Daytona Won Appellate Headquarters*, The Miami Herald, July 15, 1979.

The legislative exclusion of the tenth circuit was contrary to the recommendation of "a special commission of the Supreme Court [which], using caseload studies, recommended that the new district take in all of Central Florida from Citrus to Volusia . . . , including the Polk County headquarters of the Second District."

Id. That would likely have resulted in the Fifth District being headquartered in the existing courthouse in Lakeland (Polk County), thereby necessitating a move of the Second District's headquarters to another city, such as Bradenton, Tampa, or St. Petersburg. To succeed, the Daytona legislators had to defeat the influence of those from the Second District who would also have liked a new courthouse in their

cities.

"Enter the Daytona Beach boys. To get a courthouse of their very own, they'd have to do something about the courthouse in Lakeland. They did: They redrew the proposed boundaries to put three Central Florida counties - including Polk - back into the Second District." Former Chief Judge, Gilbert S. Goshorn, Jr., explained that "Orlando got in the act by trying to wrestle [the location of the court] away [from Lakeland]."

In a carefully considered opinion that also addressed the Legislature's increase in the number of new judgeships for the First District, four of the justices advised Governor Graham that "the omission of one recommended judicial circuit from the new appellate district is not a prohibited modification of the court's recommendation; however, the addition of one or more judicial circuits not included in the court's certification would be a prohibited modification." *Advisory Opinion*, 374 So. 2d at 963. Chief Justice England and Justices Hatchett and Sundberg wrote replies to the Governor's request in which they declined to render an advisory opinion on the questions. *Id.* at 969-72. The Chief Justice and Justice Hatchett joined in one such letter, noted the absence from the Governor's request of any specific basis for questioning the

bill's constitutionality, and explained:

Neither the constitutional grant of authority to advise the governor nor our rules of implementation impart a truly adversary character to these advisory opinion proceedings, yet in our opinion courts can competently and carefully assert their awesome power to declare legislative acts invalid only in the context of proceedings in which both sides of a clearly-framed issue have been fully and fairly presented. *Id.* at 970.

Judges obviously cannot give required deference to a solemn act of the Legislature when confronted with unspecified challenges that leave affected persons, including the court, floundering in search of applicable legal doctrines. The bill creating the Fifth District was allowed to become law without the Governor's signature. Section 35.043 of the Florida Statutes described the geographical jurisdiction of the court. Section 35.05(1), Florida Statutes, provides: "The headquarters of the . . . Fifth Appellate District [shall be] in the Seventh Judicial Circuit, Daytona Beach, Volusia County."

Just nineteen days before the effective date of the law that created the new court, August 5, 1979, Chief Justice England issued an administrative order "[t]o effect an orderly transition from four to five appellate districts in Florida." *In re Creation of the District Court of Appeal, Fifth District*, 374 So. 2d 972, 973 (Fla. 1979). The Chief Justice noted that "[t]he legislature has authorized any judge now sitting on the first, second, or fourth district court of appeal to elect to become a judge of the fifth district court of appeal, and fourth district court of appeal judges Spencer C. Cross and James C. Dauksch, Jr. have evidenced their intention to make that election." *Id.* To supply a third judge temporarily to comply with the constitutional minimum, the order provided: "Parker Lee McDonald, circuit judge of the Ninth Judicial Circuit, is hereby assigned and designated as a temporary judge of the District Court of Appeal, Fifth District." *Id.*

The administrative order made detailed provisions for basic problems such as the transfer of files to the

new court, the filing of new papers in transferred cases, and the temporary assignment to the Fifth DCA of judges from the other districts who already had heard arguments on cases that were transferred. *Id.* The court began operating on August 6, 1979, with an immediate caseload of 1,021 filings transferred from the First, Second, and Fourth District Courts of Appeal.

Judge Cross became the Acting Chief Judge in the first days and weeks of the court. While funds had been appropriated to meet the court's financial requirements, no authorization existed to expend that money until the bill became law, which date was less than certain. Judge Cross made an arrangement with the Court Administrator's Office in Tallahassee to fund its operations on a "pay-back" basis until the budget was implemented. In his dealings with the Court Administrator's Office, Judge Cross worked closely with Deputy State Court Administrator Frank Habershaw, and convinced him to become the first Clerk of the Fifth District. Mr. Habershaw, a lawyer with his Juris Doctor degree from the University of Miami Law School, stayed in Tallahassee for a month or so after he agreed to accept the Clerk's job, helping to structure the support system for the court. Acting Chief Judge Cross exhibited farsighted leadership by instituting automated systems that eventually would become the standard for the other districts. Although it would be outdated now, the word processing system that Judge Cross successfully pursued for the court was the state of the art at the time.

In addition to Judges Dauksch and Cross, who transferred from the Fourth DCA, the four other original judges appointed in 1979 were Melvin Orfinger, Warren H. Cobb, Frank Upchurch, Jr., and Winifred J. Sharp. The judges voted to determine who would be the new Chief Judge, and Judge Dauksch won. The four new judges drew straws to determine their

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seniority rankings. The huge backlog of files was distributed among the six judges by random drawing.

Only a few days after the Fifth District became “legal,” the first published opinion bearing the new court’s name was rendered. Judge Cross and Associate Judge Anstead were in the majority, and Judge Dauksch dissented in *Sears, Roebuck & Co. v. Stansbury*, 374 So. 2d 1051 (Fla. 5th DCA 1979). The decision appears to have been written prior to the transfer of that file from the Fourth District, for it states: “The trial court apparently has misconstrued *our* holding in [a 1978 4th DCA case].” *Id.* at 1054 (emphasis added).

The *Stansbury* case had not been argued in Daytona, and the Fifth District had no courtroom at all for a while. At first, its boxes of files were

housed and temporary offices set up, in a U.S. Army Reserve building on a small island within sight of the court’s present location. The first oral argument calendar was conducted on November 13, 1979, before Judges Dauksch, Orfinger and Cobb. That calendar probably was held in the City Council Chambers of the City Hall. In those early days, when argument calendars were held, the court used either a borrowed Volusia County Circuit courtroom or the City Council Chambers. Judge Sharp recalled that during the early days of the court, her office was a small classroom used for military training, complete with green wall chalkboards and bare linoleum floors stacked with files up the level of the chalkboards.

The judges, particularly the chief judge, are responsible for the ad-

ministration of the court. When the District Courts of Appeal were created, the Florida Legislature created the position of marshal to assist the courts in implementing administrative policy. The marshal is therefore charged with bringing professional management to the judiciary. Responsibilities include: budget preparation; defense and maintenance; facilities management; space planning; personnel; security; automation and public information.

The judges of the Fifth District hit the ground running. In addition to making the adjustments in their personal lives and the administrative efforts needed to build a new court from the ground up, the associate and permanent judges decided 123 cases during the last few months of 1979. One of the earliest cases decided by



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the permanent Fifth DCA judges was *Morris v. State*, 377 So. 2d 835 (Fla. 5th DCA 1979), a criminal case in which the opinion was written by Judge Sharp, with Judges Dauksch and Upchurch concurring.

After the original four appointees, Judge Joe Cowart, Jr., was the next judge appointed to the court, in September of 1980, replacing Judge Cross, who resigned to go back into private practice. In December of 1980, the local newspaper reported that ground would be broken in February 1981 for the court's permanent headquarters, on an historic site "where the city's founding fathers met . . . to sign articles of incorporation." As with most construction projects, delay was inevitable, and ground was not broken until July 1981. Design, building and other expenses brought the cost of constructing the new courthouse to \$5.3 million. The court moved in and left the Army Reserve building on October 19, 1982.

It was several years before there were any changes on the bench at the court. Judge Upchurch retired in January 1988 and was succeeded by Judge C. Welborn Daniel. Then an additional seat was created on the

court, which was filled upon Judge Gilbert S. Goshorn Jr.'s appointment in 1989. Judge Orfinger retired in August 1989, and his position was filled by Judge Charles Harris. The Legislature created two more positions, which were filled in January of 1990 by Judge Earl Peterson and Judge Jacqueline Griffin. Judge Daniel retired in 1990, and was succeeded by Judge George Diamantis. Judge Cowart retired in 1993. He was succeeded by Judge Emerson R. Thompson.

In 1995, the court appointed a new Marshal, Ty W. Berdeaux. Mr. Berdeaux holds a Bachelor's degree from the University of Florida and a Master's of Public Administration from Columbia University. He was the Senior Deputy Court Administrator for the Twelfth Judicial Circuit before coming to the Fifth District Court of Appeal. Mr. Berdeaux is assisted by a Deputy Marshal, Pamela C. Wild.

Also in 1995, the court was saddened by the death of Judge Diamantis. He was succeeded by Judge John Antoon, II, who later left the court to become a Federal Judge for the Middle District of Florida. Judge

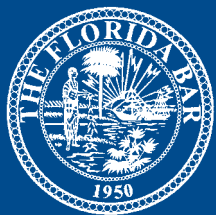
Goshorn's retirement in 1999 left another opening on the court.

The New Millennium and Beyond

The millennium brought with it a new judge's position and a string of vacancies creating sweeping changes to the court's composition. Judge Antoon's position was filled by Judge Thomas D. Sawaya in February 2000. Judge Goshorn was succeeded by Robert J. Pleus, Jr. William D. Palmer was appointed as the tenth judge on the court, and Judge Dauksch's retirement created an opening filled by Richard B. Orfinger. The retirement of Judges Cobb and Harris in 2002 brought Judge David A. Monaco and Judge Vincent G. Torpy. Thus, within a span of a few years, 60 percent of the court's makeup had changed.

More changes were to come. The courthouse was expanded to add six additional judicial suites, a new Marshal's office, appellate mediation suites, and rooms to house security personnel and visiting judges. The addition also included a parking garage for the judges and court personnel, which has greatly increased security.

In 2005, Frank Habershaw retired



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after serving as the Clerk of Court for 26 years. The mantle was passed to Susan Wright. Before her appointment as the new Clerk of Court, Ms. Wright was the director of central staff and had long served the court as a staff attorney. She earned her B.A. from Michigan State University and her J.D. from the University of Florida. She served for several years as a law clerk with the U.S. District Court for the Southern District of Florida before transitioning into private practice and later joining the Fifth District's central staff. Ms. Wright has been a member of The Florida Bar since 1976, and her bar activities have included service on the Appellate Court Rules Committee.

The Fifth District's bench continued to change with the retirement of Judge Peterson, who was succeeded by Judge Alan Lawson in 2006. The last member of the original court, Judge Sharp, retired later that year. The court's public library was dedicated to Judge Sharp in honor of her long service and special dedication to preserving the library. Judge Sharp's position was filled by the appointment of Judge Kerry Evander. In 2008, Judge Thompson retired and was succeeded by Judge Jay P. Cohen.

The following year brought with it the retirement of Judge Pleus. When a disagreement between Governor Charlie Crist and the Judicial Nominating Commission forestalled the appointment of a new judge, Senior Judge Pleus took action and filed a petition for writ of mandamus with the Florida Supreme Court, which was ultimately granted. *See Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009). In the meantime, Senior Judges Pleus, Thompson, Cobb, and Harris each stepped in to assist with the cases that would have been assigned to the new judge.

Almost a year after the judicial nominating process began, Senior Judge Pleus' position was filled. Judge Bruce W. Jacobus was appointed to the Fifth District on August 4, 2009, and became the newest member of

the court.

On November 11, 2009, the court family was deeply saddened by the passing of Senior Judge Melvin Orfinger. He was a founding member of the court and was instrumental in developing its culture and character. After his retirement in 1989, he continued serving as a senior judge until 2007.

Although the court has undergone many changes during the first decade of the new millennium, its character remains the same. The Fifth DCA past and present is a place where the judges are dedicated to excellence in administering justice and the rule of law, and where each case is given full and fair consideration.

Practice Before the Fifth District

The process by which cases move through the Fifth District is similar to that used in other appellate courts. The court does not have local rules, but detailed instructions are provided in the Notice to Parties and Attorneys that is disseminated upon acknowledgement of a new appeal. An appeal is initially assigned to a motions panel consisting of three judges. The Motions Panel stays with the case until the briefs are filed and it is ripe for assignment to a merits panel for oral argument or a decision without argument. Routine motions, such as unopposed motions for first extensions of time, are granted by the Clerk. Other motions will require the action of one, two or three of the judges on the motions panel, depending on the nature of the motions. Those motions are initially reviewed by Career Attorney, Sharon Serra. Ms. Serra analyzes each motion and any response and then makes a recommendation to the panel as to its disposition. Ms. Serra joined the court's staff in 2000 and developed what is now the Fifth District's Motions Practice.

The responsibility for managing all of the case files and their prog-

ress through the court rests with the Clerk's Office. Clerk Wright is aided by Chief Deputy Clerk, Linda Howard, and two Senior Deputy Clerks, Jean Henry and Kelly Waldron. Any questions concerning the court's procedures or the status of a pending case should be directed to the Clerk's Office. Contact may not be made with the individual judges or their personal staff regarding cases.

The Office of the Clerk is open from 8:15 a.m. until 5:00 p.m., Monday through Friday of each week except when the building is closed for holidays. The court does not accept filings by fax, and all filings must bear an original signature. In addition to the original document and required number of paper copies, counsel must transmit an electronic copy of the briefs, petitions, responses, and motions specified in the court's Administrative Order Regarding Electronic Filing. This administrative order became effective November 1, 2008, and is available on the court's website. It contains detailed instructions on what materials must be provided electronically, as well as how and in what format to transmit them.

The court maintains a secure "drop box" on the southwest side of the building which is available for after hours filings. Jurisdictional time limits cannot be extended or avoided by use of the drop box, and items placed in the drop box will be date stamped the following business day. Any document intended to be filed with the court should be directed to the Clerk's Office, Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, FL 32114. Telephone inquiries regarding cases or procedures can be made to the Clerk's Office by calling 386-255-8600. All appeals and petitions for original writs filed with the court are governed by the Florida Rules of Appellate Procedure, which are promulgated by the Florida Supreme Court.

The court has excellent staff attorneys. Each judge has two attorneys on

his or her individual staff, and a team of Central Staff attorneys serves the court as a whole. Judge Griffin has characterized the importance of the court's staff attorneys as follows: "In large measure, our ability to function under this crushing caseload is the quality of our staff attorneys." Noting that the position of staff attorney has started to change from an entry level job after law school to more of a career position, Judge Griffin was openly appreciative of the quality of work the staff attorneys generate, stating: "We really have been blessed here."

The attorneys of the Central Staff are primarily responsible for reviewing, analyzing, and making disposition recommendations on all extraordinary writ petitions and summary postconviction appeals. In much the same way, the staff attorneys for the individual judges prepare objective memoranda analyzing the cases assigned to their judge. Staff attorney memoranda contain a detailed statement of the case and facts, analyze the legal issues and arguments raised by the parties, and make recommendations as to the disposition of the case. In preparing the memoranda, the staff attorneys thoroughly review the briefs and the record, and they re-

search the cited authorities, conducting additional research as needed. Judge Griffin has mentioned that she and other judges often work closely with their staff attorneys through the preparation of these memoranda to become more fully familiar with their assigned cases in preparation for oral argument.

Several of the judges have expressed appreciation for the quality of the appellate lawyers who appear before them. Few criticisms have been voiced of a type that would lead to blanket suggestions for improvement. However, some areas for refinement of practitioners' skills have been discussed. For example, the Notice to Attorneys and Parties mentioned previously should be read carefully, even though most of the requirements are simply reminders of what is already required under the Rules of Appellate Procedure. When the appellate rules are amended, so is the Notice. Some of the requirements in the Notice that are not contained in the appellate rules are that briefs should be filed *without* brief covers, and appendices should be bound in volumes not exceeding 200 pages each. The Notice also explains the new requirements for transmitting additional copies of

certain documents electronically.

Some of the judges seem to have different views on the degree to which the court enforces the Rules of Appellate Procedure. One judge said: "I wouldn't say we're that hypertechnical," while another said: "We're sticklers for the Rules. There's no reason not to comply with the Rules." The differing perspectives are perhaps due in part to the nature of judges' interactions with other DCAs, which is such that they would not have the same opportunity as a practitioner to gage and compare their current enforcement practices.

Two common rule violations that the judges have said will result in a brief being stricken are failing to provide record citations and exceeding page limits. Another violation that has been mentioned by more than one judge is the failure to file a proper appendix in a nonfinal appeal, writ case, or with a motion that requires resort to matters filed in the trial court. Too often, it seems as though attorneys are unaware that the court does not have a record on appeal in such situations, and they forget to supply the materials the court needs to fully consider and correctly decide the matter. On the subject of appendi-



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ces, one judge has noted that they can be useful even in final appeals, where critical documents can be reproduced via appendix for each member of the panel, rather than buried in a record that can be assessed by only one judge at a time. Practitioners should take care to include a table of contents when using an appendix and should separate each document using clearly marked tabs to enable the judges and their staff attorneys to easily identify, locate and read the contents.

Oral argument is usually granted upon request in final appeals, but is very rarely granted in nonfinal appeals and writ cases. Oral argument before the Fifth District is, to say the least, a stimulating experience for all participants, both the attorneys and the three judges on the panel. Former Judge Goshorn has noted: "By reputation, we're one of the more intense benches at oral argument." The same is true today. Judge Griffin has explained that part of the reason for the intensity is the great level of preparedness which each panel achieves prior to argument. Another judge has agreed that attorneys who come to oral argument at the Fifth District should expect an active bench. Judge Sawaya has commented that the court makes a conscientious effort to treat the lawyers arguing before it with respect and dignity. He has also noted that the purpose of oral argument is to educate the court about the particular case so that the judges have an opportunity to ask questions and clarify issues. Lawyers should look forward to the exchange.

The judges generally agree that oral argument is worthwhile in most cases and should be requested. The practitioner who may be unfamiliar with this court can be sure that all the judges have read the briefs and that the panel knows the facts of each case. Attorneys should therefore avoid spending too much time on the facts during oral argument. Instead, they should focus on addressing the key issues in their case and answering

the questions posed from the bench. It should also be remembered that in the appellate arena, a well-reasoned argument will be much more effective than an impassioned plea more appropriate for a jury. As Senior Judge Thompson has observed, "Some lawyers think that righteous indignation and histrionics will carry the day, but they won't." Several of the judges have suggested that when a panel member asks a question while an attorney is presenting oral argument, the attorney should stop his or her current argument and immediately answer the precise question asked. Questions from the bench offer the attorney an opportunity to address specific concerns that the judge has, or knows another panel member has, about the case. If an attorney gives a delayed or indirect response, the opportunity may be lost and the judges' concerns left unanswered. Thus, the best approach is to answer the judges' questions immediately, directly, and candidly. Remember that oral argument is a conversation with the court designed to pinpoint the determinative issues and test the merits of your case.

Brief writing tips from the judges of the Fifth District have included the suggestion to limit the issues to those involving harmful error. In the usual case, no more than three main issues and a few subsidiary issues should be needed. There may be one good point buried in a brief that raises twenty issues, but it will likely be lost in the rubble of meritless arguments. In contrast, an appellant can build a much stronger brief by confining the issues to his or her strongest arguments.

Of course, the most important component of any brief is a thorough, candid, and accurate discussion of the facts and the issues, however many are raised. The importance of candor to the tribunal and accuracy in brief writing cannot be overemphasized. State the record with absolute precision. If there is contrary authority, acknowledge it, and utilize your ad-

vocacy skills to distinguish your case. This will benefit your current client, and your future clients will benefit from the reputation you develop among the judges and staff attorneys.

Technology

The Fifth District went online in 2004. The website, www.5DCA.org, is easy to navigate and contains a wealth of information for attorneys, parties, and the general public. As Judge Sawaya has mentioned, the "primary reason for the website is to give attorneys and the public greater access to the court's opinions and to enhance its service to the public." Another, more recent, technology resource at the court is a wireless network connection inside the building, which is available to attorneys and parties who have business with the court. The form for requesting wireless access can be found on the court's website.

The court's website contains everything from the court history to information about e-filing and mediation, to forms and administrative orders. It should be mentioned here that "e-filing" currently means the requirements instituted by Administrative Order AO5D08-01, for e-mailing briefs and certain other documents, in addition to the paper copies and original. The administrative order is on the court's website, under the "Clerk's Office" tab. Additional information on e-filing and court procedures can be found in the Notice to Parties and Attorneys, also available on the website.

Live oral arguments are now broadcast on the web, and archived arguments can also be viewed. The court's opinions and a list of PCAs are posted on the site every Friday. Links to the opinions of the Florida Supreme Court and the other DCAs are also provided. The latest search engine makes it easy to search the current and archived opinions. Up-to-date opinion releases from the Fifth DCA can also be obtained by signing

up for the court's RSS feed. In short, the Fifth DCA's website is an invaluable resource.

Advanced technology was a hallmark of the Fifth District when it was formed, and the search for innovative ways to use technology is still a topic of great interest to the judges of the court. One judge has predicted that instead of continually expanding the court, it will be necessary to make it more efficient through the use of technology. Considering the court's history of high case filings, which have totaled about 4,520 or 452 per judge annually in recent years (averaged over three years), it is clear that advances in technology and e-filing will indeed become increasingly critical resources at the Fifth DCA in the years ahead.

Appellate Mediation

The Fifth District Court of Appeal is a pioneer in appellate mediation. The pilot program, initiated in 2001, was such a success that the court adopted it as a permanent program in 2004. The goal of the program is to help litigants resolve their cases more efficiently and less expensively than the appeal process. Appellate mediation also helps to narrow and clarify issues for appeal so the cases can be resolved expeditiously even if they are not concluded through mediation. To date, more than 30 percent of cases referred for appellate mediation have been resolved.

The Fifth District's mediation program is unique compared to other mediation programs in Florida and throughout the country. One distinction is the manner in which the cases are selected for mediation. In all final civil appeals where all parties are represented by counsel, the parties are required to complete a

mediation questionnaire and return it to the Mediation Coordinator. The questionnaires are then reviewed by one of three judges, Judges Palmer, Orfinger, or Evander, who will decide whether to send the case to mediation. Once a case is selected, mediation is mandatory. The timing of mediation is such that most of the costs of the appeal can be avoided by a successful mediation, and time limits on mediation prevent the delay from affecting the course of the appeal if the mediation is not successful. All appellate deadlines are automatically extended upon receipt of the mediation questionnaire from the court. For those cases selected for mediation, the deadlines are additionally tolled for up to 45 days, until the mediation is completed. Otherwise, the deadlines begin to run from the date of the letter informing the parties that their case was not accepted for mediation.

Also unique, the Fifth District's mediation program is privately funded and the parties are responsible for paying the mediator. The mediations are not conducted by court personnel, but by private mediators who have been specifically trained in appellate mediation. Parties are free to select their own mediator from a list of qualified mediators, and, if they cannot agree, the court will appoint one. Mediation may be available on a pro bono basis for parties who demonstrate that they are unable to otherwise afford to participate. Further information about the Fifth District's mediation program, including printable mediation forms, can be found on the court's website, or by calling the Mediation Coordinator, Heather Brooke, at 386-947-1547.

Conclusion

Although it is the youngest of the

district courts of appeal, the Fifth DCA has already developed a rich history and tradition, as well as a stellar judicial reputation. The court's endeavor into appellate mediation demonstrates its commitment to offering parties innovative dispute-resolution services that may achieve more satisfying results overall than a court decision. This program, along with the building expansion and the advances in technology and e-filing, portend an exciting future for the court and those fortunate enough to practice before it.

In addition to the court's website and other resources discussed above, further insight into the inner workings of the court can be gained by obtaining a copy of the most recent "Practice Before the Fifth DCA" seminar from The Florida Bar's CLE publications. The inaugural seminar was held in March 2010, and a number of attendees described it as the best continuing legal education seminar they had ever attended. The seminar's success is a testament to the dedication of the Fifth District's judges to serving with excellence in everything they do.

The original version of this article was published in the April 1995 edition of The Record and was prepared by Roy D. Wasson with assistance from Judge Jacqueline Griffin. From 2001 through 2004, it was updated by Shannon McLin Carlyle, a former staff attorney at the Fifth DCA and shareholder in the Carlyle Appellate Law Firm. The 2010 updates were made by Bretton C. Albrecht, who served as a senior staff attorney at the Fifth DCA before joining the appellate division of Kubicki Draper in Miami.

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