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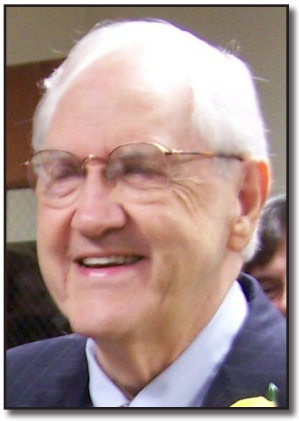
A Special Room Honoring a Special Judge

By Patricia Williams[1]



Judge Paul W. Danahy, Jr.

Honoring its longest-serving judge upon his entrance into his 30th year at the court, on November 7, 2006, the Second District Court of Appeal named its largest conference room at its Tampa branch, on the Stetson University College of Law's Tampa campus, the Judge Paul W. Danahy, Jr., Conference Room. A surprise ceremony and reception greeted Judge Danahy as he entered the room, thinking he was attending a routine court meeting. Fortunately, the surprise did not shock him too much, and he was able to enjoy the many well-wishers gathered who overflowed the room that is nearly the size of a basketball court. After an informal ceremony, the attendees, drawn from all walks of the judge's life, enjoyed refreshments provided by the Court and a chance to chat with the judge and his extended family.

Judge Danahy was born in Hopkinton, Massachusetts. It was Patriot's Day, a fitting start to a man faithful to his country and its laws. He moved to Tampa for college and basketball at the University of Tampa, where he met Georgia Reed, whom he would soon marry. He worked his way through college as a busboy at Valencia Gardens Restaurant where he picked up his working knowledge of Spanish. He is still a card-carrying member of the Spanish Waiters' Union. He graduated in 1951 and would later serve as a trustee of the University.

After graduation from UT, he went on to serve his country in the army in Japan during the Korean War, developing while there a deep interest and respect for its history, customs, and culture. This is indicative of one of the judge's most visible traits -- he is always keenly interested in everything that goes on around him, taking from it whatever it has to offer, to enrich his mind and further his education. He is also known to all friends, family, and co-workers as a Civil War expert, and although he would dismiss that appellation as overstatement, we know better.

After the army, he attended law school at the University of Florida, graduating in 1957. He served a very short stint as an assistant attorney general, then went into the private practice of law with Joseph Garcia for eighteen years. Their partnership lasted until Judge Danahy's appointment to the Thirteenth Judicial Circuit Bench, but their friendship endures to this day.

His family, now grown to three children, Matthew, Thomas, and Laura, saw less of him from 1966 to 1974 while he represented his Hillsborough district in the Florida Legislature. While there, he gained the respect of all with whom

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he served, making a reputation for himself as a tireless worker and fair-minded representative. He used his legislative experience in later years to benefit the judicial branch of which he was to become a part. His contribution to the 1968 rewrite of the Florida Constitution is one of the many important roles he had in steering our state during those turbulent times. Despite the demands of his legislative responsibilities, it is a testament to Judge Danahy's paternal role that both Matt and Tom followed their father's footsteps into the legal profession.

He heard again the call to public service shortly after he left the Legislature in 1974 when he became a circuit judge in 1975. He was elevated to the appellate bench in 1977, serving until his retirement in 1998. Judge Danahy did not believe he was ready to retire, but always faithful to the constitution, which mandated his departure from active service due to age, he relinquished his full-time duties to spend more time with his family, which now included several grandchildren. The Second DCA today benefits from his knowledge and experience because he has continued his partnership with the court, sitting whenever asked -- which is often -- as a senior judge, illustrating once again the hallmark of his personality; service to others.

At the surprise naming ceremony, and in keeping with the informal tone of any dealing with Judge Danahy, Judge Chris Altenbernd began the festivities by introducing the honoree and giving a short history of his life and service. After that, the judge's former law partner, Joe Garcia, regaled the room with stories many of us were unaware of. Then, Terrell Sessums, another long-time friend and colleague from his years in the Legislature, entertained us with stories from that time of his life. The Hillsborough County Bar Association was represented by Celene Humphries, a former staff attorney of the court. She expressed the appreciation of the Appellate Practice Section of the County Bar by presenting a plaque which will be displayed in the Danahy Conference Room, as will a portrait of the judge. On behalf of the court staff, Patricia Williams, who served as staff attorney to Judge Danahy for the last 12 years of his full-time tenure on the court, spoke a few words of appreciation, highlighting the enjoyment that any member of the court staff, no matter how lowly or high their position, felt in working with Judge Danahy. The ceremony closed with JoAnn Baker, Judge Danahy's judicial assistant at the court from 1978 to his retirement, presenting flowers to the judge and Mrs. Danahy, but not before Judge Danahy responded with warm and heartfelt words of his own.

There are two other named rooms at the Second DCA's Tampa Branch. The Judge John Scheb Classroom is a glass-walled room adjacent to the lobby that reflects that judge's belief that the court should reach out to the public and be as open and visible as possible. Amidst the private offices is the Judge Jerry Parker Library, a formal room that reflects that late judge's personality, too; a judge who thought that judging was a serious business that was not to be taken lightly. The Danahy Conference Room is also appropriately named. It, like the Parker Library, is among the private offices, but it is open and expansive, big, multi-purpose, and welcoming, not fancy or ostentatious. It reflects Judge Danahy's most-often named trait, collegiality, and it hosts the court's largest gatherings. As expressed by Judge Altenbernd, Judge Danahy has been the judge on the court most committed to maintaining a proper tie between the Lakeland and Tampa branches. To those in the know, this is no surprise, as Judge Danahy was instrumental in obtaining legislative funding for the creation of the Tampa branch. Although having a separate branch in Hillsborough County was more convenient for the practitioners and judges in the district's largest and most populous county, Judge Danahy was aware of the need to avoid any segregation of the court's two sites. To that end, the Danahy room contains all the high-tech video-conferencing equipment that is designed to achieve that goal.

Thank you, Judge Danahy, for all you have done for those of us who have had the honor and pleasure of knowing or working with you, but especially for your long and continued service to the Second District Court of Appeal and the State of Florida. May we have many more.

Endnotes

[1] Patricia R. Williams proudly calls Judge Danahy her mentor and friend. She is a graduate of Stetson University College of Law and the University of Michigan. After a career teaching French and Spanish to secondary school students, she has been with the Second District Court of Appeal since 1986. She was staff attorney for Judge Danahy for twelve years until he retired and now works for Judge Darryl C. Casanueva. A version of this article was originally published in the March issue of the Hillsborough County Bar Association Journal.

Chair's Message

By Susan Fox

Oh, spring came to my garden
And caught it unaware
Wearing just a few old leaves
And a dejected air.

But when spring left my garden,
Its work so deftly done,
Many, many Daffodils
Were dancing in the sun.

~Velma D. Bates~

Like the deft, barely-seen work of nature in Spring, your Appellate Practice Section labors on, thanks to the efforts of many volunteers, between our major annual meetings in January and June. This message provides an update on some of our ongoing activities and urges you to join us "dancing daffodils" at the June meetings detailed below. But first, let me address more pressing matters.

As I write this message, the Florida Legislature is in session. For the first time, the Section has adopted legislative positions and is asking its members to support these positions through their own contacts with legislators. These positions were approved by The Florida Bar on January 26, 2007, and some were even adopted by The Florida Bar as part of their own legislative positions. Our current approved positions are:

1. Oppose amendment of Article V, Section 2(a) of the Florida Constitution that would alter the Supreme Court's authority to adopt rules for practice and procedure in all courts, or that would change the manner by which such rules may be repealed by the legislature.
2. Support maintaining an impartial and independent judiciary.
3. Support pay raises for appellate judges and support personnel consistent with the Florida Supreme Court 2007 budget request.
4. Support legislation consistent with the recommendations of the DCA Workload and Assessment Committee and the recommendations of the Supreme Court in the Certification Opinion as to additional judges, but oppose the creation of a new DCA or the changing of the boundaries of the current courts.

The Section is fortunate to have former legislator and solicitor general Tom Warner chairing the Legislative and Public Advocacy Committee to advance these positions. We are working with Paul Hill, General Counsel to The Florida Bar, and Laura Rush, General Counsel to the Office of State Courts Administrator, to find the best ways to advance these positions. Watch your email Updates for specific bills that may be of interest so that you might want to call or write to your legislators.

It's time to think about nominations for the Adkins and Pro Bono Awards and Executive Council and Committee Positions for the 2007-08 Bar year. Tom Hall has prepared nomination forms and they are posted on the section website, www.flabarappellate.org. The Adkins Award was named for Florida Supreme Court Justice James C. Adkins, who passed away in 1994. Justice Adkins served on the Supreme Court for eighteen years in the 1970s and 1980s, and was the Chief Justice during the mid-1970s. The Section annually presents this award to a member of The Florida Bar who has significantly contributed to the field of appellate practice in Florida. The Pro Bono Award goes to an attorney who has made a significant contribution of pro bono services. In addition, the Section must select new executive committee members and committee chairs. One of our goals this year was to open and demystify the process for these nominations, so please feel free to nominate yourself or another.

Following our initial Tallahassee Outreach last October, which is the Section's effort to involve regional appellate lawyers, particularly government lawyers who may be unable to attend our meetings in southern parts of the state, we are planning additional luncheon CLEs with the theme "Full Clerk Press." One will be held on June 7, 2007, and the other on a date yet to be announced, both at the Doubletree Hotel in downtown Tallahassee. Leon County Clerk Bob Inzer and First DCA Clerk Jon Wheeler will team up for discussion on county to circuit appeals and circuit to DCA appeals. Mr. Inzer's presentation will also include everything from e-filing and technology to Article V funding issues. Mr. Wheeler will provide valuable information about how

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writs and motions proceed through the DCA, what kind of cases are being appealed, and what's new at the DCA. (You know they are converting to Word, don't you?). A second CLE will assemble the Supreme Court Team of Clerk Tom Hall and Justice Raoul Cantero. Tom, who is the immediate past chair of the Section, will provide an update on what's new at the Supreme Court. There have been some new appellate rules adopted, including a prohibition against filing jurisdictional briefs in certified question cases. Justice Cantero will focus on jurisdictional briefing and tips for appellate practitioners who argue at the Supreme Court. The Section thanks Wendy Loquasto for helping to organize these meetings. If you want more information, you may contact her at wendyloquasto@flappeal.com.

The First, Second and Third DCAs are all planning 50th Anniversary celebrations in recognition of their creation in 1957. The celebration for the Third DCA is June 22 in Miami, the First DCA's celebration is July 12 in Tallahassee, and the Second DCA's celebration will be in October. We are working with the committees and liaisons for each court to have meaningful participation in, and commemoration of, their celebrations.

As always, publications and CLE are the most important Section function. The Special Appellate Edition of *The Florida Bar Journal* was published in April 2007. The Section had an introductory column and is well represented among the guest authors. We are pleased to have had the opportunity to educate the Bar as a whole about the fundamentals of appellate practice. In addition, the Section is putting the final touches on the *Pro Se Appellate Handbook* and it will be ready in just a few months, thanks to the tireless efforts of Dorothy Easley. We have also had a series of outstanding CLE programs including the Appellate Board Certification review Course in February and Bankruptcy Appeals course in March, as well as the ongoing monthly telephonic CLEs on a variety of interesting and timely topics.

Finally, let me personally invite you to the Section's June meetings.

On June 27, 2007, at the Florida Bar Annual Meeting, the Section will once again co-sponsor the Appellate Justice Conference along with the Conference of District Court of Appeal Judges. The conference topic is Balancing Judicial Independence and Accountability. There will also be a panel discussion addressing the contemporary threats to judicial independence with panelists Judge Chris Altenbernd, Hank Coxe and Tom Warner. The panel discussion will include questions from the conference participants. Next, Arthur England and Bruce Rogow have agreed to go toe-to-toe against each other in a debate addressing the balance of judicial independence against judicial accountability. This will be followed by participants breaking out into small table discussions regarding possible strategies to address the tension between these two concepts. The conference discussions will be anonymously incorporated into an article. The conference will be limited to approximately seventy-two participants who represent a wide spectrum of experience, interest, and views regarding the Florida justice system. ***All Section members are invited to a reception following the conference***. This is a great time to get to know appellate judges. The reception will probably start around 5:30 pm, but be sure to watch your email Updates from the Section to find the exact time and location.

The following day, June 28, 2007 starting at 9 a.m., the Section will have committee meetings (Publications, CLE, Legislative/Public Advocacy, Website, etc.) followed by the Executive Council meeting at 2 p.m. The Section encourages all members to attend and become involved regardless of whether you have previously been appointed to a committee. New volunteers are always welcome. The meetings are open to members and observers. Following the meetings, the Section sponsors the annual "Conversation with the Court" at 3:30 p.m. The Supreme Court convenes live to answer all questions.

That evening, the Section's signature social event -- the annual dessert reception -- will be held. The previously planned disco theme is still in the works, but not until next year, because this year will be a little different. The Cuban American Bar Association (CABA) asked to co-host the event with us to honor incoming Bar President, Francisco Angones, and the current Bar President, Hank Coxe. CABA agreed that this is a one-time event. Celene Humphries, Programs Chair, is working with CABA to plan the dessert reception. Presentations will be made to Hank Coxe, Francisco Angones, the Section's Adkins award recipient, and the Appellate Pro Bono award recipient.

We welcome your feedback and ideas as to how well we are meeting your needs as a Section member and we look forward to seeing you at some or all of these events!

Fifteen Common Mistakes in Appellate Briefs

By Elaine M. Williams, Robert Seegmiller, David M. Barr, and Mike Giel[1]

You cannot control the law or facts, but the rest of the appeal is yours. That burden is heavy enough without the weight of needless errors. This article lists fifteen common mistakes in appellate briefs. When drafting and editing your brief, avoid these mistakes to bolster your credibility and advocacy.

1. Writing a long brief.

Ask a judge to name the most common problem in briefs, and this is the answer. The last thing a judge should glean from your brief is that you feel morally obligated to write a 50-page brief or the great American novel.[2] Most briefs should be cut by at least twenty percent.[3]

First, shorten the facts. Include only those facts relevant to the issues on appeal. If the sole issue concerns sentencing, do not detail every motion in limine. Describe the facts succintly; do not write about "a blue 1995 Saturn sedan" when "a car" will do, or talk about the evening of October 16, 1945, when the reader need remember only "1945." Also, never cut and paste ten pages of the trial court's findings into your statement of the facts. Instead, summarize or quote only those findings critical to your legal argument.

Second, shorten the argument. Do not spend page after page summarizing cases. Instead, discuss the relevant facts and rules of law in one or two cases, and then apply the law to your facts.

Third, ruthlessly edit the brief. Present a model of brevity, "even though in a painful last moment of proof-reading many an appealing paragraph has been offered as a reluctant sacrifice on the altar of condensation."[4]

2. Rambling.

This mistake often accompanies a long brief. A good way to undermine a winning argument is to render it unintelligible. Avoid convoluted sentences, jargon, acronyms, and Latin.[5] Sloppy legal writing reflects sloppy legal thinking.[6] Know what you are trying to say, say it, and keep on point. When you're writing the brief, imagine an actor reading it aloud. Go for Morgan Freeman, not Jeff Goldblum. Cut out the narrative footnotes and tangential discourse. "[S]imple arguments are winning arguments."[7]

3. Writing for a jury.

A lawyer may be masterful in front of a jury, but an appellate panel is not a jury. The determination of whether legal error occurred does not turn on drama. Histrionics suggest one is either an amateur or trying to distract the reader from a dearth of law supporting his position. This applies not just to flamboyant railing against "the most outrageous injustice in the annals of law," but to smaller mistakes such as excessive use of emphasis. One federal circuit judge warns that jury arguments on appeal signal that "your case doesn't amount to a hill of beans, so we can go back there in the conference room and flush it with an unpublished disposition."[8]

4. Attacking the other players.

You might think that the other party, opposing counsel, or the trial judge are horrible people. Occasionally, you may be right. It does not matter. The surest way to destroy your credibility is to attack other participants in the judicial process. Judge Altenbernd describes this emotional, ineffective advocate as "Attila the Hun."[9] Even if your incivility does not garner sanctions or published reprimands,[10] it invites the reader to look for reasons to disagree with you. Take the high road, even if you feel the opposing party is engaging in wretched behavior. By all means, offer a restatement of the facts to clarify any omissions or misstatements, but do not characterize such misstatements as "rotten lies."

5. Fudging the procedural rules.

Do not skirt the page requirements by changing the font or spacing. Follow Florida Rule of Appellate Procedure 9.210 and its requirements concerning format, length, font, binding, and page limits. Some judges view the failure to do so as the act of a lawyer who is either (1) an amateur or (2) "the type of sleazeball who is willing to cheat on a small procedural rule and therefore probably will lie about the record or forget to cite controlling authority."[11] Do not convey either impression, especially after you have certified to the court that you followed the rules.

6. Arguing in the statement of facts and slanting or omitting facts.

The statement of facts is not the place to argue. Your purpose is not to color the facts in your favor or malign the opposing party, but to inform the court of the procedural history and pertinent facts underlying the case.[12] "The statement **must** be objective and **must** cite to the record. If you are challenging a jury verdict, the evidence must be presented in the light most favorable to that verdict."[13]

Do not omit significant facts. If you do, opposing counsel will usually expose your omissions. Even if she does not, you do not want a judge to uncover, say, the fact you never objected to any of the evidentiary rulings that you challenge on appeal. Draw the sting and bolster your credibility by relating significant, unfavorable facts.

Also, never twist the facts or lie about them altogether. An omission may be an accident, but misrepresentations take work. When you misrepresent the record, the reader is especially careful to check your "facts" and suspects you were similarly "creative" in legal argument.

7. Failing to cite to the record or going outside it.

Back up your factual assertions with record citations. Florida Rule of Appellate Procedure 9.210(b)(3) requires references to the appropriate volume and pages of the record or transcript. Refer to the specific page of the record or transcript, not just "Deposition of…" or "Transcript of Hearing."[14] Failing to cite to the record causes the court to spend inordinate time investigating the record for support, rather than moving to the legal issues. Occasionally, a missing citation signals that the "fact" may not be found in the record.

Additionally, do not cite material outside the record. Courts may not consider "facts" outside the record and will strike them.[15] If relevant material before the trial court was not included

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in the record on appeal, move to supplement the record.[16]

8. Failing to show the appellate court has jurisdiction.

Include a statement of jurisdiction. This is especially important in appeals of non-final orders, where jurisdiction may be questionable.

9. Failing to discuss preservation of error and standard of review.

Normally, arguments must be preserved for appeal by demonstrating that they were raised before and rejected by the trial court.[17] Otherwise, appellate courts will not consider them absent fundamental error.[18] Poor briefs often fail to discuss this critical prerequisite to a court's consideration.

Additionally, Florida Rule of Appellate Procedure 9.210(b)(5) requires that the applicable standard of review be included in your argument. Poor briefs often fail to include the standard of review or demonstrate the advocate's confusion in properly applying it. For example, challenging the credibility or the weight of the evidence is futile when the appellate court reviews for competent, substantial evidence. Credibility arguments mean nothing when the factfinder has considered and resolved evidentiary conflicts adversely to the appellant. The appellate court may not reweigh the evidence.

10. Arguing weak or superfluous issues.

Too often, appellate briefs raise "everything but the kitchen sink."[19] Most appeals do not contain more than four meritorious issues. Often, they contain only one or two. Consequently, littering a brief with five or ten weak issues tends to distract the court's attention from the stronger issues.

Instead of showering the court with several issues on appeal, the better course is to present your two or three strongest arguments.[20] Clearly identify distinct arguments in the points on appeal and succinctly present them in the argument of the brief. Start with your strongest argument. Conversely, do not save your best arguments for the reply brief. Raise them in the initial brief or the court will not consider them.[21]

11. Citing improperly.

Improper citations range from typographical errors to ethical violations. Review Florida Rule of Appellate Procedure 9.800 and use proper citation format. Incorrect citations are confusing and annoying.

Also, remember pinpoint cites. General cites may be acceptable for seminal cases such as *DiGuilio*[22] and *Strickland*,[23] but the better practice is to use pinpoint cites. These save the court time by pointing directly to the page containing the proposition argued.

More serious problems arise when "citations have been overruled, do not exist, or stand for propositions other than those described in [the] brief."[24] Lawyers who habitually misrepresent or cite overruled cases acquire poor reputations, and their briefs are greeted with skepticism.

12. Using too many or no cites.

Avoid string cites. Do not cite ten cases on the same point of law when two will do. At best, string cites suggest you spent some time on research, but they do not strengthen your argument.[25] Conversely, remember that, if you make a statement of law, cite supporting authority. It is embarrassing to have a court decide the case was controlled by precedent that counsel missed altogether.[26] In short, cite as many cases as you need, but no more.

13. Not editing or proofreading.

This is a critical mistake. Some readers view typographical errors as moral failings or suggestions of bad lawyering. More readers are forgiving, given the competing demands on a lawyer's time and attention. Nevertheless, both types of readers are inclined to feel that, if you did not have time to proofread, you may not have had time to fully review the record or shepardize the cases. At the very least, get rid of the run-on sentences, poor punctuation, and misspelled words. Better yet, leave time for several editing passes to make your brief succinct and effective.[27]

14. Ignoring the appellant's issues to argue your own in the answer brief.

This can be a problem when you restate and renumber the appellant's issues on appeal. While you need not write a treatise for every point the appellant raises, be sure to address all those points, even those that seem only remotely meritorious. Discuss and distinguish the cases relied on by the appellant. However, if you seek affirmative relief, you must file a cross appeal.[28]

15. Filing improper notices of supplemental authority.

By all means, file a notice of supplemental authority for new cases bearing on an issue on appeal, but not for existing cases that you missed in your first brief. It is inappropriate and only highlights an oversight.[29]

Conclusion.

While there is little you can do about the facts and the law, their presentation is up to you. Taking the time to avoid these mistakes will pay dividends and ensure that your brief does not detract from the merits of your appeal.

Endnotes

[1] The comments contained in this article are those of the authors alone, not those of

the Fifth District Court of Appeal. Elaine M. Williams is a Career Attorney at the Fifth District Court of Appeal and currently clerks for Judge Kerry I. Evander. She received her J.D. from the Marshall-Wythe School of Law at the College of William and Mary, where she was appointed to the President's Publications Council. Ms. Williams is a member of the Virginia State Bar and The Florida Bar. Robert Seegmiller is the Director of Central Staff at the Fifth District Court of Appeal, where he has worked since 1983. He graduated with honors from the University of Florida College of Law. David M. Barr is a law clerk for Chief Judge Robert J. Pleus, Jr. at the Fifth District Court of Appeal. He graduated with honors from the University of Florida College of Law and earned his undergraduate degree with distinction from the University of Michigan. Mike Giel clerks for Judge Emerson R. Thompson, Jr. of the Fifth District Court of Appeal. He graduated in 2005 from the University of Chicago Law School, where he was a member of the *Chicago Journal of International Law*, and graduated *cum laude* from the University of South Florida in 2002.

[2] If you do, Judge Altenbernd might call you a Faulkner, Bronte, or Pack Rat. See Chris W. Altenbernd, *Brief Writing: True Confessions of a Legal Grease Monkey* (Valeria Hendricks ed.), THE RECORD: J. OF APP. PRAC. SEC., Summer 2002, at 15-16.

[3] See Altenbernd at 1.

[4] John W. Davis, *The Argument of an Appeal*, 26 AM. BAR ASS'N J., 895, 896 (Dec. 1940).

[5] Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 328, 333 (1992).

[6] Altenbernd at 1.

[7] Kozinski at 326.

[8] Kozinski at 333.

[9] Altenbernd at 15.

[10] *See, e.g.*, *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1331-32 (11th Cir. 2002); *see also Thomas v. Patton*, 939 So. 2d 139, 141-42 (Fla. 1st DCA 2006) (describes colorful phrases such as "Twilight Zone doctors," "baloney," "[j]udical murder," and, of course, "legitimizing an Internet lynch mob and elevating porno queens to the level of supreme court judges").

[11] Kozinski at 327.

[12] *See, e.g., Sabawi v. Carpentier,* 767 So.2d 585, 586 (Fla. 5th DCA 2000).

[13] Altenbernd at 13 (emphasis in original).

[14] *See Chiles v. Floridian Sports Club, Inc.*, 633 So. 2d 50, 51 n.2 (Fla. 5th DCA 1994); *Williams v. Bumpass*, 568 So. 2d 979, 981 n.1 (Fla. 5th DCA 1990).

[15] *See Ullah v. State*, 679 So. 2d 1242, 1244 (Fla. 1st DCA 1996); *Reza v. Ultra Brake, Inc.*, 637 So. 2d 984, 985 n.1 (Fla. 1st DCA 1994) (appendices of both the answer and reply briefs stricken because they contain materials not part of the record on appeal).

[16] *See Matson v. Wilco Office Supply and Equipment Co.,* 541 So. 2d 767, 769 (Fla. 1st DCA 1989); Fla. R. App. P. 9.200(b)(4).

[17] *Rimmer v. State,* 825 So. 2d 304, 330 (Fla. 2002).

[18] *Williams v. State*, 892 So. 2d 1185, 1187 (Fla. 5th DCA 2005).

[19] *See State v. Duncan*, 894 So. 2d 817, 832 (Fla. 2004).

[20] *See* Altenbernd at 13.

[21] *United States v. Levy*, 416 F.3d 1273, 1275 (11th Cir. 2005); *KMS Rest. Corp. v. Wendy's Int'l.*, Inc. 361 F.3d 1321, 1328 n.4 (11th Cir. 2004); *Medrano v. State,* 795 So. 2d 1009, 1010 (Fla. 4th DCA 2001); *Fernandez v. Fernandez,* 727 So. 2d 1108 (Fla. 4th DCA 1999). Addressing means more than merely mentioning the issue or dropping a sentence or two in a footnote; the failure to offer an argument and legal support constitutes waiver. *United States v. Gupta*, 463 F.3d 1182, 1195 (11th Cir. 2006); *Asociacion de Empleados del Area Canalera (ASEDCA) v. Pan. Canal Cmsn.*, 453 F.3d 1309, 1316 n.7 (11th Cir. 2006).

[22] *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986).

[23] *Strickland v. Washington*, 466 U.S. 668 (1984).

[24] Altenbernd at 15.

[25] Davis at 896.

[26] *See, e.g., Russell v. State,* 920 So. 2d 683, 684 & n.2 (Fla. 5th DCA 2006); *Variety Children's Hosp. v. Mishler,* 670 So. 2d 184, 185 (Fla. 3d DCA 1996).

[27] Several articles in The Record offer excellent editorial advice. *See, e.g.,* Altenbernd at 14-15; Raymond T. (Tom) Elligett, Jr. & Amy Farrior, *High Class Editing*, THE RECORD: J. OF APP. PRAC. SEC., March 2002, at 4-5.

[28] *E.g., A-1 Racing Specialties, Inc. v. K & S Imports, Inc.,* 576 So. 2d 421, 422 (Fla. 4th DCA 1991).

[29] *Brown & Williamson Tobacco Corp. v. Young*, 690 So. 2d 1377, 1380 (Fla. 1st DCA 1997).

The 2007 Lawyers' Challenge for Children

The 2007 Florida Bar Fee Statement will soon be arriving in your mailbox. Chances are, most of you won't give it a second thought, and mail it back right away.

However, if you took another moment— and just a few more pen strokes— you could make a lasting difference in the life of a child.

The 2007 Lawyers' Challenge for Children invites you to consider contributing $45 or more on your Bar Fee Statement to help provide legal services for the most vulnerable members of our community. All you have to do is mark the check-off box and add in the dollar amount.

Last year, more than 4,200 Florida attorneys and judges knew to mark that box. By doing so, they contributed more than $205,000 to help fund legal services for low-income children. That money, awarded through grants administered by The Florida Bar Foundation, went directly to local legal aid programs in your community.

Through your generous donation, a legal aid program in your community was able to help a child like "Henry." Henry, 12, has autism and loves going to school. He has uncontrollable body movements and is over-stimulated by noises and by any changes in his scheduled routine. For his safety, Henry's school is required to transport him from his front door at home to the classroom door at school so that he does not run out in the road and hurt himself. When Henry and his mother moved to a new home, the school district refused to continue picking Henry up at his doorstep because he does not use a wheelchair. Legal Aid worked with the Center for Autism Related Disorders to persuade the School District of the danger of allowing Henry to catch the bus at the bus stop. Thanks to the generous support of those who took the Lawyers' Challenge for Children to heart, the school finally agreed to implement Henry's Individual Education Plan initially approved by the school, and the youngster was able to return to school.

To see who joined the 2006 challenge in your area, please visit The Florida Bar Foundation's Web site at http://www.flabarfndn.org and click on the donors tab.

After you have made your $45 donation this year, your name will be published on our Web site, beginning November 15, 2007. And, with any donation of $100 or more, your name will be on our Web site, and also published in the 2007 annual report of The Florida Bar Foundation.

Won't you take the challenge when your Florida Bar Fee Statement arrives this year? Please make a check next to Lawyers' Challenge for Children. With your help this is a challenge everyone can win.

Michelle C. Lyles
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A Discussion of Rule 9.700, et seq., Florida Rules of Appellate Procedure: The Expanding Role of Appellate Mediations in Florida

By Nicholas A. Shannin[1]

There is a hole in your copy of "Florida Rules of Court." Even if you've got a brand new 2007 version sitting on your shelf, there's still a big gap in the Appellate Rules section. You'll find it between 9.600 (Jurisdiction of Lower Tribunals Pending Review) and 9.800 (Uniform Citation System). And for those of you latent newspaper editors who abhor "trapping the white space," I have good news – the gap, though intentional, may soon be filled with new rules regarding a uniform statewide methodology for mediations that occur at the appellate level.

Who will undertake the project of drafting these proposed rules? The task has been accepted by the Appellate Mediation Subcommittee of the Florida Supreme Court's Dispute Resolution Center's Alternative Dispute Resolution Rules & Policy Committee. Members of the committee include two appellate judges, Judge William D. Palmer of the Fifth DCA and Judge W. Matthew Stevenson of the Fourth DCA. Both jurists bring valuable insight to the committee. Judge Stevenson, who chairs the committee, was a full time mediator from 1987 to 1990. In the Fall 2006 edition of The Record, Judge Stevenson explained his optimism that appellate mediation can be of benefit to both the courts and the parties: "Appellate Mediation can allow the parties to focus on the issues which are the most important to them and often will enable them to negotiate a better outcome than that available by continuing the litigation."[2]

Judge Palmer shares Judge Stevenson's optimism regarding the future for appellate mediation. He explained the role of his committee, "we are working on a version of proposed rules [for appellate mediation programs] for submission to the Florida Supreme Court. The purpose of the rules would be to promote uniformity in the way appellate mediations are conducted before those district courts which decide to go forward with appellate mediation programs." He expressed his opinion that a draft of the proposed rules regarding appellate mediation should be submitted to the Florida Supreme Court by 2008.

Judge Palmer's optimism regarding the future of appellate mediation is well grounded. He has helped to guide the Fifth DCA Appellate Mediation program from an experimental prototype in 2001 to a robust, case-clearing program that has become a permanent part of the way the court conducts business. How robust? Precise statistics regarding both the number of cases in the mediation program and the success of those mediations are maintained by Fifth DCA mediation coordinator Penny Cooper. These statistics demonstrate that the program has grown in the number of appellate cases referred to mediation every year since its inception in 2001, *and* that the percentage of those cases referred that settle as a direct result of those mediations has also increased every year. These statistics are demonstrated in the following chart:

Year	Appellate Cases Mediated[3]	Successful Mediation (Full Dismissal after mediation)[4]	Percentage Successfully Mediated
2001[5]	33	6	18.2%
2002	69	16	23.2%
2003	65	22	33.8%
2004	91	38	41.8%
2005	96	42	43.7%
2006[6]	124	59	47.5%

It is important to note that the success of the Fifth DCA's appellate mediation program was not a given when the program started. A decade ago, the First and the Fourth DCAs also had mediation programs. While both programs were able to cite a level of success with regard to case reduction,[7] they were ultimately discontinued for lack of funding.[8] The funding was such a core issue because both programs were state-funded. The mediators were employees of the court, and therefore all costs associated with the program were borne by the court, making the reduction of cases by way of mediation not cost-effective. The Fifth DCA went with a different approach, modeled instead after the effective private-mediation model utilized by circuit courts throughout the state, pursuant to Florida's rules of civil procedure.[9]

Those rules provide the court the authority to mandate that cases be referred to mediation;[10] and that the mediator be selected by the parties at the shared expense of those parties to the litigation.[11] Accordingly, the private appellate mediation model allows the parties to choose from a list of those qualified mediators and are not restricted to using only a "state" mediator employed by the court. This freedom of choice enables the parties to select a mediator they believe to have the highest likelihood of being able to resolve their particu-

lar appellate dispute. Of additional benefit to the parties is the freedom to hold the mediation at a place of their choosing. Appellate practice often involves parties or counsel being well removed from the physical location of their District Court of Appeal. As an example, the private-funding model employed by the Fifth DCA would allow Orlando-based litigants to have their mediation held in Orlando rather than in Daytona Beach. With the likely attendance of trial and appellate counsel for two (or more) parties at such a mediation, the savings to the parties of travel time alone more than makes up for the costs involved in hiring a qualified mediator to mediate the case.

The elimination of the court-employed mediator allows the system to function at a much more cost-effective level. The fact that over 40% of those cases referred to mediation in 2006 resolved without the need for the appellate judges to review the briefs or hear oral argument is clearly a benefit to the court's ability to focus its resources on the remaining cases. With the growing success of this program, it is a prescient idea to establish rules now to ensure a uniform methodology of appellate mediation programs statewide, for those district courts that elect to follow the successful program of the Fifth DCA. The fact that a space for Florida Rule of Appellate Procedure 9.700 has been left open for this purpose is no coincidence, and neither will be the likely similarities between 9.700, et seq., and the corresponding civil rules 1.700, et seq. Based upon the experience of the Fifth DCA, we appellate litigators may soon look forward to appellate mediation programs statewide being as popular with appellate judges as the civil mediation program has been with circuit judges across the state. The hole in our rule books will soon be filled, and our practice will be better for it.

Endnotes

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[2] Margaret Wood, *Profile of Judge W. Matthew Stevenson,* The Record, Journal of the Appellate Practice Sec., Fall 2006, at. 2.

[3] This number does not include cases dismissed before mediation or cases for which the referral was withdrawn prior to mediation.

[4] This number does not include partial settlements whereby one or more issues may have settled. Inclusion of partial settlements would yield an even higher success ratio.

[5] Includes cases from the inception of the program May 1, 2001, through to the end of the calendar year.

[6] This chart was prepared on statistics current as of March 12, 2007, and accordingly does not reflect the resolution of 16 cases referred to mediation at the end of 2006 for which mediation is pending or the results have not yet reached the court. The author anticipates updating this article next year, at which time complete and updated statistics for 2006 will be available, as will preliminary results for 2007.

[7] Donna Riselli, *Appellate Mediation at the First District Court of Appeal: How and Why it Works*, 75 Fla. B.J. 58, January 2001.

[8] *Profile of Judge Stevenson, supra.*

[9] Fla. R. Civ.P. 1.700, et seq.

[10] Fla. R. Civ.P. 1.700(a).

[11] Fla. R. Civ.P. 1.720(f),(g).

To 50(b) or not to 50(b): Unitherm, Winghouse, and the New Rule 50

By Dineen Pashoukos Wasylik[1]

Federal Rule of Civil Procedure 50(b) has been called "wasteful," a "redundancy," and a "trap for the unwary."[2] The Rule has caused trial and appellate lawyers alike no shortage of headaches, particularly given language that a losing party may renew its motion for judgment as a matter of law after the entry of judgment. When not followed with precision, the Rule can affect not only the relief that an appellate court might grant on appeal, but may also effect whether the appellate court has the authority to act at all.

Recently, the Eleventh Circuit Court of Appeals and the United States Supreme Court addressed the likelihood of success on appeal where the losing party fails to file a Rule 50(b) motion. The Courts put the issue to rest, holding that the failure to file a Rule 50(b) motion prevents the appellate court from granting a new trial or any other relief.[3]

Meanwhile, new changes to Rule 50, effective December 1, 2006, have removed one area for potential misstep and made it easier for trial counsel to make a Rule 50(b) motion and position their cases for appellate review.

The new Rule 50(b) permits renewal of *any* Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a 50(a) motion be made at the close of all the evidence in order for the Court to consider a 50(b) motion for post-trial relief. Because the Rule 50(b) motion only renews the pre-verdict motion, however, it can be granted only on grounds advanced in the pre-verdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury.

To understand the intent of the Rules Advisory Committee in amending Rule 50, it is important to look at the Rule prior to the attachment. Former Rule 50(b), setting forth the procedural requirements for renewing a sufficiency of the evidence challenge after the jury verdict and entry of judgment, provided: "If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." The movant may renew a request for judgment as a matter of law by filing a motion no later than

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10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59."

Before the amendment, the Supreme Court consistently held that an appellate court was without authority to direct entry of a judgment notwithstanding the verdict where a defendant failed to file a Rule 50(b) motion in the trial court. For example, in *Cone v. West Virginia Pulp & Paper Co.,*[4] the United States Supreme Court concluded that, "[i]n the absence of such a motion" an "appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand." In a later case, the Court held that, even where the district court expressly reserved a party's pre-verdict motion and denied it after the verdict was returned, the renewed motion was necessary because it is "an essential part of the rule, firmly grounded in principles of fairness."[5]

Most recently, the Court in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, established that a party "may not challenge the sufficiency of the evidence on appeal on the basis of the District Court's denial of its Rule 50(a) motion."[6] The Court explained that, under the pre-verdict motion, district judges are generally encouraged to allow the jury to consider the evidence. Thus, the failure to grant a judgment as a matter of law on a Rule 50(a) motion cannot be considered appealable error.[7]

Like the Supreme Court, the Eleventh Circuit has held strong with this view and declined to grant new trials where the appellant failed to renew a Rule 50(a) motion under Rule 50(b). Just this past summer, the court refused to consider the appellant's substantive arguments in *HI Ltd. Partnership ["Hooters"] v. Winghouse of Florida, Inc.*[8] because the appellant failed to file a Rule 50(b) motion following entry of the judgment. In *Winghouse*, Hooters argued that the district court erred in denying its motion for a directed verdict on the issue of whether Winghouse's counter-claim for breach of an oral contract was barred by the statute of frauds. Hooters failed to file a post-trial motion under Rule 50(b). Citing two pre-*Unitherm* Eleventh Circuit cases, Hooters argued to the court that its prior cases allowed it to seek at least a new trial on the issue. The Eleventh Circuit rejected this claim, holding that *Unitherm* "explicitly rejected the very rule urged upon us by Hooters."[9]

Against the backdrop of the recent decisions from the Eleventh Circuit and the United States Supreme Court unequivocally requiring a Rule 50(b) motion, is the larger issue of whether a Rule 50(b) motion is even available if the defendant fails to make or renew a Rule 50(a) motion for judgment as a matter of law *at the close of all evidence.* The Eleventh Circuit has explained that "[b]y 'proper Rule 50(b) motion' we mean one for which the necessary predecessor Rule 50(a) motion raising those grounds was filed at the close of the trial," not merely a Rule 50(a) motion filed at the close of plaintiff's case.[10] While this is a generally accepted reading of Rule 50, some courts have considered the merits of a Rule 50(b) motion even without a close-of-evidence Rule 50(a) motion. For example, where the plaintiffs failed to oppose the post-trial briefing,[11] or the trial court indicated it considered the Rule 50(a) motion renewed even though evidence had not yet closed, some appellate courts have considered Rule 50(b) motions which were not predicated on prior Rule 50(a) motions. [12]

Given all of the confusion surrounding Rule 50, the Judicial Conference's Committee on Rules of Practice and Procedure Civil Rules Advisory Committee has been busy rethinking the whole Rule 50 procedural morass. The Committee made an initial proposal in August 2004, held hearings and took comments from the public, and made slight changes to the revised rule for clarity before submitting it for final approval.

Noting that the strictest reading of Rule 50 could lead to "harsh results," and that appellate courts' attempts to mitigate such results has "come at the price of increasingly uncertain doctrine and practice," the new rule "deletes the requirement of a motion at the close of all evidence, permitting renewal of any Rule 50(a) motion for judgment as a matter of law made during trial."[13] Thus, the most harsh of the two procedural hurdles has been removed: the words "at the close of all evidence" are deleted from Rule 50(b), and are replaced with a reference to any motion for judgment as a matter of law "made under subdivision (a)." Rule 50(a) was amended to clarify that a motion may be made "at any time before the case is submitted to the jury."[14]

What does all of this mean for practitioners? Reading the new rule and the *Unitherm* and *Winghouse* decisions together, the rule for appellate review is that trial counsel must file a Rule 50(b) motion, but such a motion can now be based on a Rule 50(a) motion made at any time during the course of trial.[15]

As a practical matter, it still may be best to make a 50(a) motion at the close of all evidence. The Rules Committee states that the change is not intended to discourage the "useful practice" of a court accepting motions at the close of all evidence.[16] Rather, it provides a "functional approach" to trial practice in the hopes of making appellate practice "more consistent and predictable."[17] The Rule 50(b) motion is still considered a renewal of, and is limited to the grounds previously raised in, a Rule 50(a) motion. Therefore, a motion at the close of all evidence may be useful if new grounds for the motion become clear over the course of defendants' case.

With the demise of the "close of evidence" trap for the unwary, appellate counsel will have one less reason to tear their hair out when combing through a trial record for grounds for appeal.

Endnotes

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2 *Szmaj v. Am. Tel. & Tel. Co.*, 291 F.3d 955, 958 (7th Cir. 2002)(allowing appeal despite failure to renew or move for a new trial where district judge took Rule 50(a) motion under advisement rather than denying it outright).

3 *See e.g., Unitherm Food Sys., Inc. v. Swift-Echrich, Inc.,* 546 U.S. 394, 126 S.Ct. 980 (2006); *HI Ltd.*
P'ship ["Hooters"] v. Winghouse of Fla., Inc., 451 F. 3d 1300 (11th Cir. 2006).

4 330 U.S. 212, 218 (1947).

5 Johnson v. New York, N.H. & H.R. Co., 344 U.S. 48, 53 (1952).

6 *Unitherm,* 546 U.S. 394, 126 S. Ct. at 988.

[7] *See id.*
[8] 451 F.3d at 1301.
[9] *Id.*
[10] *Collado v. United Parcel Serv. Co.*, 419 F.3d 1143, 1152 n. 6 (11th Cir. 2005) (citing *Mark Seitman & Assocs, Inc.. v. R..J. Reynolds Tobacco Co.,* 837 F.2d 1527, 1531 (11th Cir.1988) ("A defendant's [Rule 50(a)] motion for directed verdict at the close of the plaintiff's case will not suffice unless it is renewed at the close of all the evidence.").
[11] *See, e.g., Wheaton v. N. Oakland Med. Ctr.*, 130 Fed. Appx. 773 (6th Cir. 2005) (considering the merits of defendant's sufficiency of the evidence appeal where plaintiff failed to object to defendants' failure to renew at the close of all evidence before the trial court by not responding to post-trial briefing).
[12] *See, e.g., Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294 (8th Cir. 1982)(noting that "courts have taken a liberal view of what qualifies as a motion for a directed verdict in allowing a subsequent [Rule 50(b)] motion for judgment n. o. v.").
[13] Report of the Civil Rules Advisory Committee ("Report"), Rules App. at C-10, *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=95.
[14] Fed. R. Civ. P. 50(a)(2) (effective Dec. 1, 2006).
[15] The new Rule 50(b) also clarifies that where a post-trial motion addresses a jury issue not decided by a verdict, it must be made no later than 10 days after the jury is discharged.
[16] Report, Rules App. at C-14.
[17] *Id.*

Belated Criminal Appeals, and Ineffective Assistance of Appellate Counsel: Criminal Defendants Get a Second and a Third Bite at the Apple of Justice

by Roy D. Wasson[1]

I. Introduction:

If you handle criminal appeals now, or you are willing to include criminal cases in your practice, chances are that you will receive a call from a convicted defendant's family member, or a letter from a prisoner, seeking your counsel in a case that seems to have meritorious appellate issues, but in which appellate review appears foreclosed by untimeliness. Like the rules setting thirty-day deadlines for appeals in civil cases[2], the rule pertaining to the time for filing final criminal appeals provides: "*Commencement.*" The defendant shall file the notice prescribed by rule 9.110(d) with the clerk of the lower tribunal at any time between rendition of a final judgment and 30 days following rendition of a written order imposing sentence.[3]

Although most experienced appellate attorneys recognize the flexibility of deadlines for many aspects of appeals under Florida practice such as completion of the record[4], service of briefs, and even moving for rehearing[5] we understand that the jurisdictional nature of the time limits for filing a notice of appeal render those thirty-day periods immovable. A district court of appeal lacks jurisdiction over a criminal appeal where the notice of appeal is filed more than thirty days after rendition of the order imposing sentence, and such an appeal must be dismissed.[6]

However, before you turn down an otherwise-meritorious criminal appeal because it has been several months since sentence was imposed and post-verdict motions were denied, investigate the possibility that there are grounds for filing a belated appeal pursuant to Fla. R. App. P. 9.141(c). Contrary to widespread belief that the thirty-day filing deadline cannot be extended, Florida Rule of Appellate Procedure 9.141 and case authorities provide avenues around that jurisdictional roadblock.

Other potential clients who seek out appellate practitioners in criminal cases include the ones who already have filed a timely appeal from their conviction and sentence, but who lost the appeal either on the merits or for procedural reasons and hope to find a vehicle for additional review. Of course you will examine the district court's opinion (if one was written) for possible Florida Supreme Court jurisdictional grounds. In the absence of express and direct conflict[7], or a decision passing on the constitutionality of a statute[8], you may conclude that certiorari review by the United States Supreme Court is the only track that the defendant has left, before seeking post-conviction relief back at the trial court level under Fla. R. Crim. P. 3.850.

Another area to explore, however, is that of ineffective assistance of prior appellate counsel. Perhaps prior counsel neglected to provide a complete record to support arguments that were briefed, or failed to brief meritorious issues that were preserved at the trial court level. In such situations, Rule 9.141 and case law recognizes the possibility of yet a second direct appeal to the district court of appeal. This article introduces the appellate practitioner to the related subjects of belated appeals and second appeals permitted due to ineffective assistance of counsel.

II. Historical Procedure for Relief Due To Untimely or Ineffective Appeal:

A. Appeal Not Timely Filed Due to Trial Counsel Error:

The right of a criminal defendant to pursue a belated appeal was recognized by the Florida Supreme Court in the 1969 case of *Baggett v. Wainwright*[9], which held that the appropriate procedure for obtaining a belated appeal was by way of a habeas corpus petition filed in the appellate court to which the appeal should have been taken, as discussed in the later case of *State v. District Court of Appeal*[10]*:*

> In *Baggett*, the petitioner alleged that he had been represented during trial by privately employed counsel but was unable to retain that counsel for purposes of appealing his conviction because he had become indigent. He

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> said that he and his trial counsel informed the judge of this and that the judge advised them that the appeal was to be handled by the public defender. Subsequent communication with the public defender revealed that the appeal had never been filed. The petition was premised on the theory that because of state action, the petitioner was deprived of the assistance of counsel for the purpose of appealing his conviction. We held that habeas corpus was the proper remedy and directed that if factual determinations were deemed necessary, the appropriate district court of appeal could appoint a commissioner to make the necessary factual determinations. *Id.* at 440.

The Court in *Baggett* holding that the standard for allowing an indigent defendant to file a notice of appeal belatedly should not be more burdensome than that imposed on a defendant who timely files an appeal rejected the State's argument that a defendant seeking to belatedly appeal by way of habeas corpus must make a showing of at least arguable reversible error occurring at trial which might have prompted reversal on appeal.[11]

In *State v. District Court of Appeal* the Court noted that the legal basis upon which the right of a belated appeal rests had shifted from the notion that state action (inaction by the Public Defender) had deprived the defendant of an appeal, to a focus on the ineffectiveness of counsel issue.[12] Recognizing that it was well settled that claims of ineffective assistance of trial counsel, with rare exceptions . . . , are cognizable only by rule 3.850 and may not be raised by petition for habeas corpus before an appellate court, the procedure for belated appeals was changed for a time to require the defendant to file a motion for post-conviction relief in the trial court.[13]

The procedure which evolved from that decision included the requirement that, once the trial court granted the motion for leave to belatedly appeal, the defendant would file a notice of appeal directed at the original judgment and sentence.[14] However, due to the lack of any procedural rule setting the deadline for filing a notice of appeal after the Rule 3.850 motion was granted, problems arose with that procedure such as the case in which the notice of appeal was not filed until twenty months after the trial court granted leave for the defendant to pursue a belated appeal.[15]

Later cases arose in which untimely appeals had to be dismissed, due to the lack of a Rule 3.850 motion, even though the record reflected that the delay in filing a notice of appeal was indisputably due to ineffective assistance of counsel.[16] At least some of the district court decisions dismissing such appeals did so without prejudice to the defendant's right to file a motion with the trial court pursuant to Florida Rule of Criminal Procedure 3.850 seeking a belated appeal because of the ineffective assistance of trial counsel in filing an untimely notice of appeal.[17]

In *Stephenson v. State,*[18] the Second District voiced criticism of the cumbersome procedure, and certified the question to the Supreme Court whether the district courts of appeal had the authority to grant a belated appeal in a criminal case where the record on direct appeal indisputably reflects that trial counsel, through neglect, inadvertence or error filed an untimely notice of appeal and thus rendered ineffective assistance of counsel as a matter of law. Noting that this issue is currently under review by this Court and the Committee on Rules of Appellate Procedure, the Supreme Court in 1995 answered the certified question in the negative and held: For now, we continue to adhere to this principle [that] a district court of appeal does not have the authority to grant a belated appeal in a criminal case when it is claimed that trial counsel, through neglect, filed an untimely notice of appeal. . .[20] The sole method for obtaining a belated appeal remained a Rule 3.850 motion filed in the trial court.

B. Appeal Otherwise Not Filed Or Ineffectively Pursued:

In cases where the deprivation of the defendant's right to appeal was caused by factors other than ineffective assistance of trial counsel, including the trial court's failure to advise the defendant that he or she had a right to appeal, a petition for habeas corpus filed in the appellate court remained the appropriate remedy.[21] Where trial counsel filed a notice of appeal, but the defendant was denied his or her right to an effective direct appeal by reason of ineffective assistance of appellate counsel, the only vehicle for correcting such ineffectiveness was by way of habeas corpus petition to the appellate court.[22]

Thus, the *State v. District Court of Appeal* decision resulted in there being two procedures for requesting belated appeal: Florida Rule of Criminal Procedure 3.850 when the criminal appeal was frustrated by ineffective assistance of trial counsel . . . ; and habeas corpus for everything else.[23]

III. Appellate Rules Committee Responds With Unified Rule:

A. Procedure and Time Limits:

By amendment to the appellate rules adopted in 1996, Rule 9.140(j)(5) was added to provide a uniform procedure for requesting belated appeal and to supersede *State v. District Court of Appeal of Florida . . .*[24] The long-awaited rule, later re-numbered as Fla. R. App. P. 9.141(c), provides in part as follows:

(c) ***Petitions Seeking Belated Appeal or Alleging Ineffective Assistance of Appellate Counsel.***

(1) ***Treatment as Original Proceedings.*** Review proceedings under this subdivision shall be treated as original proceedings under rule 9.100, except as modified by this rule.

(2) ***Forum.*** Petitions seeking belated appeal or alleging ineffective assistance of appellate counsel shall be filed in the appellate court to which the appeal was or should have been taken.

(3) ***Contents.*** The petition shall be in the form prescribed by rule 9.100, may include supporting documents, and shall recite in the statement of facts

(A) the date and nature of the lower tribunal's order sought to be reviewed;

(B) the name of the lower tribunal rendering the order;

(C) the nature, disposition, and dates of all previous proceedings in the lower tribunal and, if any, in appellate courts;

(D) if a previous petition was filed, the reason the claim in the present petition was not raised previously;

(E) the nature of the relief sought; and

(F) the specific acts sworn to by the petitioner or petitioner's counsel that constitute the alleged ineffective assistance of counsel or basis for entitlement to belated appeal, including in the case of a petition for belated appeal whether the petitioner requested counsel to proceed with the appeal. *Id.*

The rule establishes two-year time limits for both petitions seeking belated appeals (whether due to trial counsel error or failure of the trial court to advise of the right to appeal)[25] and petitions alleging ineffective assistance of appellate counsel,[26] with exceptions which require statements under oath with a specific factual basis[27] to establish why those deadlines were not met. If a petition for belated appeal fails to assert under oath that the defendant requested that counsel file an appeal on his or her behalf, the petition will be denied.[28]

Although the rule does not expressly provide a procedure for the situation where the State refutes the factual assertions in the petition, the common practice is for the appellate court faced with a factual controversy to appoint a commissioner (frequently the trial judge involved in the case) to take testimony and resolve the conflict.[29] However, [a]bsent a showing in the state's response of a good faith basis for opposing a facially sufficient motion, belated appeal will be granted without appointment of a commissioner.[30] Some courts have found that the mere inability of the State to reach prior counsel for the defendant to confirm the factual allegations of the petition will not constitute such a good faith basis for appointment of a commissioner.[31] Other courts have indicated that a commissioner should be appointed even without an evidentiary showing by the State to refute the allegations of a petition for belated appeal, in the absence of a definitive record demonstrating both that the defendant asked for an appeal to be filed and qualified for appointment of appellate counsel.[32]

B. Practice Under the Rule:

There are any number of factual and procedural settings in which the appellate courts will grant relief due to ineffective assistance of appellate counsel. Even where prior appellate counsel fails to raise an issue because it was not preserved at trial, if the issue involves fundamental error the courts will permit a second appeal to argue that error.[33]

Since adoption of the single appellate rule dealing with both situations, the distinction between belated appeals (which require no showing of potentially-meritorious issues) and petitions asserting ineffective assistance of appellate counsel (where meritorious issues and ineffective assistance must be shown) has blurred somewhat. Courts sometimes use the term belated appeal in cases granting petitions based on ineffective assistance of appellate counsel, where the first appeal was filed by counsel, but dismissed due to neglect.[34]

Other decisions have used belated appeals to address the situation where the defendant already enjoyed a properly-filed direct appeal, but in which certain important issues were not raised.[35] However, some courts have continued to recognize the distinction between the two types of petition.[36] Counsel consulted to seek relief under Rule 9.141(c) should consider the more difficult standard that must be met to warrant relief based on ineffective assistance of appellate counsel, and instead phrase the request as one for a belated appeal, even though a prior appeal had been pursued, where the defendant has been denied appellate review of an important issue on the merits.[37]

IV. Conclusion:

Rule 9.141 provides defendants in criminal cases with a second bite at the apple of justice, affording them the opportunity to belatedly appeal where trial counsel or the trial court fails in their duties and the jurisdictional deadline for filing a timely appeal is thereby lost. The rule also gives a convicted defendant a third bite where his or her prior counsel timely files a direct appeal, but is so ineffective in prosecuting the appeal that a potentially meritorious issue is not fairly addressed.

This rule reflects Florida courts' commitment to dispensing justice on the merits. Counsel consulted about handling belated appeals, or successive appeals, should do their part to effectuate the intent of the rule by looking long and hard before rejecting such cases and, where possible, by being the hand that brings the apple of justice back for another bite, nourishing our judicial system as well as our clients.

Endnotes

[1] The author is board certified in appellate practice, a former chair of the Appellate Practice Section, former chair of the Appellate Court Rules Committee, a member of the Appellate Certification Committee, and engages in civil and criminal appellate practice as the principal of Wasson & Associates, Chartered in Miami.

[2] *See* Fla. R. App. P. 9.110(commencement of final civil appeals & 9.130(commencement of non-final civil appeals).

[3] Fla. R. App. P. 9.140(b)(3).

[4] *See* Fla. R. App. P. 9.200(b)(3) (recognizing flexibility of deadline for completion of transcripts).

[5] *See* Fla. R. App. P. 9.330(a)(post-decision motions may be filed with 15 days of an order or within such other time set by the court).

[6] *E.g., McIntosh v. State*, 906 So. 2d 1272 (Fla. 5th DCA 1995).

[7] *See* Fla. R. App. P. 9.030 (a)(2)(A)(iv).

[8] *See* Fla. R. App. P. 9.030 (a)(2)(A)(ii).

[9] 229 So. 2d 239 (Fla. 1969).

[10] 569 So. 2d 439 (Fla. 1990).

[11] 229 U.S. at 243.

[12] 569 So. 2d at 441 (citing *State v. Meyer*, 430 So. 2d 440 (Fla. 1983) and *Polk County v. Dodson*, 454 U.S. 312 (1981)(recognizing that the actions of a public defender did not constitute state action)). The *Meyer* Court concluded that the right to obtain a belated appeal should not depend on whether the default occurred as a result of the actions of a court-appointed attorney or a private attorney. *State v. Trowell*, 739 So. 2d 77, 79 (Fla. 1999).

[13] 569 So. 2d at 441-42.

[14] *See Mack v. State*, 586 So. 2d 1266 (Fla. 1st DCA 1991).

[15] *Lofton v. State*, 639 So. 2d 1134 (Fla. 5th DCA 1994).

[16] *See Stephenson v. State*, 640 So. 2d 117 (Fla. 2d DCA 1994).

[17] *Id.* at 118.

[18] *Id.*

[19] *Id.* at 119.

[20] *Id.*

[21] *E.g., Turner v.* State, 745 So. 535 (Fla. 1st DCA 1999). *See also* Scalf *v. Singletary*, 589 So. 2d 986 (Fla. 2d DCA 1991).

[22] *See, e.g., Pope v. Wainwright*, 496 So. 2d 798 (Fla. 1986). The standard for grant of habeas corpus relief due to ineffective assistance of appellate counsel is [w]hether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Id.* at 800. The reader should note that ineffective assistance of appellate counsel has permitted a second appeal even where appellate counsel has failed to raise an unpreserved issue in the first appeal, so long as that issue involved fundamental error. *See, e.g., Barnes v. State,* 932 So. 2d 589 (Fla. 5th DCA 2006).

[23] *In Re Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103, 1137 (Fla. 1996).

[24] *Id.*

[25] A petition for belated appeal shall not be filed more than 2 years after the expiration of time for filing the notice of appeal from a final order, unless it alleges under oath . . . that the petitioner (i) was unaware that an appeal had

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not been filed or was not advised of the right to an appeal; and (ii) should not have ascertained such facts by the exercise of reasonable diligence. Fla. R. App. P. 9.141(c)(4)(A).

[26] The deadline for a petition alleging ineffective assistance of appellate counsel is two years after the conviction becomes final on direct review, unless the defendant alleges under oath that he or she was affirmatively misled about the results of the appeal by counsel. Fla. R. App. P. 9.141(c)(4)(B).

[27] Fla. R. App. P. 9.141(c)(4)(A)&(B).

[28] *E.g. State v. Trowell,* 739 So. 2d 77, 81 (Fla. 1999).

[29] *See Lewis v. State*, 874 So. 2d 728 (Fla. 3d DCA 2004)(denying petition for belated appeal where commissioner appointed to make factual findings found that petitioner did not timely request his attorney to file an appeal and in fact knowingly waived his right to appeal); *Marino v. State*, 828 So. 2d 393 (Fla. 4th DCA 2002)(denying petition for belated appeal where commissioner found that petitioner did not communicate to his attorney that he wanted to file appeal); *Brooks v. State*, 816 So. 2d 199 (Fla. 1st DCA 2002) (en banc)(affirming denial of belated appeal where special master's finding that petitioner had not timely requested that attorney file appeal was supported by competent substantial evidence).

[30] *Reese v. State,* 743 So. 2d 1104 (Fla. 4th DCA 1998).

[31] *See Thompkins v. State,* 876 So. 2d 711 (Fla. 4th DCA 2004)(State's allegations of inability to reach prior defense counsel after playing phone tag insufficient to warrant appointment of commissioner).

[32] *See Oliver v. State*, 834 So. 2d 910 (Fla. 5th DCA 2003)(If defense counsel cannot be found or will not communicate with the State concerning whether and appeal was timely requested, a rule that the belated appeal must be granted will encourage bogus claims and increase the number of unwarranted appeals).

[33] *E.g., Safrany v. State*, 895 So. 2d 1145 (Fla. 2d DCA 2005)(granting petition where prior appellate counsel failed to argue unpreserved double jeopardy issue).

[34] *E.g., Mills v. State,* 924 So. 2d 942, 942 (Fla. 1st DCA 2006)(grant[ing] petition for belated appeal where counsel failed to pay filing fee and complete docketing statement); *McClain v. Moore*, 775 So. 2d 1003 (Fla. 1st DCA 2001)(granting petition for writ of habeas corpus for belated appeal due to ineffective assistance of appellate counsel where appeal dismissed for failure to timely file initial brief).

[35] *E.g., Parker v. State*, 906 So. 2d 1273 (Fla. 5th DCA 2005)(granting belated appeal to address appellate counsel's failure to raise sentencing enhancement issue in prior appeal); *Singleton v. State*, 860 So. 2d 1017, 1017 (Fla. 3d DCA 2003)(noting that court had previously granted a belated appeal on the issue of ineffective assistance of appellate counsel for failure to raise the issue of vindictive sentencing).

[36] *See Stigall v. State*, 915 So. 2d 260, 261 (Fla. 5th DCA 2005)(denying defendant's request for belated appeal. . . without prejudice to his opportunity to file a petition stating a legally-sufficient claim of ineffective assistance of appellate counsel); *Goebel v. State*, 848 So. 2d 479 (Fla. 5th DCA 2003)(requiring showing of ineffectiveness of appellate counsel who failed to file answer brief in prior appeal as a precondition to habeas corpus relief). *But see id.* at 481 (Sharp, J., concurring in part and dissenting in part)(In my view, the complete failure of Goebel's attorney to represent him in the state's interlocutory appeal of the suppression ruling in Goebel's favor by not filing a brief or motion or informing Goebel about the proceeding was tantamount to absence of counsel at a critical stage in the criminal case. Thus, it was per se incompetent and prejudicial.)(footnotes deleted).

[37] *Cf. Rodgers v. State*, 822 So. 2d 584 (Fla. 1st DCA 2002)(granting petition for a belated appeal where first appeal dismissed due to failure to pay filing fee).

Direct Appeals From Bankruptcy Courts to Circuit Courts of Appeal Under Amended 28 U.S.C. § 158(d)

by Paul Avron[1]

In conjunction with the recent amendments to the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*,[2] bankruptcy courts, district courts or bankruptcy appellate panels (BAP), may *sua sponte*, or on motions by litigants, certify appeals from bankruptcy court orders, judgments or decrees directly to circuit courts of appeal without intermediate appellate review by district courts or BAPs. The decision whether to accept such a certification lies with the circuit court. There are a handful of decisions, reported and unreported, applying the recently amended statute, 28 U.S.C. § 158(d), and this article reviews them in an effort to assist litigants who seek to certify a bankruptcy appeal to a circuit court.

Prior to the recent amendment to section 158(d), circuit courts had jurisdiction to hear bankruptcy appeals only *after* a district court or a BAP conducted intermediate appellate review as contemplated by section 158(a). Section 158(d) now authorizes, in certain circumstances, that an order, judgment or decree of a bankruptcy court can be certified for direct appeal to a circuit court of appeal and bypass intermediate review by district courts of BAPs.[3] This amendment is procedural in nature. *In re McKinney,* 457 F.3d 623, 624 (7th Cir. 2006). A sampling of decisions interpreting and applying the amended section 158(d) follows.

In *In re Virissimo*, 332 B.R. 208, 209 (Bankr. D. Nev. 2005), the court considered whether the amendments made by BAPCPA to section 522(p) of the Bankruptcy Code, which limit the amount of the homestead available to those who have owned their homes less than 1215 days, are applicable to Nevada debtors. *Id.* The court noted that where a court believes certification is appropriate, the order, judgment or decree must certify it prior to the docketing of an appeal because an appeal divests the court of jurisdiction, s*ee Griggs v. Provident Consumer Discount Co.,* 495 U.S. 56, 58 (1982) (the filing of a notice of appeal is a jurisdictional event), but that if no appeal is taken the certification is rendered moot. *Virissimo*, 332 B.R. at 208, n.1. The court, notwithstanding "fully recogniz[ing] and appreciat[ing] the work done by, and expertise of, the bankruptcy appellate panel and the district court in hearing appeals from the bankruptcy court," and being cognizant of the "tremendous" workload of the Ninth Circuit, found that the issue before it was "one which will recur in Nevada as well as other districts in the Ninth Circuit and will impact the administration of bankruptcy estates until the issue is ultimately decided." *Id.* at 209. The court further found that because the issue before it was a

"hotly contested provision of BAPCPA and is a matter of first impression, there is no question that the Court of Appeals will ultimately be required to determine the question. Hence not merely one, but all three, of the criteria specified in § 158 exist and justify an immediate appeal…." *Id.* In support of its certification, the court noted that while it believes that the statute applies to Nevada residents, another Judge within the Ninth Circuit had held otherwise. *Id.*

The issue before the court in *In re Salazar*, 339 B.R. 622, 624 (Bankr. S.D. Tex. 2006), was whether Congress intended to impose an eligibility requirement of first obtaining credit counseling on putative debtors, but also intended for an ineligible person to receive the benefits of the automatic stay provisions of section 362(a) of the Bankruptcy Code. *Id.* The court answered the first part of the question in the affirmative, but answered the second part in the negative. The context of the court's decision was its denial of the debtors' motion for reconsideration of the court's prior order denying a motion for an extension of time within which to obtain credit counseling required by section 109(h) of the Bankruptcy Code. Noting the "importance of this matter for many consumer debtors and their creditors" the court, *sua sponte*, certified its order to the Fifth Circuit. *Id.* at 634-35.

In *In re Waczewski*, 2006 WL 1594141, *4 (Bankr. M.D. Fla. May 5, 2006), the court considered a motion for rehearing of an order denying a motion to set aside a settlement and compromise or, alternatively, a motion for certification of a direct appeal to the Eleventh Circuit. With respect to the alternative request for certification the court found that the amendments to section 158(d) did not apply because the debtor filed her bankruptcy case prior to the effective date of BAPCPA and there was no indication that these amendments were among those that took effect prior to that date. *Id.* at *5. The court found that in the absence of a clear statement of Congressional intent indicating otherwise, it would not apply the statute retroactively.[4] *Id.* In the alternative, the court considered the debtor's request for certification to the Eleventh Circuit, noting that her sole argument was that a direct appeal would speed up the appellate process. *Id.* at *6. The court found that even if the amendments to section 158(d) applied the request for certification would be denied because "materially advancing a case requires more than arguing that the appeal will proceed faster if it goes directly to the Eleventh Circuit." *Id.* The court found that the debtor failed to meet the requirements for certification,[5] and that merely arguing for speed in resolving an appeal was insufficient. *Id.*

Lastly, in *Figueroa v. Wells Fargo Bank N.A.*, Case No. 06-810840-CIV-GOLD/TURNOFF (S.D. Fla. Feb. 5, 2007) (unpublished), the district court first found that the bankruptcy court's orders were final for purposes of appeal and then found that certification of a direct appeal to the Eleventh Circuit of an order dismissing an adversary proceeding in which the debtor primarily sought rescission of residential mortgages under the Truth in Lending Act was appropriate.[6] The debtor sold her home, then leased it from the purchaser with the right to repurchase it within one year; subsequently, the debtor filed a chapter 13 bankruptcy case and asserted in the schedules annexed to her bankruptcy petition that she owned an equitable (and homestead) interest in the property. *Id.* at 2. The court addressed the finality of this order (and the order denying rehearing) based on the appellees' motion to dismiss for lack thereof, although they also sought certification for direct appeal to the Eleventh Circuit. *Id.* at 2, n.1.[7] After finding that the orders were final for purposes of appeal, *id.* at 3-5, the court first noted that "direct certification should be the exception and not the rule." *Id.* at 5. The court then found that the there was no controlling decision from the Eleventh Circuit or the Supreme Court, the case involved a matter of public importance, that certification would materially advance the ultimate termination of the litigation against the Appellees, and that the questions presented were of public importance. *Id.* at 7, 8, n.4. Like the court in *Virissimo*, *supra*, the district court noted the Eleventh Circuit's "tremendous" workload, but nevertheless found that the legal rights of parties to sale lease-back transactions presented "uncertainty" that would impact law suits—not just in bankruptcy—and would not be resolved until the Eleventh Circuit reached those issues. *Id.* at 7. The district court opined that the Eleventh Circuit would "ultimately be called upon to determine and examine the legal questions presented by this appeal in light of the increasing popularity of the same and lease-back with repurchase option transaction as a means of attempting to avoid foreclosure by homeowners." *Id.* at 7-8.

These cases shed some light on what legal issues will and will not suffice for certification of bankruptcy appeals to circuit courts of appeal, as well as confirming that the amendments to section 158(d) do not apply to bankruptcy cases filed prior to the effective date of BAPCPA. Finally, these case illustrate that certification will be decided on a case-by-case basis.

Endnotes

[1] ***Paul A. Avron*** is an attorney with Berger Singerman, P.A. practicing primarily commercial bankruptcy law and appellate litigation, state and federal.

[2] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).

[3] "(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) [providing district courts with jurisdiction to review final orders of judgments of bankruptcy courts] if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described

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in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a controlling question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken; and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request by a majority of the appellants and a majority of the appellees (if any) to make the certification described in subparagraph (A); then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A). 28 U.S.C. § 158(d)(2)(A)-(B) (Emphasis added).

[4] *Cf. McKinney,* 457 F.3d at 624 (in holding that revised section 158(d) did not apply to the debtor's case which was filed prior to the effective date of BAPCPA, the Seventh Circuit explained that while "the certification provision is procedural…, and that statutory changes in procedures…are normally applied to pending cases," "the presumption that a procedural change is to be applied retroactively falls away when the statute making the change specifies that the statute shall not apply to pending cases…."). *Id.* (internal and external citations omitted).

[5] To the same effect is *In re Berman*, Mo. 04-45 435, 2007 WL 43973, *1 (Bankr. D. Mass. Jan. 5, 2007), where the court found that none of the circumstances enumerated in section 158(d)(2)(A)(i)-(iii) existed.

[6] The author discloses that a colleague of his at Berger Singerman, P.A. is serving as co-counsel to the appellant in this case.

[7] The court noted that the Appellees could not "have it both ways. I am required to make a preliminary determination in all appeals of Bankruptcy Court Orders whether I have appellate jurisdiction. Therefore, Appellees cannot leap-frog from this Court to the Eleventh Circuit without a proper analysis of this Court's appellate jurisdiction." *Id.*

Stopping at the Gate: Your Court's Jurisdictional Limitations

by D. Patricia Wallace[1]

In the summer of 1997, I interned at the Third District with the Honorable Joseph Nesbitt, who taught me an invaluable lesson about power. My first assignment was to decide whether the District Court had jurisdiction over a case on its docket. I concluded that it did not, and the judge agreed. That lesson stuck with me and served me well in a recent appeal before the First District.

Jurisdiction – the court's power to review a case – is the first issue that the appellate attorney or judge must consider. Some attorneys are moved by the question of jurisdiction, impressed by our founding fathers' foresight in establishing competing branches of government. Regardless of your interest in the structure of government, appellate attorneys cannot afford to take jurisdiction for granted. Whether a court has jurisdiction over the matter before it is an increasingly important question these days. Witness the Florida Supreme Court's recent amendment of Florida Rule of Appellate Procedure 9.120(d), which allows us to brief jurisdiction where a district court has certified conflict with another district court.[2] Witness the Florida Supreme Court's occasional reluctance to exercise jurisdiction even though the district court certified an issue as a matter of great public importance or certified conflict with another court. For example, in *Campus Communications, Inc. v. Earnhardt*, 848 So. 2d 1153 (Fla. 2003), the Florida Supreme Court declined to exercise jurisdiction despite having ordered the parties to brief the merits of a question certified by the Fifth District. Similarly, the court has discharged jurisdiction after oral argument after determining that review was improvidently granted.[3]

Most appellate attorneys I know sense that the Florida Supreme Court, like the United States Supreme Court, is increasingly reluctant to exercise discretionary jurisdiction. As Judge Nesbitt taught me, however, it is not just the highest courts that evaluate the extent of their power of review. A case recently before the First District Court of Appeal illustrates how essential it is for appellate counsel on both sides to consider jurisdictional issues, both whether the court has jurisdiction and, if so, what is the extent of its jurisdiction. This article examines *Jacksonville Emergency Consultants, P.A. v. Vista Health Plan*, 941 So. 2d 1262 (Fla. 1st DCA 2006), and discusses how the issue of jurisdiction transformed it from a case of difficult statutory interpretation with enormous implications for the health care industry into a PCA that did not address any of the issues raised in the briefing.

The significance of the jurisdictional issue in this PCA turns in part on the importance of the substantive issues, not only for the parties briefing them but also for health care providers and HMOs operating throughout the State of Florida. At issue was how to interpret Section 641.513(5), Florida Statutes (2005), which requires HMOs to reimburse emergency care providers on the basis set forth in that statute. The HMO, Vista Health Plan, had paid Jacksonville Emergency Consultants (JEC) 100% of Medicare's rates for similar services and argued that this was the appropriate rate under Section 641.513(5), but JEC argued, on the basis of the same statute, that it was entitled to full billed charges. JEC filed its claims with MAXIMUS, a fast-track dispute resolution procedure established by Florida's Agency for Health Care Administration (AHCA). A MAXIMUS panel reviewed the evidence submitted by both parties, consulted with its coding expert, and concluded that the HMO was liable to the provider at a rate of 150% of Medicare.[4] As required by Section 408.7057(4), Florida Statutes (2005),

AHCA accepted the recommendation and entered a final order adopting it.

JEC appealed AHCA's order pursuant to Florida Rule of Appellate Procedure 9.190 and section 120.68(7)(d), Florida Statutes (2005). Both parties directed their briefs solely to the merits: the interpretation of section 641.513(5) and the amount that an HMO owed a provider for emergency services.

Only weeks before oral argument, the Second District released an opinion reviewing another MAXIMUS action, *Baycare Health System, Inc. v. Agency for Health Care Administration*, 940 So. 2d 563 (Fla. 2d DCA 2006). Relying on this decision, Vista moved to dismiss JEC's appeal for lack of subject matter jurisdiction. Like JEC, the health care provider in Baycare had opted to file its claims with MAXIMUS instead of in circuit court. Upon MAXIMUS's recommendation, AHCA entered an order that Baycare subsequently challenged in an appeal with Second District. Baycare argued that it had been denied due process during the MAXIMUS proceedings and that AHCA's orders must be set aside. The Second District disagreed. It concluded that Baycare had not been denied due process because the action of MAXIMUS, which is not a state agency, was not state action and therefore not subject to due process requirements. The Second District likened the MAXIMUS proceeding to arbitration. Where a private dispute resolution process is undertaken voluntarily, even where the process is established by state law, the resulting arbitration order is not state action. *See Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995).

The Second District also held that AHCA had obeyed Section 408.7057. Most significantly, the court held that it lacked jurisdiction under section 120.68(7)(a-b) to review AHCA's order because that order was not based on the agency's factual findings but was merely a ministerial act required by statute. The Court concluded that neither it "nor the AHCA may review the merits of the decision of MAXIMUS CHDR so long as it was entered in accordance with [section 408.7057]." Id. at 570.

In *Jacksonville Emergency Consultants*, Vista argued by analogy to the Baycare decision that the First District lacked jurisdiction under section 120.68(7)(d). Vista argued that because AHCA had not undertaken to interpret Section 641.513(5), there was nothing for the Court to review. Although the First District denied the motion, it affirmed without discussion AHCA's order with a citation to the Baycare decision. The First District concluded that it did have jurisdiction, but apparently only to review whether AHCA complied with section 408.7057. The First District's silence indicates that it was not persuaded that AHCA had interpreted Section 641.513(5), the necessary predicate for review under Section 120.68(7)(d).

The First District's decision not to address the merits of AHCA's order may seem somewhat shocking. After all, this was an order of a state agency, and Chapter 120, Florida Statutes, sets forth several mechanisms for appealing administrative orders. Jurisdiction of the district courts, however, must be expressly conferred by general statute, and there is no statute that confers upon the district courts an unlimited power to review state agency decisions or, as was the case here, the power to review the action of a private entity. Generally there are two mechanisms available to the unhappy party subject to an agency's order: Section 120.57, which provides for additional proceedings before an administrative law judge, and Section 120.68, which restricts the courts to reviewing solely the agency's actions. When the Legislature enacted the statute requiring AHCA to establish an alternative dispute resolution program, it did not provide any means for appealing those decisions. On the contrary, it deliberately rejected a review process pursuant to Section 120.57. *See Health Options, Inc. v. Agency for Health Care Administration*, 889 So. 2d 849 (Fla. 1st DCA 2005). In *Health Options*, the Court concluded that "[i]t appears that the legislature intended … that chapter 120 discipline would be imposed only at the judicial review level via section 120.68." *Id*. at 853. But where, as in *Baycare* and *Jacksonville Emergency Consultants*, the agency merely adopted a recommendation as it was required to by statute, there was no agency action for the courts to review.

The lesson to draw from *Jacksonville Emergency Consultants* is simple, yet crucial: always evaluate the basis for jurisdiction of every issue on appeal. As Fourth District Senior Staff Attorney Kristi L. Bergemann has pointed out, citing the proper basis for jurisdiction helps avoid "unforeseen consequences, such as having an unexpected standard of review applied to your appeal."[5] Moreover, the question of jurisdiction *vel non* provides you yet another means of thwarting your opponent's position and capturing a victory for your client.

Endnotes

[1] D. Patricia Wallace is an appellate attorney with the Law Offices of Steven M. Ziegler, P.A., which focuses its practice on defending and advising managed care organizations throughout the United States.

[2] See In re Amendments to the Fla. Rules of Appellate Procedure, 941 So. 2d 352, 352-53 (Fla. 2006) (amending the prior rule by removing the prohibition against filing jurisdictional briefs where the district court has certified a conflict).

[3] *See Post-Newsweek Stations Fla., Inc. v. City of Miami*, 863 So. 2d 1190 (Fla. 2003).

[4] Prior to *Jacksonville Emergency Consultants* (JEC) filed its claims with MAXIMUS, Vista had paid it 100% of Medicare's rate for services similar to those provided by JEC. JEC argued that it was entitled to full billed charges, which is significantly higher than the Medicare rate. By statute, MAXIMUS was required to determine "the usual and customary rate for similar services in the community." Section 641.513(5), Florida Statutes (2005). MAXIMUS rejected JEC's argument and instead used the rates set by Medicare, the nation's largest payer of health care claims, as evidence of reasonable, usual, and customary charges.

[5] Kristi L. Bergemann, Details, Details: Practical Tips from Appellate Law Clerk's Perspective, The Record, Journal of the Appellate Practice Section, Fall 2006, at 6.

UPCOMING CLE PROGRAMS

Preservation of Error
September 28, 2007

Advanced Appellate Practice and Appellate Certification Review
February 1, 2008

THE FLORIDA BAR APPELLATE PRACTICE SECTION ANNUAL MEETING EVENTS

Discussion with the Florida Supreme Court & Final Round of the Robert Orseck Moot Court Competition

co-presented with the Young Lawyers Division
Thursday, June 28th, 2:00 p.m. - 4:30 p.m. • (Room Crystal G)

Annual Dessert Reception with The Cuban American Bar Association

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Thursday, June 28th, 8:00 p.m. - 10:30 p.m.
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