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Outgoing Chair's Message – It's Been A Wonderful Year, Here's To The Road Ahead

By Caryn Lynn Bellus



C. BELLUS

The year that I have been Section Chair has flown by, and I can hardly believe that this amazing year is now drawing to a close. I want to thank all of the Appellate Practice Section's judicial liaisons, committee chairs, editors, officers, executive council members, and Section members who devote their time, brilliance, and energy to develop and coordinate all of the Section's programs, events, and publications. Each of you ensure that the Section remains a vital part of The Florida Bar and continues in its mission to promote excellence and professionalism in appellate practice.

The Appellate Practice Section began the year at the Annual Convention of The Florida Bar in June 2013 with a wonderful celebration of its 20th anniversary. The Section hosted several memorable celebratory events, including an anniversary dinner to commemorate the Section's work over the past 20 years. The keynote speaker, Florida Supreme Court Chief Justice Ricky Polston, delivered remarks to a packed house of appellate practitioners and judges, providing insight into the

importance of appellate practice and the Section's work. Founding members of the Section regaled the audience with the history of the Section. Later in the evening, the Section held its signature dessert reception with the theme "Great Gatsby Gala." The ballroom was transformed into a speakeasy where practitioners and judges became a crowd of flappers and men in fedoras, celebrating the Section's entry into its "Roaring 20s."

The annual events mixed important business with the festivities. The Section's executive council met to continue planning for the Section's future, and the Section hosted another of its signature events, a discussion with the Florida Supreme Court justices following the final round of the Robert Orseck Memorial Moot Court Competition. Over the past few years, this discussion with the court has become a highlight of the annual convention. It provides practitioners and law students with the unique opportunity to ask questions of the justices, after which the court announces the winning moot court team. We again thank the justices of the Florida Supreme Court and the Young Lawyers Division for participating in this annual event.

This year, the Section focused on men-

Chair's Message



C. BERMAN

When I sat down to compose my Chair's Message, I was struck by an unfamiliar feeling: a loss for words. For those of you who know me, I usually have many things to say (in fact, probably more than people want to hear). But the truth is, our recent Chairs have made a lot of the points that first spring to mind when I consider the future of this organization. Those points cover related goals: expanding the Section with new members, especially young members; allowing new members to become a part of Section and make it their own; and, after celebrating 20 years, working towards—and looking forward to—another 20.

And then it occurred to me: my Chair's Message should be a report on these talking points—already artfully-articulated by my predecessors—as a kind of status update. How are we doing in achieving these goals? Where is the Section now? What have we been up to, as I write this message on August 1st, since the annual meeting? When it comes to these questions, I am not at a loss for words (see, that didn't last long), as I am excited and hopeful about what is in store for the Section.

First, we are well on our way to recruiting young, active members—

a goal our Section has been pursuing for a long time. If you were at the annual meeting in June, you saw that our morning committee meetings were busier and better attended than ever. The room just hummed with activity. Better still, many of the folks in attendance were new faces, and I know from comments I have received that the old guard loved it. I also had the wonderful experience of being able to assign three or more assistant editors to every single publication we have; we had that many new people jumping right into the mix. I did not know most of these volunteers, and I loved that, too. Plus, I have, in my first month as Chair, received over 20 emails from individuals I have never met asking for a way to be involved in the Section. Wow. We are so glad to have new members, all willing to step in and help the Section. Welcome!

Second, our committees are roaring into action. Our Publications Committee—led by Kimberly Jones this year—is taking my breath away (in a good way!). Our editions of *The Record* are cranking back up, with June Hoffman leading the charge. You will see *The Record* on a regular basis this year.

Third, we have already made major updates to our website. Go take a look. We'll admit, we used to have a few items out of date—from the name and contact information of our Executive Council members, to our

listing of past articles we have published in the *Florida Bar Journal*. No longer. Jonathan Streisfeld has quickly and efficiently made sure all of those updates have been made. If you see something we missed, please let us know and we'll take care of it right away.

Also on the website, we have removed the password protection for Section resources like *The Record* and *The Guide*. Use these tools, because they are there for you. We are hoping that removing the password requirement (because who ever knew the password anyway?) will make it easier to access all of the good information the Section puts out. So again, go surf our website. It's already getting stronger.

I could tell you more—like all of the CLEs Jessie Harrell is getting off the ground nearly a year in advance, or all the pro bono cases Sarah Lahlou-Amine seamlessly reviews, assigns, and handles—but I'll save that for next time. After all, I have to bank something for later, right?

I hope you're getting the idea. It has only been a month, but I can already say: all those calls to action that you have been hearing for the past couple of years? This Section is answering them, and I'm thrilled to be at the helm as it happens. Call or email me anytime, and I will plug you in. The Section is full of good lawyers doing going work, and we always have room for more.



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WHAT STATE CRIMINAL PRACTITIONERS SHOULD KNOW ABOUT FEDERAL HABEAS CORPUS

By Gray R. Proctor

I. General Considerations

Practitioners should be aware that federal habeas review exists to correct only errors of federal law.¹ Violations of state law are still relevant when they prove a violation of a federal right, such as effective assistance of counsel. Another general matter to keep in mind is that the law governing federal habeas corpus changed greatly when congress passed the Anti-terrorism and Effective Death Penalty Act (“AEDPA”) in 1996. Do not cite to older cases without making sure AEDPA did not overrule them. Practitioners should also be aware that separate procedural rules apply.²

II. Procedural Issues

Three main procedural barriers to habeas relief exist. The first is the one-year statute of limitations in 28 U.S.C. § 2244(d). For most claims, the statute of limitations begins to run when the time elapses for seeking further review, or when the highest court declines discretionary review.³ If a state-created impediment prevented actual filing of the petition, Section 2241(d)(1)(B) applies.⁴ If the claim is based on a new, retroactive rule of constitutional law, Section 2241(d)(1)(C) applies. Most petitioners will never be able to use this provision because new rules are rarely retroactive.⁵ If applicable, the limitations period begins to run on the day that the new rule is announced, not on the day that the Supreme Court declares it retroactive.⁶ Finally, if the claim relies on newly-discovered evidence, Section 2244(d)(1)(D) applies; however, courts expect petitioners to make reasonable efforts to discover the factual basis for any claim within the normal one-year limitations.⁷

A “properly filed”⁸ state post conviction relief (“PCR”) motion tolls the limitations period under Section 2244(d)(2). If it is not certain whether

a PCR motion is properly filed, file the federal petition and follow up with a motion to stay and abey until the state proceedings are finished.⁹ The 90-day period for petitioning the U.S. Supreme Court for certiorari is not included in the tolling period.¹⁰

Equitable tolling exists,¹¹ but is granted only in exceptional circumstances.¹² Additionally, innocence can be grounds for disregarding the normal timeliness requirement.¹³

The second procedural barrier is the rule against successive petitions, codified at 28 U.S.C. § 2244(b). Only claims that either rely on a new, retroactive rule or newly-discovered evidence that establishes innocence may be brought, and the petitioner must obtain permission from the Court of Appeals before filing. As in other contexts, retroactivity is exceedingly unlikely and innocence is an extremely difficult showing to make.¹⁴

The final procedural bar is exhaustion/procedural default. Exhaustion requires the petitioner to first present his or her claims to the state courts. Unexhausted claims should be dismissed without prejudice, to allow the petitioner to return to state court.¹⁵ However, if an adequate and independent state procedural rule (such as the statute of limitations for filing a Rule 3.850 motion) would provide a basis for the state court to dismiss the unexhausted claim, federal courts will dismiss the claim with prejudice as defaulted rather than dismissing it without prejudice as unexhausted.¹⁶ For a rule to be adequate and independent, it must be consistently and evenly applied.¹⁷

Ineffective assistance of counsel can provide good cause to hear a procedurally defaulted claim,¹⁸ although these ineffectiveness claims also must first be presented to state courts, and may be procedurally defaulted

themselves.¹⁹ Petitioners who went *pro se* on state postconviction review are not subject to procedural default for claims that could not have been presented sooner.²⁰ Petitioners who are represented for postconviction proceedings can bring a procedurally defaulted claim if counsel’s failure to bring the claim constitutes deficient performance under the *Strickland* standard.²¹

III. Standard of Review of State Court Adjudications

Federal courts review the merits of claims adjudicated by the state courts according to a uniquely deferential standard. The state court need not cite to federal law or even explicitly decide the federal issue.²² Deference does not apply to claims not adjudicated on the merits in state court, including decisions based on procedures too fundamentally flawed to result in an “adjudication.”²³

For questions of law, the petitioner must show that the state court’s decision is not merely wrong, but unreasonably wrong based on the record before it.²⁴ Only Supreme Court cases are relevant.²⁵ Although the law must be “clearly established,”²⁶ there is no “all fours” requirement.²⁷ A decision is also unreasonable if the court applies an incorrect legal standard.²⁸ For questions of fact, the petitioner similarly must show that the decision was unreasonable based on the evidence. Additionally, a petitioner may be able to rebut the presumption of correctness of a state court factual finding with clear and convincing evidence; this is not necessary if the finding was unreasonable based on the record.²⁹ Most petitioners, however, will not be allowed to expand the record to rebut the presumption of correctness because Section 2254(e)

continued, next page

HABEAS CORPUS from previous page

prohibits evidentiary hearings unless the facts underlying the claim show that the petitioner was innocent. Additionally, the petitioner must fulfill one of two other requirements: either a new, retroactive constitutional rule or a factual predicate that could not have been discovered sooner with due diligence. This rule does not apply unless the petitioner is at fault, however,³⁰ and petitioners who are not to blame for the underdeveloped record receive the benefit of the relatively generous pre-AEDPA standard for an evidentiary hearing.³¹

IV. Appeals of Habeas Proceedings

Appeals require a certificate of appealability (“COA”) verifying that the issue is at least debateable.³² The District Court will decide whether to issue a certificate of appealability at the conclusion of the proceedings.³³ Petitioners may apply to the Court of Appeals to grant or expand a COA. At this stage, the court cannot give full consideration to the merits of the appeal.³⁴

Gray Proctor is a former law clerk for federal judges in the Southern District of Texas, the Eastern District of Virginia, and the Fourth Circuit Court

of Appeals. His Orlando, Florida practice focuses on criminal appeals, post conviction review, clemency, and corrections issues. He sits on the advisory board of the Bloomberg BNA Criminal Law Reporter.

Endnotes

- 1 *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).
- 2 See generally Rules Governing Section 2254 Proceedings in United States District Courts.
- 3 *Gonzalez v. Thaler*, 132 S. Ct. 641, 656 (2012); see also *Clifton v. Sec’y*, No. 6:10-cv-539, 2012 WL 3670264, at *5 n.3 (M.D. Fla. Aug. 27, 2012) (giving petitioner benefit of 90-day period for petitioning SCOTUS because PCA opinions are not appealable to the Florida Supreme Court).
- 4 See *Sallie v. Humphrey*, 789 F. Supp. 2d 1351, 1357-60 (M.D. Ga. 2011).
- 5 *Whorton v. Bockting*, 549 U.S. 406, 418-21 (2007).
- 6 *Dodd v. United States*, 545 U.S. 353, 358 (2005).
- 7 *Aron v. United States*, 291 F.3d 708, 712 (11th Cir. 2002) (explaining that due diligence “does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts”).
- 8 *Artuz v. Bennett*, 531 U.S. 4, 8 (2000); but see *Drew v. Dep’t of Corr.*, 297 F.3d 1278, 1284 (11th Cir. 2002) (holding that a successive Rule 3.850 petition was “properly filed”).
- 9 See *Rhines v. Weber*, 544 U.S. 269, 278 (2005).
- 10 *Lawrence v. Florida*, 549 U.S. 327 (2007).
- 11 *Holland v. Florida*, 130 S. Ct. 2549 (2010).
- 12 *Downs v. McNeil*, 520 F.3d 1311, 1323 (11th Cir. 2008).
- 13 *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1933-34 (2013); see also *House v. Bell*, 547 U.S. 518 (2006) (actual innocence standard).
- 14 For examples, see *Sawyer v. Whitley*, 505 U.S. 333 (1992) (applying identically phrased pre-AEDPA common-law standard) and progeny.
- 15 *Rose v. Lundy*, 455 U.S. 509 (1982).

- 16 *Snowden v. Singletary*, 135 F.3d 732, 735-78 (11th Cir. 1998).
- 17 *Lee v. Kemna*, 534 U.S. 362, 387 (2002).
- 18 *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991).
- 19 *Edwards v. Carpenter*, 529 U.S. 446 (2000).
- 20 *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012).
- 21 *Id.*
- 22 *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013); see also *Allen v. Sec’y, Fla. Dep’t of Corr.*, 611 F.3d 740, 748 (11th Cir. 2010).
- 23 *Skipwith v. McNeil*, No. 09-cv-60361, 2011WL 1598834, at *11 (S.D. Fla. Feb. 17, 2011) (citing *Winston v. Kelly*, 592 F.3d 535, 555-56 (4th Cir. 2010)).
- 24 *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011); see also *Knowles v. Mizayance*, 556 U.S. 111, 123 (2009) (discussing the “doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d) (1) standard”); *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) (discussing role of generality of rule in determining whether it was unreasonably applied).
- 25 *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450-51 (2013).
- 26 *Williams v. Taylor*, 529 U.S. 362, 412 (2000).
- 27 *Id.* at 407; but see *White v. Woodall*, 134 S. Ct. 1697, 1705-07 (2014) (rejecting unreasonable failure to extend where court would have to extend reasoning of prior case as well).
- 28 *Lafler v. Cooper*, 132 S. Ct. 1376, 1390 (2012) (finding decision unreasonable where state court failed to apply *Strickland* to claim of ineffective assistance of counsel).
- 29 *Adkins v. Warden, Holman Corr. Fac.*, 710 F.3d 1241, 1249 (11th Cir.), cert denied 134 S. Ct. 268 (Oct. 7, 2013).
- 30 *Williams v. Taylor*, 529 U.S. 420, 432 (2000); see also *Jefferson v. Upton*, 560 U.S. 284, 288-10 (2010).
- 31 *Townsend v. Sain*, 372 U.S. 293, 313 (1963), overruled on different grounds by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).
- 32 *Gonzalez v. Sec’y, Dep’t of Corr.*, 366 F.3d 1263, 1267 (11th Cir. 2004).
- 33 Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts.
- 34 *Gonzalez*, 366 F.3d at 1267.



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ELEVENTH CIRCUIT DECLINES TO LIMIT THE PEARLMAN DOCTRINE TO INTERLOCUTORY APPEALS IN THE GRAND JURY CONTEXT

BY PAUL A. AVRON¹

In a first impression issue, a panel of the Eleventh Circuit declined to limit the Pearlman doctrine²—under which an intervenor can file an interlocutory appeal from an order denying a motion to quash a grand jury subpoena—to the grand jury context. Relevant here, in *Doe No. 1 v. United States of America*,³ the Eleventh Circuit held that it possessed subject jurisdiction over an interlocutory appeal by criminal defense attorneys and their client who intervened in a proceeding ancillary to a criminal investigation to assert the attorney-client privilege to prevent disclosure of plea negotiations with the United States.

The issue arose from a motion by the victims (of alleged sex-related crimes under Federal and Florida law) to dismiss an appeal by intervenors, defense counsel for Jeffrey Epstein. *Id.* at *1. After investigating claims of sexual abuse, the Office of the United States Attorney for the Southern District of Florida, on behalf of the United States, and Epstein’s lawyers entered into a non-prosecution agreement, with the United States agreeing to not file any federal charges in exchange for a guilty plea to charges of solicitation of prostitution and procurement of minors to engage in prostitution under Florida law. *Id.* The U.S. Attorney’s Office did not confer with the victims prior to entering into the non-prosecution agreement or advise them of the existence of the agreement until several months after it had been memorialized. *Id.* at **1-2. The U.S. Attorney’s Office did not disclose to the victims that Epstein’s plea was a result of the undisclosed non-prosecution agreement. *Id.*

Shortly after Epstein’s plea, Jane

Doe No. 1 filed suit against the United States alleging, *inter alia*, that it wrongfully excluded her from plea negotiations with Epstein. *Id.* at *2. The district court concluded that Jane Doe No. 1 and Jane Doe No. 2 (who subsequently joined the initial petition) were “crime victims” under the Crime Victims Rights Act.⁴ After settlement of a related civil suit, and over Epstein’s objections, the district court ordered the United States to produce documents given to Epstein’s lawyers during plea negotiations; however, no correspondence from Epstein’s lawyers was produced. *Id.* at *3. The victims filed a motion to compel directed at the United States. *Id.*

In response, Epstein and his lawyers moved to intervene to challenge production and use of correspondence authored during plea negotiations. *Id.* Subsequently, the intervenors moved for protection arguing, *inter alia*, that Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11 created a privilege for plea negotiations. *Id.* In one of two orders the district court compelled the United States to, *inter alia*, produce documents requested by the victims, including correspondence between the United States and Epstein’s lawyers. *Id.*

The victims argued that the intervenors’ appeal should be dismissed because the Pearlman doctrine applies only to grand jury subpoenas, and that *Mohawk Indus., Inc. v. Carpenter*⁵ precluded an interlocutory appeal of a denial of a privilege claim. *Id.* at *4. The Eleventh Circuit first noted that discovery orders are not treated as final orders for purposes of appeal, but that certain exceptions existed, one of which was the Pearlman doctrine which “permits an

order denying a motion to quash to be ‘considered final as to the injured third party who is otherwise powerless to prevent the revelation.’”⁶ Quoting from Supreme Court precedent,⁷ the Eleventh Circuit explained that “[u]nder Pearlman, ‘a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance.’”⁸ *Id.*

The Eleventh Circuit further explained that appellate jurisdiction pursuant to the Pearlman doctrine is not dependent upon successful assertion of a privilege, and noted the various bases for the intervenors’ privilege claims, *i.e.*, Federal Rule of Evidence 410, the work product privilege, the right to effective assistance of counsel pursuant to the Sixth Amendment, etc., “however tenuous,” suffice to establish jurisdiction.⁹ *Id.* at *5. Continuing, the court explained that, “[a]bsent an interlocutory appeal, the intervenors would be left with no recourse” to challenge the order requiring production by the United States.¹⁰ *Id.* at *6. The court then explained why it was unlikely that the intervenors would be able to appeal under the “established mechanisms for [immediate] appellate review,” *i.e.*, 28 U.S.C. § 1292(b), or through a writ of mandamus.¹¹ *Id.*

The Eleventh Circuit next found victims’ reliance upon *Mohawk*, in which the Supreme Court precluded an interlocutory appeal of an order compelling production of attorney-client privileged materials because the claimant could appeal a final judgment, misplaced.¹² *Id.* Specifically, the Eleventh Circuit explained that the Supreme Court considered its appel-

late jurisdiction in *Mohawk* under the *Cohen* collateral order doctrine,¹³ that the Court did not discuss the Pearlman doctrine or discuss appeals like the one before the Eleventh Circuit in which the holders of the privilege “are limited intervenors in a proceeding ancillary to a criminal investigation and seek to prevent the disclosure of information held by a disinterested party,”¹⁴ that is, the United States. *Id.*

The Eleventh Circuit’s opinion—set to be published—is important because it rejects the contention that the Pearlman doctrine is only applicable in the grand jury context. More importantly, the court’s opinion is important because third parties to an action can intervene and take an immediate interlocutory appeal to challenge a discovery order compelling production of documents of asserted privileged material and, in so doing, preserve rights without risking a contempt citation or having to wait to appeal for a final judgment on the merits of the underlying claim(s) when it would simply be too late.

Endnotes

1 Paul A. Avron is of counsel to Berger Singerman LLP and is based in the firm’s Boca Raton, Florida office. Mr. Avron’s primary practice areas are corporate restructuring and commercial litigation, including appellate litigation. Mr. Avron has substantial experience in appellate litigation before the United States Court of Appeals for the Eleventh Circuit.

2 *See Pearlman v. United States*, 247 U.S. 7 (1918).

3 No. 13-12923, 2014 WL 1509015 (11th Cir. April 18, 2014).

4 18 U.S.C. § 3771(e).

5 558 U.S. 100 (2009).

6 *In re Grand Jury Proceedings*, 832 F.2d 554, 556-58 (11th Cir. 1987) (quoting *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199, 202 (5th Cir. Unit A Mar. 1981)).

7 *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992).

8 *Jane Doe No. 1*, 2014 WL 1509015, *4 (quoting *Church of Scientology*, 506 U.S. at 18 n.11).

9 *Id.* *5.

10 *Id.* *6.

11 *Id.*

12 *Id.*

13 *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949).

14 *Jane Doe No. 1*, 2014 WL 1509015, *6.

TERMS OF ENDEARMENT FOR APPELLATE CLERKS: HOW TO STAY IN AN APPELLATE COURT CLERK’S GOOD GRACES

Carrie Ann Wozniak, Esq., Partner, Akerman LLP with
Pamela Masters, Esq.,
Clerk of Florida’s Fifth District Court of Appeal

Most appellate practitioners know that the Clerk’s Office is the gateway to the Court. All documents are filed in the Clerk’s Office and reviewed by the Clerk, who is responsible for ensuring that the jurisdictional and procedural requirements are met for those documents to be acted upon and for your case to be perfected and sent to a judge’s chambers for analysis and decision. If an attorney, paralegal, or assistant has a question concerning filing, he or she often contacts the Clerk’s Office. Stay in the good graces of the Clerk’s Office and you are well on your way to a pleasant and efficient appellate experience. There are some common and completely avoidable errors made by appellate practitioners that can lead to a fall from the good graces of the clerks and a less than stellar reputation for you and your office. Whether or not you are an offending party, these helpful reminders of the proper procedures practitioners should follow will help you keep your appellate cases on track.

1. Use The Proper Procedure To Secure an Extension of Time.

Most of the appellate courts now use agreed-upon extensions of time to extend the time for filing briefs rather than requiring motions for extension of time pursuant to Florida Rule of Appellate Procedure 9.300. For example, the Fifth District Court of Appeal issued Administrative Order 5D13-02, allowing parties to agree to an extension of up to 90 days for an Initial Brief or Answer Brief and 60 days for a Reply Brief and to

file a notice of agreed extension of time. No order is needed granting the extension. However, the procedure may only be used in criminal and civil appeals (including dissolution of marriage), and not in appeals in adoptions, dependency, termination of parental rights, expedited, or emergency cases and not in original proceedings—including petitions for writs of certiorari. The same procedure applies in the Second District, *see* Administrative Order 2013-1; the Third District, except that extensions for Initial Briefs and Answer Briefs may be for an aggregate total of 120 days and 60 days for Reply Briefs, *see* Administrative Order Re: Agreed Extensions of Time For Filing Briefs In Certain Appeals, 3D13-01; and the Fourth District, which allows the same time periods as the Third District. *See* Admin. Order No. 2011-2. The mistakes most commonly made when using agreed-upon extensions are attorneys using the procedure to agree to more than the allowed amount of extension and using the procedure in a proceeding in which it is not allowed, *i.e.*, to extend the time to respond in a certiorari proceeding or an adoption appeal. Once the parties have agreed to the maximum number of days allowed by the administrative order, any further extension must be sought by motion filed with the Court.

2. Consult With Opposing Counsel Concerning Extensions of Time, Be Specific, And Don’t Be Excessive.

The Clerk’s Office receives far too

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A Moving Target: How to Seek Fees in Your Original Proceedings

By Jared Michael Krukar, Esq.

Florida Rule of Appellate Procedure 9.400(b) establishes the procedure for seeking attorneys' fees on appeal. Many practitioners have long assumed that the rule similarly applies to original proceedings, there being no other rule clearly providing an alternative procedure. However, two recent opinions establish that rule 9.400(b) does not apply to original proceedings.

The Fourth District Holds That Rule 9.400(b) Does Not Apply.

The Fourth District Court of Appeal first questioned the relevance of rule 9.400(b) to original proceedings in *Advanced Chiropractic and Rehabilitation Center Corp. v. United Automobile Insurance Company*.¹ In that certiorari proceeding, the petitioner made its first request for fees in a motion filed three days after the court had awarded the petitioner its requested certiorari relief.² The Fourth District initially denied the motion for fees as untimely pursuant to rule 9.400(b), which provides that a motion "may be served not later than . . . the time for service of the reply brief."³ The petitioner moved for rehearing, arguing that rule 9.400(b) did not apply to original proceedings, but only to "a standard appeal with respect to a series of briefs."⁴

Upon reconsideration, the Fourth District agreed that the language of rule 9.400(b) limited its application to appeals, and not to original proceedings.⁵ However, the court concluded that the petitioner's request was still untimely.⁶ It relied upon the supreme court's decisions in *Stockman v. Downs*⁷ and *Green v. Sun Harbor Homeowners' Association, Inc.*⁸—both trial court fees cases—to hold that a request for attorneys' fees must be pled in the original petition, response, or reply, in a certiorari proceeding.

Hence, the court likened an original proceeding in the appellate court to an original lawsuit in the trial court, where entitlement to fees usually must be pled in a plaintiff's complaint or a defendant's answer. The motion that was filed after the writ was granted was insufficient.

The Florida Supreme Court Partly Agrees With the Fourth District, but Holds a Different Procedure Applies.

The supreme court took jurisdiction over the case to review alleged express and direct conflict between the Fourth District's opinion and *Stockman and Green*.¹⁰ The court agreed with the Fourth District that rule 9.400(b) "does not and was not intended to apply to rule 9.100 original proceedings . . . [so it] does not govern the time or method by which a party to a rule 9.100 original proceeding must request attorney fees."¹¹ However, the court "conclude[d] that the Fourth District misapplied *Stockman and Green*—cases that address requests for attorneys' fees at the trial level—to a situation materially at variance with the one under review—a request for appellate-level original writ attorneys' fees."¹²

After determining that rule 9.400(b) procedures do not apply in original proceedings, the court determined the proper procedure for seeking fees in an original writ. It held that Florida Rule of Appellate Procedure 9.300—the general rule for appellate motions—governs.¹³ And because rule 9.300 does not set a prescribed time for a motion for fees, the court held that such motion "simply must be timely to provide the relief sought."¹⁴

Consequently, Florida law currently requires a party seeking an award of fees in an original writ proceeding only to file a motion for fees under

rule 9.300, within sufficient time to obtain the relief requested.

The Florida Appellate Court Rules Committee Recommends Amending Rule 9.400(b) to Include Original Proceedings.

Following the Fourth District's *Advanced Chiropractic* opinion—but before the supreme court's subsequent ruling—the Florida Appellate Court Rules Committee recommended amendment to rule 9.400(b) specifically to "clarify any confusion caused by [that opinion]."¹⁵ The following is the committee's proposal¹⁶:

(b) Attorneys' Fees. With the exception of motions filed pursuant to rule 9.410(b), a motion for attorneys' fees shall state the grounds on which recovery is sought and shall may be served not later than:

(1) in appeals, the time for service of the reply brief and shall state the grounds on which recovery is sought;
or

(2) in original proceedings, the time for service of the petitioner's reply to the response to the petition.

The assessment of attorneys' fees may be remanded to the lower tribunal. If attorneys' fees are assessed by the court, the lower tribunal may enforce payment.

Thus, the Committee seeks to bring both original and appellate proceedings under the same rule and procedure. The supreme court has not yet acted upon this proposed amendment.

Conclusion

The process for seeking fees in original proceedings has been unsettled over the past year. If the supreme court ultimately adopts the Committee's proposed rule change, it will mark the third procedural modification in less than twelve months. Practitioners should watch upcoming

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JUDICIAL PROFILES

Judge Wendy Berger

By Shannon McLin Carlyle

In 2012, Judge Wendy Berger became the third female to serve on the Fifth District Court of Appeal. Judge Berger grew up in Jacksonville, Florida, where she attended high school at Stanton College Preparatory School. She was involved in theatre both in her high school and in her community. Her interest in acting brought her to Florida State University where she started out majoring in theatre. Her father, Bob Williams, a corporate lobbyist for the paper industry, was wondering what she would do with a theatre degree. His question was answered when Berger ultimately graduated with a degree in communications, continued at the FSU College of Law, and fell in love with trial work. He often quipped, "I think all that theatre work really helped you out in court."

Having interned at the State Attorney's office in Jacksonville for two summers, upon graduation in 1992, Berger landed a job as an Assistant State Attorney for the Seventh Judicial Circuit in the small town of Bunell in the juvenile and misdemeanor division. Fresh out of law school, her supervisor handed her a stack of files, pointed, and said, "The courtroom's that way."

Berger moved to St. Augustine in 1994. She was only 25 years old and by that time was handling a felony case load. By the time she left the state attorney's office in 2000, she had prosecuted every possible type of case that an assistant state attorney could handle – from simple traffic cases to homicides.

In 1997, Berger married Larry Berger, and they have two children. Georgia (11), loves art and is an avid horseback rider, and Griffin (15) plays high school baseball and travel ball. Because her children are her number one priority at this stage in her and her husband's

lives, Berger's been known to take the appellate briefs from cases she's working on to Georgia's riding lessons and Griffin's baseball games.

In 2000, Berger was appointed Assistant General Counsel to Governor Jeb Bush and served as his clemency aide. As Assistant General Counsel, she was responsible for advising Governor Bush on death penalty cases and other issues related to criminal and juvenile justice. In particular, she monitored the procedural advancement of all prisoners on Florida's death row, prepared the death warrants and all other related documents for the Governor's signature and acted as a liaison with the Florida State Prison, Attorney General's Office, Capital Col-

lateral Regional Counsel, and Florida Supreme Court until the execution of sentence. Berger also reviewed extradition requests, requests for international prisoner transfers, and executive orders involving state attorney special assignments and the suspension and removal of elected officials. She helped draft and review legislation, reviewed requests for independent investigations by the Florida Department of Law Enforcement, responded to victim and other constituent issues, and provided legal counsel to the Executive Office of the Governor and designated Governor's agency general counsels. She was also involved in interviewing candidates nominated for judicial appointment and provided counsel to the Governor regarding the selection of those judges.

As Governor Bush's clemency aide, Berger offered counsel on all issues related to executive clemency, including whether the various forms of executive clemency such as the restoration of civil rights, remission of fines, commutations, and full pardons should be granted or denied.

Berger continued as Assistant General Counsel and clemency aide until

2005 when Governor Bush appointed her to the Seventh Judicial Circuit Court where she served as the first female circuit court judge in St. John's County. Berger was assigned to the civil and probate division for a little over a year before moving to the criminal division, where she presided over every adult felony case in St. Johns County and earned a reputa-

tion for being tough. She also presided over the St. John's County Adult Drug Court.

When Berger began to describe the program, her eyes lit up. "You can actually see people's lives transformed," she said. Berger described the post plea program, noting that it is offered only to nonviolent offenders pleading to second or third degree felonies. The program incorporates community service, drug testing, group meetings, and counseling. The offenders are on probation and report to the court. "It is a reward and sanction based program grounded on personal responsibility. The goal is to divert offenders out of prison and jail, and get them back on track so that when they complete the program, they can become productive



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members of the community” Berger noted. “If you can fix the drug problem, hopefully, you can fix the crime problem.” She added, “The program should last one year. Some people finish in a year; it takes others longer – some up to 5 years. Not all make it but for the ones that do, it is incredibly rewarding. I support drug courts 100 percent.”

“Unfortunately, our prison system has a revolving door,” Berger stated. “Often times, we know very little about the people we send to prison other than what appears in their case file and on their scoresheet.” She noted, “Drug Courts are different. In drug court, you get a chance to know the participants as they progress through the program. There are certainly ups and downs through each participant’s journey, but when the light finally comes on for them and you get to witness their transformation, that’s when you know your work has meaning.” Berger’s goal was to help the participants help themselves and she misses that aspect of being on the trial bench. “We did some good work in St. John’s County.”

Berger was appointed to the Fifth District court of Appeal in August 2012 by Governor Rick Scott. Berger enjoys the appellate court. She finds it much more academic and intellectually challenging than the circuit

court. “I enjoy reading and writing and getting a chance to learn new areas of the law,” Berger said. She also enjoys having the time to reflect on the law and how it applies to the various issues and nuances associated with a particular case; a luxury she did not have on the circuit court. Also, because she came primarily from a criminal background, Berger noted that she does not instinctively have a plaintiff or defense bias in the civil arena.

Judge Berger stated that if she could give any advice to practitioners it would be, if your client can afford it, to have an appellate lawyer at trial to provide trial support, and preserve potential appellate issues. She warned that countless appeals are lost because issues are not preserved below.

As for appellate briefs, they “should be concise,” Berger advised. “Just because you have a 50 page limit doesn’t mean you have to use it, especially in a case with only one or two issues. Some of the best briefs I’ve read are short and to the point.” She recalled her days on the trial bench reminding attorneys just before closing arguments that “the mind can only absorb what the posterior can endure.” Bringing that logic to the appellate court, she says the same can be said for the eyes. Berger also noted that professionalism in brief writing is always important.

“Wasting space in a brief with disparaging comments about opposing counsel or the trial judge in no way benefits your client and only distracts from your argument.”

In terms of oral argument, “knowing your case is most important.” Judge Berger also suggests that it is not always necessary to utilize the entire time allotted, especially if the court is not asking any questions. “If you have addressed all the points you need to address, it is alright to rely on your briefs and sit down.” She also notes that not every question from the panel is hostile. “Learn to recognize the friendly question because they serve a purpose.” She also warns “be careful what you concede.”

As the interview came to a close, the conversation turned back to drug court. Berger needed to get back to St. Augustine because she was attending graduation that evening for several of her offenders who had completed the program. She looked forward to seeing them and hearing about their progress.

Several more of Florida’s citizens were kept out of jail and off the streets as a result of drug court. Although she’s now in Daytona Beach interpreting the law and making an impact throughout Florida, Judge Berger’s legacy continues in St. Johns County.

Judge Mark W. Klingensmith

By Siobhan Helene Shea

Judge Mark W. Klingensmith grew up in Melbourne, Florida as the oldest of three children. After his family moved to the West Palm Beach area, Judge Klingensmith attended John I. Leonard Community High School where he graduated in 1978. Judge Klingensmith’s first job was working for his father installing telephone systems during high school, continuing over the summers while in college.

Judge Klingensmith started at the University of Florida in 1978, and

graduated with a Bachelor of Arts in 1982 and a Juris Doctor in 1985. He was a member of UF’s Florida Blue Key, President of Phi Alpha Delta Law Fraternity and Editor-in-Chief of the Florida Journal of International Law. His service to the university has continued. In 2006, he served as President of the UF Law Alumni Council, and has served on the Law School Board of Trustees since 2011.

Judge Klingensmith is a loyal double Gator, rarely missing a home football

game.

Judge Klingensmith decided early on a career in law, around the age of 6, having been influenced by his favorite childhood television show, Perry Mason. That interest never wavered. One teacher remarked to his parents that she believed he had a “gift of gab” that would serve him well as a lawyer. At the same time, he also developed an interest in politics, which continued through college where he majored in Political Science before attending

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law school. This interest continued beyond school, leading him to become involved in many state and local political matters.

After law school, he returned to West Palm Beach. Judge Klingensmith was admitted to the Florida Bar in 1986 and the California Bar later that same year. He joined the firm Metzger and Sonneborn right after law school, which later became Sonneborn Rutter Cooney & Klingensmith. He worked at the firm for 25 years, becoming a shareholder in 1990. He became Florida Bar Board Certified in Civil Trial in 2001, and re-certified in 2006 and 2011, with his practice largely consisting of health care related litigation, specifically medical malpractice defense, as well as employment and licensure issues.

Judge Klingensmith is married to Wendy H. Werb, a Magistrate for the Nineteenth Judicial Circuit. They will celebrate their 26th anniversary later this year. They met in 1986 when she was a paralegal at Metzger and Sonneborn. She left the firm to attend UF law school, graduating in 1991 before they were married in 1993. In 1999, they moved to the town of Sewall's Point in Martin County, which Judge Klingensmith describes as a wonderful community in which to live and raise a family. In 2008, a friend suggested that he run for elected office, which he did, and he was elected a Town Commissioner, becoming the Vice Mayor in 2009, and then the Mayor of the Town of Sewall's Point from 2010 to 2011 before being appointed to the bench.

Judge Klingensmith and Magistrate Werb have two children, Hope and John. Hope was recently



graduated from high school at age 16, and as a dual enrolled student, also earned her Associate's in Arts degree. She plays violin and her main academic interests are biology and international studies. She was accepted to her parents' alma mater this coming year. John just completed the seventh grade, plays bass guitar, and is an avid basketball player. John is also a First Class Boy Scout, and expects to receive his Star rank this summer.

Judge Klingensmith was a Boy Scout himself, and now serves as an Assistant Scoutmaster for his son's troop. He has also served as the District Chairman for the Treasure Coast District, Gulf Stream Council, Boy Scouts of America since 2008. He also serves on the Executive Board of the Gulf Stream Council, and from 1993 to 1999 served on the Board of Directors for Palm Glades Girl Scout Council.

Judge Klingensmith decided to apply for a judgeship after a suggestion from a friend, Chief Justice Jorge Labarga, who was then serving on the Fifteenth Judicial Circuit. "My mom and dad always thought I would probably be a judge, or in Congress. But it wasn't something I had been giving lot of thought to until then," he recalls.

Judge Klingensmith was appointed by Governor Rick Scott to the Circuit Court in the Nineteenth Judicial Circuit in 2011, and elected without opposition in 2012, assigned to divisions in St. Lucie County. Then, in August 2013, Governor Scott appointed Judge Klingensmith to fill the vacancy on the Fourth District Court of Appeal created by the retirement of Judge Mark Polen.

Judge Klingensmith has a keen interest in professionalism. He has served on several Florida Bar Committees including the Rules of Judicial Administration Committee and the Rules of Civil Procedure Committee. He also served two terms on Florida Bar Grievance Committees. He has authored many articles and book chapters, including a chapter on the Attorney-Client Relationship, found in *Florida Civil Practice Before Trial*, and Opening Statements, found in *Florida Civil Trial Practice* (both Florida Bar Publications).

Judge Klingensmith's perspective from the bench is that there are some lawyers who aggressively represent their clients, but who unfortunately cross the line to where their actions become unprofessional. "Lawyers should advocate strongly for their clients, but when they cross that line, they are doing their clients a disservice," observes Judge Klingensmith. "Believe me, judges know who those lawyers are."

Judge Klingensmith is also sensitive to the demands of balancing a law practice with raising a family. "Certainly as a litigator in private practice, I spent a lot of hours working. Being on the bench, I still carry a great appreciation for what it's like for a lawyer to juggle professional and family responsibilities," says Judge Klingensmith. "Although judges have a responsibility to manage their dockets, they should never lose sight of the fact that lawyers must manage their personal lives as well." Too many judges have become indifferent about the importance of lawyers having a balanced work-family life. "After I became a circuit judge, I promised myself that I would always stay sensitive to the family obligations of the lawyers who appeared before me, especially when scheduling trial dates and hearings."

Although he developed a love for trial practice during law school, his motivation for taking the California

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Bar stemmed from a desire to prepare for a possible future career change to pursue another early interest -- entertainment law.

Part of his interest in entertainment law developed from his lifelong love of music. Judge Klingensmith even played guitar in a band while in law school, mostly covering eighties bands such as the Pretenders, Aerosmith, and Led Zeppelin. In fact, before they were married, his wife referred to him as the "Heavy Metal Attorney." Judge Klingensmith lists his favorite bands as Led Zeppelin, Van Halen, Aerosmith, and Kiss; he names Jimmy Page as his favorite guitar player. Over the years, he has attended countless rock concerts, and still enjoys going to shows. Recently he has seen Billy Joel and Alice Cooper, attending both concerts with his Fourth District colleague, Judge Alan Forst. When asked about whether he still plays guitar, Judge Klingensmith described himself

as a "retired guitarist."

Judge Klingensmith's other passion is martial arts, and he has a Black Belt in Shaolin Kempo, a Chinese fighting style. While he also enjoys both golf and tennis, he hasn't found time to play much of either lately.

The one indulgence he does find time for is riding his Harley motorcycle, a 2003 Fatboy (100th anniversary edition). His wife has a 2002 Harley V-rod, and they both enjoy weekend rides up and down the Treasure Coast.

Although he misses being in court everyday as he was when serving on the circuit bench, he enjoys the scheduling flexibility, and more so the intellectual challenge, that the appellate court offers. The one drawback he notes is that his caseload does not allow much time for recreational reading. When he does have time, he prefers non-fiction history and biographies, but lately they have been in the form of audio books listened to

while driving each morning to the court. When asked about any recent books he has read, Judge Klingensmith especially recommends any of David McCullough's books, including his biographies of Presidents Truman and Adams. Judge Klingensmith also recently finished two books written by Justice Sandra Day O'Connor, as well as another, *Lone Survivor* written by Marcus Luttrell about a failed U.S. Navy SEALs mission.

In fact, Judge Klingensmith's reading schedule just got even busier. At the time of his interview for this article, Judge Klingensmith was at Duke University in Durham, North Carolina, enrolled in the Masters in Judicial Studies program, attending his first summer session toward completing his LL.M. degree. Next summer, Judge Klingensmith will return to Duke for the second session of coursework, leading to work on his Master's thesis before graduating in 2016.

Judge Alan Orantes Forst

By Siobhan Helene Shea

Alan Orantes Forst was born in Pittsburgh, Pennsylvania on December 13, 1958. Judge Forst was (and remains!) the eldest of two sons, growing up in a traditional "reformatory" Jewish family, with a stay-at-home mom. The family moved three times during Judge Forst's adolescence (to Buffalo, Chicago, and Philadelphia), before he was accepted into Georgetown University in 1976.

In 1980, Judge Forst graduated with a Bachelor of Science degree from Georgetown University's School of Foreign Service. After Georgetown, Judge Forst went to Israel where he worked on a kibbutz, getting up at five a.m. to work in the cotton fields, pick olives and cucumbers, or fish in the Sea of Galilee. The hard work ended with afternoon rests in a hammock, reading his favorite books, Herman Wouk's *Winds of War* and *War and Remembrance*. On return

to the States, Judge Forst worked for the 1981 Presidential Inaugural Committee, followed by Reagan Administration postings at the U.S. Commission on Civil Rights, the Civil Rights Division of the U.S. Department of Justice, and the Legal Services Commission, while attending evening law school at the Columbus School of Law of the Catholic University of America from 1982 to 1985. During his last year of law school, Judge Forst coordinated the fourth annual Federalist Society national student symposium,

featuring future Justices Scalia and Ginsburg, Judge Bork, Chief Justice Burger, and Senator Hatch, who was

introduced by Judge Forst.

"I was thinking of leaving D.C. after graduating from Georgetown, but if I had done that I wouldn't have met my wife," muses Judge Forst, who



credits "landing on the right side of the sliding door" for his good fortune. Thirty-three years ago, Diana moved into the same D.C. house that a young Alan Forst and six other young professionals were living. They fell in love and were married five years later. This past Memorial Day weekend

was the Forsts' twenty-eighth wedding anniversary. The Forsts played co-ed softball and football together

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when they lived in D.C. and Northern Virginia prior to their migration to Florida in 1998. Along the way, Alan returned to Georgetown, as the university's hospital was where their three children were born: Amanda, age 23, and twins Andrew and Vicky, both 22 in August.

Diana Orantes Forst is a dedicated chemotherapy and oncology nurse who works 12-14 hour shifts at the local hospital. She was recently interviewed for a position on the Board of Nursing with the Department of Health.

"I hope she gets it," says Judge Forst proudly. "She is an incredibly dedicated nurse and it would be good for her to have the recognition and the opportunity to be of service to the State."

Judge Forst recently accepted a position on the local board of Molly's House, a charitable organization that arranges for the housing of patients and families of patients at the nearby hospital where his wife works. He had just come from a board meeting earlier the morning of our interview.

If fate set the wheels in motion for Judge Forst's good fortune at home, his foresight and planning had to have more to do with his career. He took the Florida Bar exam following law school and was admitted to the Florida Bar shortly thereafter. However, Judge Forst remained in D.C. for 13 years after law school graduation, first working at a legal think tank, the National Legal Center for the Public Interest, and then as a staff attorney at the U.S. Department of Education. From there, following up on a referral from his friend Clint Bolick, Judge Forst met with the Chairman of the U.S. Equal Employment Opportunity Commission, Clarence Thomas. He was hired for the position of special assistant/counsel to the Chairman in the summer of 1987.

Justice Thomas made a strong impression on Judge Forst, who remembers the future Justice as a

great boss and role model, as well as a friend. "When I was Chairman (of the Florida Unemployment Appeals Commission), I used Justice Thomas as my model in dealing with the Commission's employees, remembering how important it was to be personable and show my appreciation for each as both part of my staff as well as one of my colleagues." Another early influence on Judge Forst was Justice/Chief Justice William Rehnquist, whose early opinions, even when the sole dissent, impressed Judge Forst for their consistency and logic.

Just prior to then-Chairman Thomas' departure from the EEOC to join the judiciary, Judge Forst moved to the U.S. Department of Labor as an official in the George H.W. Bush administration, serving at both OFCCP and the Wage and Hour Division. He continued his service as a "schedule C" Federal attorney following Bush's loss in 1992, moving to the Merit Systems Protection Board as Legal Counsel to the Bush-appointed Vice Chair. Thus, from 1987 to 1997, Judge Forst had the opportunity to deal with labor and employment law issues from both a policy and appellate adjudicatory perspective, drafting and reviewing policy guidance, regulations and Agency decisions,

as well as reviewing appellate briefs filed by the EEOC. His final job in Washington was as an employment and labor law trial attorney at the U.S. Department of Commerce, with the Bureau of the Census as his principal client.

Judge Forst's parents live in Boca Raton, which was a strong influence in the Forst family moving to Florida in 1998. Judge Forst accepted a job at the Crary Buchanan law firm in Stuart, where he became partner and represented employers and employees on employment law matters. Judge Forst became active with the Florida Bar's Labor and Employment Law Section, joining the Section's executive council in 2000 and elected an officer in 2003 and Chairman in 2008. While at Crary Buchanan, Judge Forst became friends with his office neighbors. On one side of his office was William Roby, who was appointed to the 19th Circuit in late 1999 and would later serve as the Circuit's Chief Judge. On the other side was Joe Negron, for whom Judge Forst campaigned during Negron's runs for the Florida House following the resignation of Representative Tom Warner, husband of Judge Forst's future colleague, Judge Martha Warner. Judge Forst and Representative/Senator Negron would

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continue their friendship when both moved to jobs in Tallahassee, occasionally guarding each other during legislative session basketball games.

One day, after listening to a frustrated client bemoaning the firm's billing statement, Judge Forst decided to investigate jobs in State government. He came across the position of Chairman of the Unemployment Appeals Commission (renamed the Reemployment Assistance Appeals Commission in 2012), determined it was a perfect fit, and submitted an application. He also convinced his friend Thom Epsky to apply for one of the two part-time Commissioner positions. The legislation creating the Commission requires the Chairman to be an attorney, with the qualifications (and pay) of a Circuit Court judge; the two other commissioners are part-time, need not be lawyers, and are paid \$100/day. While their applications were pending, Epsky called Judge Forst and informed him that he had convinced his State Senator to change the statute to enable Epsky to be appointed Chairman, with Judge Forst being considered for the \$100/day position. "I was pretty sure that he was pranking me, but I nonetheless spent the following two hours making sure that there was no such legislation," recounts Judge Forst.

Governor Jeb Bush appointed Judge Forst in 2001 to serve a four year term as Chairman of the Unemployment Appeals Commission. Judge Forst was re-appointed by both Governor Bush and Governor Charlie Crist in 2005 and 2009, respectively. Upon Judge Forst's initial appointment to the Tallahassee-headquartered Commission, the entire family checked out Tallahassee and decided that rather than uproot they would remain in Palm City. Judge Forst initially commuted to Tallahassee by air, prior to changes in air service from PBI to Tallahassee forcing him to the road. During the initial years of commuting by air, Judge Forst became friends with fellow air travelers Justice Barbara

Pariante, then Solicitor General Tom Warner, and then Senator Dave Aronberg. Judge Forst remained active in local organizations during his nearly twelve years of commuting, including service to his synagogue, Temple Beit Hayam, where he served as a vice president from 2006-2008, as well as the Martin County Bar Association, which he led as President in 2007-08 and organized the Association's annual Constitution Week program.

Chairman Forst became Judge Forst in April 2013, following his appointment to the Fourth DCA by Governor Rick Scott. Judge Forst was at a Firestone service center getting a wheel alignment when he received "the call" from Governor Scott. "Of course, I asked if he was really the Governor. Later, after being told that I needed to keep the appointment a secret until a press release had been issued, I determined I needed to tell someone. So, I told the guy getting a brake job!"

Judge Forst proudly describes his Palm City (Martin County) community as something out of a Norman Rockwell painting. The children walked to school and he coached their soccer teams from kindergarten until middle school. Judge Forst has also managed to become friends with his weekly basketball buddies, including Nineteenth Circuit Chief Judge Steve Levin. He jokes that his basketball friends hope he is better on the appellate court than he is on the basketball court. He notes that basketball buddies Judge Levin and Senators Aronberg and Negron would attest that this is "a very low bar."

Certain D.C. loyalties remain. Judge Forst enjoys listening to the Tony Kornheiser radio show podcasts, which he downloads and listens to during the drive to the court from his home in Palm City. He is also still a loyal Washington Wizards and Georgetown Hoyas fan, as well as a Dolphins fan, though taking a timeout after a 12-year run as a season ticket holder.

Judge Forst loves going to rock concerts and is the rare judge that might be found near a mosh pit listening to the music of Papa Roach, Garbage, or the Offspring. Last year, he and his oldest daughter met up with Judge Pat Kelly and her son at the Midtown Music Festival (Red Hot Chili Peppers, Weezer, and QOTSA) in Atlanta and that was Judge Forst spotted with his colleague Mark Klingensmith at the Alice Cooper concert and with Diana at last week's Styx/Foreigner show in Estero. After the Beatles, the Foo Fighters are his favorite band. He has seen Paul McCartney in concert "about eight times" and is hoping to see him again this summer at Dodger Stadium. Judge Forst is also really looking forward to having all three of his kids with him in June during an excursion to the Firefly Music Festival in Delaware (headliners include the Foo Fighters and two of Judge Forst's other favorites, Weezer and the Kaiser Chiefs). When not listening to Kornheiser podcasts, Judge Forst listens to Sirius radio and confesses that Lithium, Classic Vinyl, and Octane are his favorite Sirius channels.

In addition to continuing on the Florida Bar's Labor and Employment Law Section executive council, Judge Forst will be serving a second term on the Constitutional Judiciary Committee and commencing service on the Annual Convention Committee, as well as serving as the Fourth DCA's representative on the Appellate Practice Section. He looks forward to meeting and working with members of the APS.

When asked what he liked most about being on the Fourth DCA, Judge Forst didn't hesitate in answering "my colleagues," adding that the entire DCA staff has been very welcoming. Judge Forst summed up his feelings toward his new job by noting that he pinches himself every day that he goes to work at his dream-come-true job, and every night as he heads home to his dream-come-true family.

Judge Edwin A. Scales, III

By David A. Karp

Edwin Scales, solo practitioner, was driving to his law office in Key West on a Friday morning last October when his cell phone rang.

“Hey, Ed, this is Rick Scott,” the voice said over the phone.

Scales, who had been nominated to sit on the Third District Court of Appeal, thought one of his friends might be playing a prank on him. The last time Scales had been nominated to the court, his friends had tricked him with hoax calls from the governor. But this time, the voice sounded authentic.



Scales pulled over to the shoulder of the road. “Gov. Scott,” he said.

Two and a half months later, Scales, wearing a black robe, sat behind the bench in the Third District’s courtroom in Miami for his first oral argument as a judge. For Scales, who had worked in private practice his entire career, his professional landscape had abruptly changed. So had the rest of his life. Instead of living at home in the Keys and hosting a radio show on the weekends, Scales was living in an apartment in Coral Gables and reading briefs in chambers every Saturday and Sunday.

Scales’ appointment to the bench also marked a change for the Third District Court of Appeal. Scales became the first Monroe County lawyer appointed to the court since its creation in 1957. Although the Court’s jurisdiction covers Key Largo and the Florida Keys, the Court had exclusively drawn its ranks from Miami’s bar and bench. Key West was 153 miles and a world away.

The road to the Court

Scales was born in 1966 in Birmingham, Alabama, and raised in Lakeland,

Florida, a small town in Central Florida dominated by the citrus industry and phosphate mining. His father was an engineer. His mother was a public school teacher who filled the home with music. The radio was a little box, but, for Scales, magic came out of it.

As a child, Scales dreamed of becoming a broadcaster. At Lakeland High School, he called play-by-play at football games. At the University of Florida, he was the “mike man” and head cheerleader for the Florida Gators. He studied telecommunications and worked on the business side of *The Independent Florida Alligator*. “I had a passion for journalism,” Scales recalled, “and still do.” But even in the 1980s, Scales saw that the broadcasting business was facing financial challenges. To get a decent job, you had to move to Los Angeles or Chicago. “It seemed more practical to go to law school,” Scales said. He enrolled at the University of Florida College of Law.

Scales was popular on campus. During law school, he served as president of the university student body. He was also named as the University of Florida’s outstanding male graduate as an undergraduate. He was inducted into the University of Florida Hall of Fame, and appointed by then Gov. Bob Martinez as the student representative to the Board of Regents, the government agency that oversaw the state university system.

After law school, Scales returned to Lakeland to practice at Lane, Trohn, Bertrand & Vreeland, P.A. On his first day in the office, a partner handed Scales a stack of files and told him,

“Go try these cases.” The cases—mainly subrogation and foreclosure matters—were filed in counties across Florida. Many involved small amounts of money; some of his adversaries were pro se litigants. “It was great, great experience,” Scales said. The judges could see that Scales was fresh out of law school, and, after a trial or hearing, some judges would call Scales aside or into chambers to critique his performance and offer him advice. “That was tremendously valuable to me,” Scales said. “I was the beneficiary of judges who did not have to do that.”

In 1998, he got a phone call from a classmate about a job at Historic Tours of America, a national site-sighting company based in Key West. Scales had spent almost his entire life in two Southern towns, Lakeland and Gainesville. The job at Historic Tours of America gave Scales exposure to a substantial business commercial practice, including real estate matters, employment issues, and government relations across the United States. The job also allowed Scales to live in Key West, a city unlike any other in Florida. In some ways, Key West was a small town like Lakeland. Yet, it was completely different. Key West had big city flair. It had great restaurants. It had character and eccentricity, including parties like Fantasy Fest. The island was also beautiful, with warm breezes and blue water that stretched to the sunset.

About three years after moving to the island, Scales ran for a seat on the Key West City Commission. He wanted to serve his new home, and had been taught that lawyers built their practice by building their community. He won a four-year term. But elected office did not suit Scales well. “I am a lawyer first and foremost, and I am not much of a politician,” Scales recalled. “It was a tough four years.” Because Scales had returned to private practice in Key West, he often ran into conflicts that

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prevented him from voting on matters that affected his clients. He joked that he had the Florida Ethics Commission, a board on which he later served, on speed dial to get advisory opinions about conflicts. When his term on City Commission ended, Scales did not seek re-election. "I wasn't too terribly upset when the term ended," he said.

His legal work, though based in Key West, took Scales across the state. He became "of-counsel" to the Florida law firm Gray Robinson. He also succeeded a former partner who was stepping down as general counsel of the Florida Citrus Commission. As counsel to the Commission, Scales handled administrative law issues, dealt with marketing and business matters, and worked on agricultural problems.

Scales also served on the judicial nominating commission for Florida's Sixteenth Judicial Circuit, which covers Monroe County, and the Federal Judicial Nominating Commission, which screens applicants for the federal bench in the Southern District of Florida. He was appointed to the board of trustees of the Florida Keys Community College and the Florida Ethics Commission, and was elected to the Board of Governors of the Florida Bar.

Even as his practice grew, Scales wanted to fulfill his long-time goal of becoming a judge. He had always aspired to sit on the district court of appeal. Decision making on the appeals court is "the most dynamic process in Florida government," Scales said, and the work product of the appeal courts is "the gold standard" for lawyers. Attorneys rely on the district courts' opinions every day to craft arguments and solve clients' problems. "That is why I applied 144 times" for the post, joked Scales, who, like many judges, was nominated three times before Gov. Scott appointed him.

"A fundamentally different perspective"

Scales' first months on the bench have underscored how radically his professional life has changed. Being a judge brings "a fundamentally different

perspective" on the law, Scales said. At oral argument, Scales is asking—not answering—the questions. He has no clients in the case. In private practice, "everything is about the client," Scales said. "You do that every day for 20 years, and then one day, you stop. Your whole focus changes. You are no longer an advocate for anything except the law."

To climb what he describes as a "steep learning curve," Scales works seven days a week. He rented an apartment in Coral Gables to be close to the court. He also hired a veteran staff. His two law clerks previously worked for retired Judge Alan R. Schwartz and Chief Judge Frank A. Shepherd. His judicial assistant is a courthouse fixture, whose mother also works at the Third District.

Scales's colleagues, many of whom were trial judges before they joined the appellate court, have been incredibly collegial about helping Scales make the transition to the bench, he said. The judges regularly go to lunch together and drop into each other's offices to discuss cases. Judge Kevin Emas has been especially generous with his time, Scales said. Judge Leslie B. Rothenberg, whom Scales describes as an expert in criminal law, often talks to Scales about criminal cases. In his 23 years of private practice, Scales noted, "I practiced zero criminal law."

Since taking the bench, Scales said he has learned how the court works collaboratively to reach decisions about cases. As a practitioner, Scales did not fully appreciate how the deliberative process works and how judges use oral argument to communicate with each other. Oral argument "helps you understand where your colleagues are coming from," he said.

Instead of writing briefs, Scales is now reading briefs—lots of them. The court has a 50-page limit for initial and answer briefs. "Fifty pages is not a minimum," Scales said. "Brief is best." He recommends that counsel begin briefs with their strongest points and concentrate on their best arguments.

When briefs are cluttered with every possible argument, strong arguments can get lost.

While Scales cannot pull young lawyers into his chambers to critique their arguments, as trial judges did for him when he started, Scales wants to give back by mentoring law students and becoming active with the Bar.

Scales also wants to represent Monroe County well. He knows that lawyers will look at him, as the first judge from Key West, as a representative of the Bar in Monroe County.

"I am committed to making sure the Bar knows me as the author of strong opinions, not as the strange guy from Monroe County with the Beatles posters in his office," said Scales, whose chambers are dominated by full-sized posters of Bob Dylan and the Beatles, as well as all types of Gator memorabilia.

Still, Scales hopes to maintain a presence in the Keys. The court administrator in the Sixteenth Judicial Circuit has offered Scales an office in the courthouse in Key West. Scales hopes to work there from time to time. Scales is also considering returning to his weekly radio show, the "Ed Scales Show," on Keys radio station US-1. He obtained an opinion from the Judicial Ethics Advisory Committee that he can host the radio show as long as he follows certain restrictions on a judge's outside work.

Later this year, the Third District will also hold oral arguments in Key West, as it does annually. Usually, the judges sitting in Key West must drive three and a half hours for the sitting. But this year, for the first time, one of the judges on the court could already be home.

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OUTGOING CHAIR'S MESSAGE

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toring and expanding its membership with new and diverse practitioners. In July, the Section made presentations at the William Reece Smith, Jr., Bar Leadership Academy Fellow meetings and encouraged the Fellows to participate in the Section. The Section also continued to grow its Outreach Committee and interact with other sections of The Florida Bar, as well as with the local and appellate bar organizations. We appointed more than 30 liaisons to help ensure the Section remains involved in both statewide and local legal communities.

In September, the Section was honored to once again participate in the Florida Conference of District Court of Appeal Judges. The conference took place in Ft. Myers and was attended by more than 45 appellate practitioners. On the first evening of the conference, the Section hosted a reception that was attended by Justice Clarence Thomas of the United States Supreme Court. Over the next day and a half, Florida Supreme Court justices, Florida's appellate judges, and Section members collaborated together in insightful educational seminars. Participants also earned advanced appellate continuing legal education credits. Given the close proximity in time of the Appellate Judges' Conference to The Florida Bar's Midyear Meeting, the Section held its fall executive council meeting at the Judges' Conference. The conference was a fantastic experience for Section members, and the Section looks forward to continued opportunities to work with, and learn from, Florida's appellate judiciary.

Later, in October, I had the honor of making a presentation on behalf of the Section at Tom Hall's retirement ceremony at the Florida Supreme Court. Tom, a former Section Chair (2004-2005) and active member, retired as clerk of the Florida Supreme Court after 13 years of dedicated

service. He has been an invaluable resource to both the Court and the Section. He is also one of the founders of the Section's Appellate Practice Workshop, an outstanding educational appellate practice seminar. The Section is currently planning to hold the workshop again in the next couple of years. It is a unique, intensive, three-day continuing legal education program in which participants develop brief writing and oral argument skills under the tutelage of a faculty of appellate judges and highly experienced appellate practitioners. More details to follow!

In January, the Section's executive council again had the opportunity to meet and continue to plan for the future. Thanks to the Section's work and the efforts of the CLE Committee, the Section is able to provide valuable services to its members and the legal community. The CLE Committee spearheaded four successful CLE programs this year, including "Advanced Appellate Review" in January, "The Art of Objecting: A Trial Lawyer's Guide to Preserving Error for Appeal" in March, "Practicing Before the Second District Court of Appeal" in May, and in partnership with the Government Lawyer's Section, "Practicing Before the Florida Supreme Court" also in May. And for those too busy to attend these larger in-person programs, the Section continued to host monthly Tuesday lunch-time telephonic CLE courses.

Appellate attorneys are, of course, writers. In that vein, and continuing its tradition of publishing educational and informative materials, the Section's Publications Committee remained active. The committee submitted monthly articles for publication in *The Florida Bar Journal*. The committee also prepared two issues of the Section's signature publication, *The Record*, the second of which is pending publication now. And the committee continued the online publication of *The Guide*, which offers insight into Florida's appellate courts. The Section's Pro Bono Committee also remained active handling appeals for litigants who cannot afford

an appellate attorney. Not to be outdone, the Self-represented Litigant Committee has been updating the 22-chapter *Pro Se Appellate Handbook*, an informal but helpful guide for pro se appellate litigants.

The 20-year anniversary of the Section made clear that the Section's history is rich and should be preserved. Thus, the Section appointed its first Historian and History Committee, who, along with the Website Committee Chair, will continue to gather and update the content of the Section's website.

To conclude what has been another great year, the Section's officers, executive council, committees, and membership will meet again in June at the 2014 Annual Convention of The Florida Bar in Orlando. The Section will again host its annual dessert reception and discussion with the Florida Supreme Court. I look forward to seeing you there, and to another great year as the Section welcomes Ceci Berman as its new Chair.



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many motions for extension of time that do not state that opposing counsel was consulted and what his or her position is on the motion. This is required by Florida Rule of Appellate Procedure 9.300. *See* Fla. R. App. P. 9.300(a) (“A motion for extension of time shall . . . contain a certificate that the movant’s counsel has consulted opposing counsel and that the movant’s counsel is authorized to represent that opposing counsel either has no objection or will promptly file an objection.”). The Clerk’s Office also receives many motions for extension of time that do not specify how much time is needed or seek an excessive extension. The Fifth District rarely will entertain a request for extension beyond 90 days to file a brief. In fact, such requests must be acted on by a three-judge motions panel and not by the Clerk.

3. Do Not Wait For A Show Cause Order To File A Brief,

And If One Is Issued, Respond To It.

The Clerk’s Office receives too many motions for extension of time that are filed only after an order to show cause why the case should not be dismissed for failure to file a brief is issued by the Court. The clerks detest receiving a motion for extension in response to a show cause order, and are especially aggravated when the motion is *not* accompanied by an official response to the show cause order. It appears that some attorneys rely on the clerks to be their calendaring system, which is entirely inappropriate, annoys the Clerk’s Office, and is not sound appellate practice.

4. Do Not Include A Request For Oral Argument In A Brief; File It Separately.

Per Florida Rule of Appellate Procedure 9.320, requests for oral argument must be filed as a separate document not later than the time for filing the last brief of that party. Fla. R. App. P. 9.320 (“A request for oral argument shall be a separate document served by a party not later than

the time the last brief of that party is due.”). Many attorneys include the request for oral argument in a brief, which is improper. Frequently such requests will be overlooked as the Clerk’s Office does not read entire briefs before docketing them. If the request is missed by the Clerk’s Office, the case will be calendared as an “oral argument waived” case, and bringing the request to the Court’s attention after the case has appeared on a non-oral argument calendar is likely to lead to a determination that the request is untimely. Request oral argument as early in the case as possible, but in no event after the time for filing your last brief and do so in a separate pleading.

5. Show The Clerk Why The Appeal Is Timely In The Notice Of Appeal.

When filing a notice of appeal, if the date of the judgment is more than 30 days prior to the notice of appeal—in other words, it would appear to the Clerk that the notice is untimely on its face—counsel should state in the notice that a motion tolling the



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time for appeal (such as a motion for rehearing) was filed, the date it was served, and the date it was ruled upon. Attaching the motion tolling time and the order on the motion allows the clerks to easily and quickly make a determination about jurisdiction. The clerks spend a great deal of time gathering information from the lower tribunal to determine whether the appellate court has jurisdiction, and the attorney filing the notice of appeal has all the necessary information at his or her fingertips. Share it!

6. Read The Acknowledgement Of New Case And Other Correspondence From The Court Carefully.

Correspondence is sent by the Court for a good reason. For example, the Fifth District's Clerk sends an acknowledgment of new case in every appeal. It contains important information that will inform an Appellant how the Clerk's Office has opened and categorized the case. Aside from obvious issues like spellings of names and alignment of parties, the most important item on that acknowledgment is whether the Clerk's Office has opened the case as a final or non-final appeal (which have very different briefing deadlines and record issues). The Clerk is delighted to entertain a motion if counsel disagrees with how the Clerk's Office has characterized a case. The Clerk is much less happy when he or she has to issue a show cause order for failure to file an initial brief, and receives a response stating that the brief is not due yet because the appeal is a final appeal as opposed to a non-final appeal. Every practitioner should read the acknowledgment of new case and take prompt action if she or he believes that the Clerk has opened the case incorrectly.

7. Inform The Court Promptly Concerning Settlement.

Way too often parties request a stay because they are resolving the case, but then they do not tell the Court when the case has been resolved. A

motion to dismiss the appeal should be promptly filed if the appeal is rendered moot by a settlement. Unfortunately, more often than not, the Clerk's Office does not even receive a response to an order to show cause requiring an attorney to advise as to the status of the case! On some occasions, the Clerk's Office actually has to call the attorneys involved in the appeal to determine the status, which is not a good way to stay in the Clerk's good graces. An attorney's job on a case is not over when the settlement agreement is executed. Let the Court know as soon as possible about the settlement.

8. Keep the Court Informed on Matters that Required Relinquishment of Jurisdiction.

Similar to the failure to inform the Court when a case has settled is the failure to inform the Court when the purpose for a relinquishment of jurisdiction has been fulfilled. If the relinquishment has been requested to obtain a final appealable order, the proper procedure is to file the order with the Court as soon as possible after it is obtained. Practitioners should bear in mind that an order rendered by the lower tribunal after the stated period of relinquishment has expired is a nullity. Therefore, appellate lawyers must be aware of the end of the relinquishment period and move to extend the period *before it expires* if an order has not yet been rendered by the lower tribunal. It is simply bad form to request the appellate court to accommodate some procedural defect in your appeal and then not follow through, thereby creating more work in the Clerk's Office when, if the period expires and nothing has been filed, it has to issue an order to show cause.

9. Use Your Manners.

It should go without saying, but unfortunately does not, that when a lawyer or member of a lawyer's staff calls the Clerk's Office with a problem or question, the call should be conducted with courtesy and civility. The Clerk's Office receives several phone calls per month from lawyers or staff during which the clerk answering the phone is not treated with common courtesy, or even worse is yelled at or called

names! The Clerk's Office is here to serve the public and takes great pride in doing so with professionalism. The same effort should be extended by appellate counsel and their staff dealing with the Clerk's Office.

In sum, keep in mind that thousands of appeals are filed each year with unique procedural issues that take time to address, research, and resolve. Every lawyer handling an appeal should be familiar with, consult and follow the rules of appellate procedure. It is also a good practice to consult the website of the district court in which you are practicing to keep abreast of new administrative orders. Finally, it is in every attorney's and every client's best interest to make a Clerk's job easier whenever possible to do so.

MOVING TARGET from page 6

rule amendments from the Florida Supreme Court to ensure they remain in compliance with current standards, satisfy any potential new standards, and avoid unintended abandonment of fee claims in original proceedings.

Endnotes

- 1 103 So. 2d 869 (Fla. 4th DCA 2012).
- 2 *Id.* at 870.
- 3 *Id.*; Fla. R. App. P. 9.400(b).
- 4 *Advanced Chiropractic*, 103 So. 3d at 870-71.
- 5 *Id.*
- 6 *Id.* at 871.
- 7 573 So. 2d 835 (Fla. 1991).
- 8 730 So. 2d 1261 (Fla. 1998).
- 9 *Advanced Chiropractic*, 103 So. 2d at 870-71.
- 10 *Advanced Chiropractic and Rehabilitation Center, Corp. v. United Auto. Ins. Co.*, 2014 WL 2208895 (Fla. May 29, 2014).
- 11 *Id.* at *4.
- 12 *Id.*
- 13 *Id.* at 6.
- 14 *Id.*
- 15 Appellate Court Rules Committee, *Three-Year Cycle Report of the Appellate Court Rules Committee*, page 17 (petition filed February 3, 2014, in case number SC14-227) (available at http://www.floridasupremecourt.org/clerk/comments/2014/14-227_020314_Petition.pdf)
- 16 Appellate Court Rules Committee, *Appendix B to Three-Year Cycle Report of the Appellate Court Rules Committee*, page B-127 (filed February 3, 2014, in case number SC14-227) (available at http://www.floridasupremecourt.org/clerk/comments/2014/14-227_020314_Appendix%20B.pdf)

The Section's Outreach Committee has recently been in contact with the Animal Law Committee (ALC) to determine ways we can integrate our appellate work and section members with that committee's work and members. If any APS members have thoughts about how the APS and the ALC might collaborate, please email Fran Toomey, the Outreach Committee's liaison to the ALC, at toomeyf@flcourts.org. All suggestions are welcome. We have included a description of the ALC's mission and information about its goal to reach section status. APS members can learn more about the ALC by contacting Gil Panzer, whose email address is set out below.

The ALC monitors and informs the members of The Florida Bar and the public of significant developments in the area of animal law. The ALC takes an active role in communicating about and reviewing proposed legislative changes and holds an annual seminar addressing animal law issues, including how such issues affect more traditional legal practice areas. In general, the ALC brings together attorneys who have different backgrounds and experience with regard to a variety of animal law issues. The ALC meets at least three times a year in person to share new information regarding this practice area.

The ALC is in the midst of a membership drive to help reach section status with The Florida Bar. Section status is a critical goal for the committee, which will allow the ALC to engage in a number of activities currently prohibited or restricted, including but not limited to, increasing publications and drafting and supporting legislation.

There is no cost to join, and preference forms are available on The Florida Bar website. For further information, please visit The Florida Bar website or email Gail Panzer at gil@gilpanzerlaw.com.

