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The 21st Century Gently Pokes Its Nose Under the Tent of Appellate Courts in Florida –

Rule 2.420 and Confidentiality of Court Records

By Paul Regensdorf

P. REGENSDORF

I. Introduction

So, you're asking yourself, what in the heck does Florida Rule of Judicial Administration 2.420, "Public Access to Judicial Branch Records," have to do with the 21st Century... and someone, please tell me why I, an appellate lawyer/litigation support guru, need to read this article about trial court records???

Well, let me take a crack at these two not unreasonable inquiries.

II. What Does Confidentiality of Documents in the Court Record Have to Do With the 21st Century?

In 2002 and 2003, a number of reports were published by the Legislature and the Judicial Management Council regarding the public's access to the court's records kept by the judiciary and clerks, and they raised questions about access to them in an electronic world. Although progress on actually *building* the electric courthouse of tomorrow has been painfully slow (with some recent acceleration[1]), the Supreme Court of Florida recognized in 2003 and 2004 that our antiquated system of using paper records would neither crawl nor walk, let alone fly, in an electronic, fully accessible court system of the future.

In the paper world of yesterday, and sadly still today, our court records contain an appalling abundance of private and confidential material about litigants and non-litigants alike. No great hue and cry has gone up about this, however, because most of the confidential material is buried deep in the bowels of the clerk's office, effectively hidden from the probing eyes of the public. Our secrets are "protected" by a concept known as "practical obscurity."

The Court was not sanguine about the effectiveness of "practical obscurity" if – some day – the courts in Florida joined the 21st Century (or some would say sort of the 20th) and converted their records to electronic digital records, available to the public, litigants, lawyers and, yes, data miners. So it appointed the Committee on Privacy and Court Records (Privacy Committee) and asked it to study the issues the courts would face if (when???) the paper world faded into the past, overtaken by the inevitability of an electronic

See "Confidentiality" page 17

Message from the Chair

What I Learned From My Fiction Writing Professor, Part II

In my last column, I explained that most of what I know about legal writing I learned from my fiction writing professor. I concluded that most of the essential legal writing skills are simply skills about *writing*. My professor, Jerome Stern, taught me the importance of constant editing. The first draft should never be the last. I also learned that excellence does not come easily; it takes work. But it's worth it.

But as I noted in my last column, Professor Stern taught me much more than that. I still use many other lessons I learned in his first fiction writing class. Years later, Professor Stern taught a course on legal writing, and published an article in the *Florida Bar Journal*. *See* Stern, "Can Lawyers Write English?", 66 Fla. Bar J. 44 (Oct. 1992). In that article, he demonstrates how many of the skills used in writing fiction can be applied to drafting briefs. In fact, briefwriting is much like other writing; it is simply a different genre, like a haiku in poetry or a mystery novel or a newspaper article. It has certain constraints and parameters. It is a document meant more to persuade than to entertain. But like other writing, it must first and foremost maintain the reader's interest.

In his *Florida Bar Journal* article, Professor Stern offers advice well-known to a fiction writer: tell a story. In an appeal, that should be easy to do. By definition, every case is a story about parties who have a conflict with each other. In a fiction story, conflict—whether internal or external—is essential. In an appeal, it is handed to you. The court is interested in how this conflict arose, who the parties are, how the trial court resolved it, why the appellant disagrees.

Another fiction-related point Professor Stern makes is: note only the facts essential to the appeal. This advice is crucial, and is often ignored. Briefs regularly contain many more facts than are necessary for the appellate court to decide the issues. Sometimes this is a result of a desire for thoroughness—a party wants the court to know the background.

Raoul Cantero, Chair, 2010-2011

Sometimes it's because the facts are copied-and-pasted from a complaint or some other document where those facts mattered. But an appeal usually involves only a small part of what happened below. It usually does not matter that the complaint was filed on a certain day, that it was amended three times, that it asserted six causes of action when only one is the subject of the appeal, or that the parties engaged in months of discovery disputes before trial. The issues on appeal will dictate which facts are important *now*, as opposed to which facts were important at some point but have now lost their relevance.

Another point that Professor Stern makes is: use short sentences. Remember that when reading briefs, judges are just like the rest of us. They become *readers*. Readers get tired. Most lawyers write as if they were paid double for long sentences. I have seen sentences that are half a page long. That's a lot to read before you take a breath. Short sentences not only seem more emphatic because they're short; they also establish a rhythm with longer sentences, so that the brief avoids the monotony of consistency.

The next point Professor Stern makes is: read your writing aloud. Adopting that practice will help you avoid many pitfalls, including writing many long sentences. You will notice when words don't go well together, when sentences are hard to get through, when a particular acronym you adopted doesn't work as well as shortening a name. It is good practice for all writing.

Professor Stern's final piece of advice: read and re-read *The Elements of Style*. I've heard this from many writers, lawyers and nonlawyers. When I returned to private practice and joined White & Case, I found a copy of *The Elements* on my desk. I wondered whether someone had read one of my opinions and was giving a hint. Then someone told me that the firm gave copies of the books to all new partners. Good idea. I re-read it. You should, too.

Professor Stern died several years ago. I had already become a lawyer, but not yet a judge. I never got to thank him for everything he taught me about legal writing. So instead I have tried to tell his story.

How to Irk a Law Clerk

By Kimberly Jones

K. JONES

A plethora of resources are devoted to answering the question of how to avoid irritating the judiciary. However, there is another group of individuals who dedicate most of their working hours to reviewing and analyzing your briefs—the staff attorneys and law clerks of the appellate courts. In some courts, these lawyers are the front line of review for your arguments and enjoy the unique opportunity of closely assisting the judges in resolving the case.

According to Justice Scalia, "In my chambers, at least, my law clerks are the principal people with whom I discuss a case. . . . Where I really hone my view of the case is in discussions with my [four] law clerks, each of whom should know the case four times better than I do because . . . each one of them is assigned just one-quarter of the cases."[1] For Justice Stevens, his law clerks' "job is to prevent [him] from looking like an idiot."[2]

Given the view that the job of a law clerk is to protect their judge by knowing the assigned case better than the judges deciding it and the lawyers arguing it, law clerks devote their working hours to scrutinizing your briefs, dissecting your arguments, and verifying your legal authority. During this process, the law clerk sometimes uncovers mistakes or decisions by counsel that cast doubt upon the quality and credibility of a legal argument. The following is a compilation of grievances revealed through an informal survey of the staff attorneys and law clerks of the Florida appellate courts. Although it may come across as a preachy rant from the ivory tower of no billable hours, I hope it can provide some guidance into simple ways to avoid irking a law clerk. Furthermore, as some of the law clerks surveyed expressed, this list of pet peeves is likely inapplicable to the talented and conscientious appellate advocates who are reading *The Record*. (Yes, some clerks really did say that.) Rather, think of this as an education into what the rest of the appellate lawyers do to drive the law clerks crazy.

1 Be Reader Friendly

In school, we learn that fancy report covers can set your work product apart as professional. In the appellate courts, however, those fancy report covers and special binding generally find a one home—the trash can. You can save your client money and a law clerk some time by sticking to the simple methods of binding discussed in the appellate rules.[3] A staple at the top corner of your brief works remarkably well.

In addition, an appendix is a useful tool to the Court that can easily become a hassle. In other words, refrain from attaching a long appendix to your brief. A 100-plus page brief and appendix bound together is <u>not</u> easy to read. If your combined brief and appendix results in a stack of documents larger than The Bluebook, bind and submit it separately. Likewise, do not bind your appendix in a way that makes it totally impossible to read "unless you have the strength of The Situation to hold it open," such as an ACCO Binder across the top of the document. Also, be kind and make it easy for the law clerk to find the order on review by placing it at the beginning of the appendix, rather than at the very bottom.

In some circumstances, such as when you have a very lengthy record, it can be extremely helpful to separate out the key documents on review and submit them in an appendix. This assists the Court in easily retrieving the important documents while reviewing your case. Furthermore, if you cite to a circuit court or county court order or opinion, some courts do not have access to these documents on Westlaw or Lexis. The subscription to these services at the state appellate courts is limited. Accordingly, help a law clerk out by attaching any legal authority that is not published in the commonly used reporters in an appendix. The clerks will greatly appreciate this simple act.

2 We Are Paid to Read What You Write

Law clerks often criticize counsel for failing to represent legal authorities in an intellectually honest way by inaccurately summarizing or misrepresenting a case in an effort to mislead the Court. Basically, you are better off not making bogus arguments or attempting to be sly because you will be caught. This seems elementary, but it happens often enough that many law clerks wonder whether appellate attorneys actually believe the Court lacks the insight to realize that the authority presented does not support the proposition advanced.

The majority of the law clerks surveyed repeated this sentiment. Law clerks want you to realize that they <u>will</u> read your argument closely. They will read the record, and they will read the authority that you cite. As one staff attorney said, "Our jobs depend on us presenting things clearly to the judges. We like getting paid for a living. I like having the ability to buy groceries. So we will follow these arguments back to the record or cited authority because our necks are on the line if we fail to spot such efforts to mislead, confuse, or obfuscate the judges."

If an attorney deliberately makes a convoluted argument in an effort to confuse the Court or the issues, it has an impact on his or her credibility. For example, in one recent case, counsel devoted multiple pages of a brief to presentation of an argument regard-

ing an amendment to certain rules. After the staff attorney carefully read all of the rules and amendments, it was clear that the rules were indeed amended, but the amendment was to a subdivision in those rules that was totally unrelated to the subdivision at issue in the case. Thus, three pages of counsel's "detailed research" into these rules and the related arguments were totally meritless and "actually offensive."

Furthermore, if you quote from an opinion other than the majority opinion (e.g., a concurrence), you must make it clear in your brief that you are quoting from a non-majority opinion. As one law clerk responded, "If I do not discover that you are giving me dicta rather than holding until I read the case, I will be [ticked]. Yes, this just happened 30 seconds ago."

The moral of this story—law clerks *always* read the cases that you cite, and know when you are misrepresenting the law. You can try to misstate the law in the hopes that your opposing counsel will not notice, but it is doubtful that you will get past the scrutiny of a law clerk.

3 Cite Right!

It seems so simple to avoid, but one of the most frequent complaints of law clerks is the failure to use proper citations to legal authority. In the rush to complete a brief, it is easy to sacrifice proper citation when your main priority is presenting your legal argument. In addition, some of the computer programs that are supposed to magically create the table of authorities seem determined to make your citations look sloppy.

However, it is one of the first ways to make a law clerk doubt your credibility. For example, if you omit the designation for a Florida district court, which is easy to do and happens frequently, it looks like you are citing Florida Supreme Court authority. When the clerk pulls up the case to discover it is not from that court, generally every other citation in your brief will be checked again for accuracy and to ensure that you are not misstating the binding authority of a decision. During my time as a staff attorney, I often found that the culprit for most incorrect citations was copying and pasting a citation from Westlaw or Lexis, which do not follow the format prescribed by Florida Rule of Appellate Procedure 9.800. When doing so, remember to check that the court designation follows the appellate rules and that you include the name of the correct court.

Furthermore, despite its tedious nature, inclusion of a pinpoint citation ("pincite") is very important.[4] Some attorneys may erroneously assume that the appellate court does not check the veracity of each proposition in a brief, but this is often the task of a law clerk. As one clerk stated, it is frustrating and time consuming to hunt through a seventeen-page opinion for a minor proposition when no pincite is provided.

In addition, it is important to double-check your page numbers, because the law clerks certainly are. When numbers are transposed or inadvertently incorrect, a law clerk spends a great deal of extra time correcting these citations. In some courts, it is the responsibility of the law clerk to check the accuracy of every citation in a brief and to note in bold typeface any corrections of these citations for the judges. In these circumstances, the appellate judges become aware of each instance where your citations are incorrect.

Also, use block quotes sparingly. Law clerks cringe at an argument that merely consists of a series of block quotes interspersed with a few connecting sentences. This method of legal writing is neither effective nor convincing because it fails to demonstrate how the law applies to the facts of your case. Block quotes are best used when the language presented is pertinent and you could not summarize the premise in a concise fashion. In addition, readers tend to glaze over lengthy block quotes, which can diminish their impact for your argument. With many attorneys struggling to stay within the page limits, omission of unnecessary block quotes is an easy way to slim down your brief.

4 Be True to the Record

I cannot stress enough how important it is to accurately cite to the record. This pet peeve, which was raised by the majority of survey respondents, includes the failure to accurately cite to the record and the absolute failure to cite to the record at all. Although law clerks generally have the luxurious benefit of a bound and prepared record on appeal, it should not be a scavenger hunt to locate and verify the fact you are presenting. For example, some judges require their law clerks to include a record cite for every fact in the summary of the case prepared by the law clerks. A brief that follows this rule is of great value to a law clerk. Furthermore, failure to cite to the record could result in the Court striking your brief for failure to adhere to Florida Rule of Appellate Procedure 9.210(b)(3).[5]

Likewise, please make sure that you are representing the record accurately, because the clerks will be checking the veracity of every single one of your statements. When a brief cites to a document in the record that does not support the fact presented, it is likely that this discrepancy will be pointed out to the Court and possibly questioned during oral argument.

5 Go Green—Be Brief

We have all been cautioned that briefs should be the epitome of brevity and that the page limit is a guideline, not a goal. With this understanding, it is unnecessary to rehash the opposing party's argument in either the answer brief or the reply brief. For example, the following is a waste of space: "Appellant contends [insert long quote from initial brief] (Initial brief, p. 8), but we believe [insert sly insult of appellant.] Appellant also argues [insert long quote from initial brief] (Initial brief,

p. 9)." To some law clerks, this method of legal writing insinuates that the attorney believes that the clerks do not read the briefs, as discussed above. It is the law clerk's job to know what each party is arguing. Their responsibilities include reviewing the opposing arguments to compare the merits of each side. Therefore, you do not need to waste your page restrictions telling the clerks the exact wording of opposing counsel's argument. As one staff attorney explained, "Please don't insult our intelligence."

Likewise, it is completely unnecessary to recite pages of facts that are irrelevant to the issues on appeal. For instance, please save some paper and omit the lengthy discussion on jury selection if you are not raising any issues regarding it. Or vice versa—if the issue is limited to jury selection, please do not explain every detail of the trial. Such verbosity is either (1) just a waste of everyone's time and effort, or worse, (2) an attempt to influence the Court based on the equities of the case rather than the merits of the issue on appeal. Furthermore, it looks sloppy and lazy to copy a large portion of the statement of the case and facts into the argument section instead of simply applying the pertinent facts to the law.

You also do not need to repeat the same proposition over and over and over again. We understand the rules allow you to use fifty pages, but very few cases require that. As is often repeated in reference to appellate writing, it's called a brief for a reason.

6 But Don't Be Lazy

Despite the above warnings, it is essential that you present your arguments in the brief for your case. Attempts to incorporate an argument by reference to the proceedings in the lower court or to the briefs in another case are futile derelictions of your responsibility.[6] "The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."[7] Furthermore, the Florida Supreme Court has held that it is "impermissible under any circumstances" to attempt to cross-reference a brief from a separate case because "it may confuse factually inapposite cases, it leaves appellate courts the task of determining which issues are relevant (which is counsel's role), and it circumvents the page-limit requirements."[8] Accordingly, the Florida Supreme Court held that "the proper method of bringing relevant matters before this Court that are contained in separate records of pending cases is by way of a motion to supplement the record, not by a request for the taking of judicial notice."[9] Any attempts to cross-reference separate records on appeal in pending cases can result in those portions of your brief being stricken.[10]

Despite the clear prohibition against this practice, some lawyers still attempt to incorporate arguments or facts by reference to extrinsic briefs and records. Doing so will only result in those portions of your brief being stricken, or worse, your claim being denied.

7 The Last Word

Another frequent complaint of staff attorneys is when an attorney attempts to slip an argument into a case at a point when the opponent does not have the opportunity to respond, and counsel is not permitted to do so, such as in the last brief filed in a case. From one law clerk's perspective, "such acts are desperate last ditch attempts to slip something in unfairly. The Court does not buy them." Furthermore, do not use the reply brief as an attempt to merely reiterate points in the initial brief. This is just another senseless killing of trees and a waste of the Court's time. Also, please remember to follow the Florida Rules of Appellate Procedure (i.e, you are not authorized to file a cross-reply unless you file a cross-appeal).

8 This Is Not Judge Judy's Courtroom

An appeal should not be an opportunity to make personal attacks on the opposing party. You do not come off as clever by slipping in a snide, offhand comment about your opposing counsel. As one staff attorney explained, "This is not a jury filled with laypeople. We know you have some issues with the opposing side because if you didn't, you would not be in this Court appealing a contentious decision from the lower court." Law clerks much prefer to read an argument that sticks to the facts of the case. Please avoid grandstanding like a trial lawyer, or using underhanded trial tactics, such as filing a baseless motion to strike a brief. As another law clerk succinctly stated, "When I see personal attacks, I assume you can't win on the merits so you are resorting to mudslinging."

9 The Final List

This article will not elaborate on some of the most simplistic errors made by appellate lawyers because, as one staff attorney stated, the people who are reading it "are not the people who need common sense knocked into them." Accordingly, let it be known that any of the following will also instantly cause a staff attorney to doubt the quality of your brief and consequently the quality of your legal argument:

- Unintelligible, incoherent, or incomprehensible writing;
- Failure to proofread or pay attention to details ("If I see that they took the time to get the little things right then they probably got the major things right too.");
- Failure to use proper grammar, punctuation, and citation ("A poorly written brief poorly conveys the party's position.");
- Ignoring the Florida Rules of Appellate Procedure;
- Attempts to circumvent the page requirement (i.e., putting the majority of your argument in single-spaced footnotes – in some courts,

IRK A CLERK
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your footnotes are only going to be removed and placed in the body of the argument anyway);

- Failure to include the proper standard of review, or the basis for timeliness, jurisdiction, or preservation;[11]
- Alternatively, the failure of an appellee to address these issues if they are raised in the initial brief;
- Failure to find relevant, controlling, and easily accessible precedent. If the law clerk finds precedent that you missed, it makes the clerk question all of the analysis provided in your brief;[12]
- Failure to cite to any legal authority, such as making broad legal assertions with no precedent to back it up;
- Failure to cite to more recent cases for the same legal proposition—if the decision is from 1910, find something closer in time to this decade;
- Not applying the facts of your case to the opinion/statute/rule you are citing;
- Failure to develop legal arguments;
- Failure to identify the remedy or relief sought;
- Failure to understand the issue (e.g., raising the issue as one thing but arguing something completely different or incorrect);
- Raising a novel issue, but failing to support it through caselaw or logic (i.e., making the law clerk do the research for you);
- Inviting the appellate court to reweigh the evidence by advancing conflicting evidence that the trial court rejected and ignoring or attempting to discredit evidence the trial court accepted without objection;
- Filing frivolous appeals;[13] and
- Failing to concede error when it is appropriate to do so.

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Endnotes:

1 *In the Opinion of Justice Scalia*, Legal Times (March 11, 2008), http://www.law.com/jsp/article.jsp?id=900005560669 (last visited Oct. 28, 2010).

2 Nina Totenberg, *Justice Stevens: An Open Mind On A Changed Court,* NPR (Oct. 4, 2010), http://www.npr.org/templates/story/story.php?storyId=130198344 (last visited Oct. 28, 2010).

3 *See, e.g.,* Fla. R. App. P. 9.210(a)(3), 9.220(b).

4 *See* The Bluebook: A Uniform System of Citation R. B4.1.2, at 9 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

5 *See R.E. v. Dep't of Children and Families*, 996 So. 2d 929, 930 n.1 (Fla. 4th DCA 2008); *Williams v. Winn-Dixie Stores, Inc.*, 548 So. 2d 829, 830 (Fla. 1st DCA 1989).

6 *See Beasley v. State*, 18 So. 3d 473, 481 n.3 (Fla. 2009).

7 *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990); *see also Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997) (stating that a failure to fully brief and argue points on appeal "constitutes a waiver of these claims").

8 *Johnson v. State*, 660 So. 2d 648, 652 (Fla. 1995).

9 *Id.* at 653 (footnote omitted).

10 *See id.*

11 *Wilson By and Through Wilson v. Duval County School Bd.*, 436 So. 2d 261, 263 (Fla. 1st DCA 1983).

12 *See Fuller v. State*, 867 So. 2d 469, 470-71 (Fla. 5th DCA 2004) ("We assume that the State's failure to cite two cases directly on point, one of which is a controlling decision of this court, was an oversight. We express our sincere hope that the State might be more helpful in focusing the court's attention on controlling case law in the future, especially where, as here, the Appellant is pro se.")

13 *See Walker v. State*, 579 So. 2d 348, 350 (Fla. 1st DCA 1991) ("We caution counsel and pro se litigants that we will not hesitate to sanction persons who initiate frivolous appeals. *See* Fla. R. App. P. 9.410.")

A Day in the Life of a Staff Attorney at the Second District Court of Appeal

By Shannon Tan

Introduction

There are fourteen judges at the busy Second District Court of Appeal, which handles more than 6000 case filings a year. Each judge has a judicial assistant and two staff attorneys. Staff attorneys assist their judge by preparing summaries, analyzing cases, performing research, and drafting opinions. We spend a great deal of time reading, researching, writing, editing, and discussing the disposition of cases.

The Second District Court of Appeal Building in Lakeland, FL

Each staff attorney is typically assigned to handle nine cases a month, although the number can vary depending on the court's caseload. The cases include direct appeals, appeals from the denial of petitions for certiorari, appeals from the denial of other extraordinary writs, original requests for extraordinary relief, and appeals from the denial of post conviction relief. The cases generally follow one of two routes: oral argument or oral argument waived.

Oral Argument Cases

Parties can request oral argument by filing a timely motion with the court. The Second District generally permits oral argument in appeals from most final orders. The court may also sua sponte set a case for oral argument.

Each oral argument case is randomly assigned to a three-judge panel with one judge as the primary judge on each case. The case wallets, which consist of the parties' briefs, the record on appeal, and appendices if filed, are sent to the primary judge's suite about a month before the cases are heard. The primary judge's staff attorneys are responsible for preparing a "summary" for the panel. The summary is not a synopsis of the case. Instead, the parties' briefs are merged into one document that is organized according to the issues presented. The staff attorney will check the record to determine if the appeal is timely and if the order on appeal is reviewable under the Florida Rules of Appellate Procedure. The staff attorney will then review the parties' briefs and the record on appeal to verify the accuracy of citations to the record. He or she will also check the accuracy of the case citations in the briefs. The staff attorney will make note of any misrepresentations so that the judges are not misled by inaccuracies in the parties' briefs. Finally, the staff attorney will attach copies of pending motions and pertinent record documents, such as the orders on appeal, to the summary.

Completed summaries are distributed to each judge on the panel approximately two weeks prior to the scheduled oral argument date. In most cases, the staff attorney will not prepare an analysis or recommendation for the judges prior to oral argument. If the case is complex, however, the primary judge may ask the staff attorney to perform additional research and prepare a memorandum analyzing a specific legal issue or legal issues.

Staff attorneys can watch the oral arguments in the courtroom or on their computers via the court intranet system. Following arguments, the panel will discuss the disposition of the cases and any pending motions. If the primary judge holds the majority view, he or she will be responsible for preparing the opinion. If the primary judge holds the minority view, however, the senior member of the panel will either assume responsibility for drafting the opinion or assign this task to the junior member of the panel.

Some judges will write an opinion themselves and have the assigned staff attorney review it. Other judges will have the staff attorney prepare an initial draft of the opinion and then make changes. After the opinion is drafted, the co-staff attorney and the judge's judicial assistant will review the opinion before circulating it to the other judges on the panel. The opinion is circulated first to the junior judge on the panel, then to the third judge on the panel. The two judges, four staff attorneys, and two judicial assistants will review the opinion for typographical errors, grammar, spelling, content, and citations, and suggest changes to be implemented into the opinion. During this process, the judges may even change their minds as to the disposition of the case after reading the proposed opinion and reviewing the record.

The opinion is circulated to the entire court after all three judges have signed off on the opinion. Court personnel will proofread the opinion for substance, citations, and grammar, and send any suggestions to the primary judge's suite. Occasionally,

a judge will make a request that an opinion not issue as written. Judges may "pull" an opinion if they are concerned that the opinion contains a legal error or if they believe the court should consider the matter en banc. The opinion will not issue until these concerns have been resolved.

After the opinion has been reviewed by court personnel, the clerk's office will issue the opinion on the Second District's website. The opinion will subsequently be published on Westlaw and LexisNexis, and in Florida Law Weekly and the Southern Reporter. The parties may then file motions for rehearing, rehearing en banc, clarification, a written opinion, or certification. The staff attorney will review the motions and make a recommendation to their judge.

Oral Argument Waived (OAW) Cases

In OAW cases, the parties have not requested oral argument or the court did not grant their request for oral argument. The court generally does not grant oral argument for motions or in nonfinal appeals, post conviction appeals, original proceedings, and appeals where a pro se party is incarcerated.

As in oral argument cases, each OAW case is randomly assigned to a three-judge panel with one judge as the primary judge for each case. The wallets are sent to the primary judge's suite about a month before the cases are heard, and the primary judge's staff attorneys are responsible for preparing a summary for the panel.

The staff attorney assigned to a case will also write an analysis for the panel. This legal memorandum outlines the facts of the case, discusses the specific laws that apply to the case, and recommends how the case should be decided. This process involves extensive research and thorough reading of the briefs and the record on appeal. If the case is especially complicated, an analysis could take several days to complete. Cases involving post conviction motions where the pro se defendant raises numerous grounds for relief can be especially time-consuming because the motions are difficult to read and comprehend.

Completed analyses are distributed to each judge on the panel approximately one week prior to the scheduled OAW conference date. Because the judges may be located in Lakeland and Tampa, the judges and staff attorneys can either discuss the cases in person or via video conferencing. During the conference, each staff attorney will present his or her cases to the panel. The staff attorney typically gives a brief summary of the case and explains the analysis and recommendation. The staff attorney will also make a recommendation on the disposition of motions for attorneys' fees. The judges may have questions concerning the record or the legal analysis. If the judges decide to affirm without an opinion, the staff attorney will present a prepared per curiam affirmance decision for the judges to sign at the conference. If the judges decide that an opinion should be written, an opinion will be drafted and circulated using the same procedure as in oral argument cases.

The court recently adopted a new procedure to reduce the time taken to dispose of termination of parental rights and dependency cases. Instead of preparing a summary, the briefs are immediately distributed to the judges. The staff attorney assigned to the case will then prepare an analysis that is distributed by email. The other two judges on the panel will either vote by email or request a conference within seven days. This expedited procedure has resulted in the speedy resolution of cases that are affirmed without an opinion.

Other Duties

Certain cases handled by central staff attorneys are also randomly assigned to each judge. Central staff attorneys handle appeals of summary denials of post conviction motions, some petitions for extraordinary writs, motions filed before a case is assigned to a judge's suite, and requests for emergency relief. When the central staff attorney recommends that an opinion be written, the judge's staff attorneys and judicial assistant will review the central staff attorney's analysis and proposed opinion carefully and make suggestions.


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The Cautious Migration Toward Electronic Filing in Florida's Courts

By Beth C. Schwartz

Florida's court system has been working on automating the process for filing court records for many years now. In fact, the Supreme Court established its first set of rules on electronic filing, or e-filing—which, back then, meant filing by fax—more than three decades ago, in 1979. These rules established the requirement for Supreme Court approval for all e-filing systems implemented in the trial courts. Then in 1996, seeking assistance with reviewing the plans proposed by the clerks of court to implement the e-filing of documents, the court established its first Electronic Filing Committee.

Since these early forays into the domain of e-filing, the court system has proceeded deliberately in its endeavor to facilitate the electronic delivery of court records and supporting documents from lawyers and litigants to the clerks of court. Technology continues to astound the world with its life-changing advances, but, as State Courts Administrator Lisa Goodner often emphasizes, if the new technologies don't provide the courts with outcomes that are at least as good as, if not better than, before, then adopting them would merely squander money and time. To truly improve the administration of justice, e-filing must reduce costs for the court and the clerks; ameliorate case processing and case management; and enhance attorneys' and litigants' courtroom experience and their secure access to the courts—without substantially increasing their costs to use the courts.

Now, after years in development, an e-filing system that will achieve all these goals is ready for release. Starting in early January, Florida attorneys, regardless of where they are located and with which Florida court (and which tier of court) they are filing—and needing nothing more than a computer and web-access—will be able to file their court documents electronically.

The path to this significant breakthrough has not been uncomplicated. Before e-filing could become a reality, the court system had to develop or acquire a statewide e-filing portal: a uniform, public, Internet-based "gateway" or access point for the transmission of electronic court records to and from all Florida courts. Toward that end, in November 2007, the supreme court tasked the Florida Courts Technology Commission, chaired by Eleventh Circuit Judge Judith L. Kreeger, and the Electronic Filing Committee, chaired by Thirteenth Circuit Chief Judge Manuel Menendez, Jr., with developing a plan for the portal, directing them to propose policies to ensure uniformity as well as standards to secure a comprehensive electronic record.

Approved and adopted by the supreme court on July 1, 2009, their report, *Florida Supreme Court Statewide Standards for Electronic Access to the Courts*, identifies the major components of the electronic court; offers a conceptual model of the portal; details the standards for e-filing that must be used by any parties submitting e-filing plans for the court's consideration; describes a framework for developing a baseline for a court case management system; and addresses governance and oversight issues. (Follow this link to access the report: *http://www.flcourts.org/gen_public/technology/bin/Standards-ElectronicAccess.pdf.)*

A few months later, the Florida Association of Court Clerks and Comptrollers (FACC) announced it had built a portal that the courts could utilize. FACC already had an infrastructure for e-filing documents like deeds and for making electronic child support payments; by tweaking this operationally-successful system, FACC was able to develop something that would be useful both to the courts and the clerks.

Soon thereafter, the Supreme Court and FACC began negotiating the terms of two fundamental agreements. The first, signed by eight clerks of circuit court and the clerk of the supreme court, Tom Hall (as the designee of the chief justice), was an interlocal agreement to establish the Florida Courts E-Filing Authority, a public entity that would own the portal and make the business decisions regarding its operation. The second agreement is a development agreement between the E-Filing Authority and FACC providing that FACC will design, develop, implement, operate, upgrade, support, and maintain the portal for the benefit of the E-Filing Authority; as vendor, FACC will also pay for the cost of operating the portal.

Come January, the portal will "go live." Over the course of a year or so, statewide e-filing will grow incrementally: at first, e-filing will not be available in all parts of the state, and e-filing will be possible only in five trial court divisions: probate, circuit civil, county civil, family, and dependency. Moreover, in the early stages, only the Supreme Court and the Second DCA will be able to accept appellate e-filings. Within the year, however, e-filing will expand to include the other five trial court divisions (civil traffic, criminal traffic, juvenile delinquency, county criminal, circuit criminal), and the other four DCAs will gradually be able to accept e-filings as well. (To learn about the various e-filing initiatives that have been approved thus far, follow this link: *http://www.flcourts.org/gen_public/technology/e-filinginfostatus.shtml*.)

Also, only attorneys will be able to e-file at first—in fact, eventually, as e-filing becomes increasingly available in the various trial court divisions, attorneys may be required to

file electronically. In time, however, self-represented litigants will also be able to file documents electronically: FACC is working on a specialized e-filing program that, much like tax preparation software packages, will walk a pro se party through a series of questions and create the pleading for him or her.

As for the costs associated with filing electronically, court users who e-file will pay no more than they would for a traditional paper filing—unless they use an electronic check or a credit card to pay the filing fee. The E-Filing Authority recently approved the use of certain credit cards for paying filing fees (MasterCard, Discover, and American Express), but, because the state has to "break even," e-filers will be responsible for the small merchant fee that credit card companies charge for using their card. So e-filers will pay the normal filing fee—and the merchant fee if they use a credit card—but they will incur no additional expenses in filing electronically.

The E-Filing Authority is in the process of developing a website for the portal (operational after the first of the year, the website will be at *www.myflcourtsaccess.com*). Once that's completed, it will post a promotional video, a kind of comprehensive tutorial, which will demonstrate how the portal works and what filers can expect. The video should help to assuage the anxieties that this momentous shift to e-filing might stir up. For, as Tom Hall, supreme court clerk and E-Filing Authority member, acknowledged, "E-filing is going to be a profound change for the court system; it will change the way court users and courts do business." Nonetheless, he added, "I feel very confident that this system is going to work. There will be some things that we [the eight clerks of circuit court and the Supreme Court clerk] will disagree on," he conceded, but "We're all clerks. We all want to get e-filing up and running to make it easier, cheaper, and more efficient for people to file electronically. We are all in agreement about this," he emphasized.

E-filing is sure to benefit everyone who utilizes or works in the court system: the public and the legal community will have easy and convenient access to the courts; clerks won't have to spend time scanning, processing, copying, and searching for paper documents; and judges and court employees will be able to retrieve case-related documents more readily, which will improve judicial case management and increase the timely processing of cases. In addition to saving time for everyone, these enhancements will reduce the costs associated with using and storing court records in paper form.

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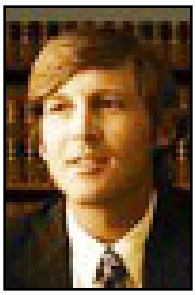
No Introduction Needed?
The Effectiveness of Introductions in Appellate Briefs

By Lance Curry


L. CURRY

At the beginning of this year, a colleague sent me an order from the First District Court of Appeal striking an appellate brief because the brief included a rather long and argumentative introduction. The order striking the brief did not say why the brief was stricken, but the motion to strike the brief argued that the introduction was nothing more than a long, aggressive summary of the argument that was improperly placed before the statement of the case and facts. Florida Rule of Appellate Procedure 9.120 does not expressly authorize the use of introductions, but does specifically state that the summary of the argument must come after the statement of facts.[1]

The First District's ruling in that case piqued my interest as to whether the stand-alone introductions I had come to include in most of my briefs were actually adding value. I started using introductions a few years ago because my opponent had done so in what appeared to me to be an effective manner. The introduction provided the reader—at the outset—with a concise statement of the issues and arguments that the writer viewed most important, as well as the desired outcome.[2] Since that time, the introductions I have used have always been well-received by my clients and colleagues. But what about those who matter most? Do judges and law clerks find introductions helpful or persuasive?

Before seeking the input of the judiciary, I contacted a group of appellate practitioners to see whether they were using a separate introduction. I asked those who do use introductions to describe how the introduction is used and how it differs from a summary of the argument. After receiving numerous responses, I contacted several current and former judges and law clerks to obtain their thoughts.

The vast majority of the practitioners who contributed believe that using a separate introduction at the beginning of the brief is helpful, if not necessary, to guide the reader into the statement of the case and facts. Several of the judges who I spoke with, however, felt that introductions are neither helpful nor permitted under the appellate rules. Other judges felt that introductions can be helpful if they assist the reader in better understanding the issues and arguments. The law clerks were generally receptive to the use of separate introductions, provided that their use was warranted under the circumstances. While it is obviously difficult to please everyone, the discussion below will hopefully aid practitioners in determining for themselves the best way to introduce the case on appeal.

The Practitioners' Views

Although a few of the appellate practitioners I contacted do not use introductions because they are not expressly authorized by the Florida and Federal appellate rules,[3] most of them do. Indeed, some practitioners believe that a stand-alone introduction is a critical component of a brief. Others will use an introduction only under certain circumstances. Here are some of the comments I received, organized by those who always or often use separate introductions, those who use separate introductions only under certain circumstances, and those who seldom or never use them.

A. Those Who Always Or Often Use A Separate Introduction.

A former chair of The Florida Bar's Appellate Practice Section who has taught appellate practice and legal writing for several years stated that he has used introductions in briefs for more than 30 years (without ever having had one stricken). He believes that introductions are critical to set out important themes, put the statement of facts in context, and generally let the reader know what they are about to read and why they are reading it.

One practitioner stated: "My goal with an introduction is to explain what the case is about, from my perspective. Before plunging into the facts, I want the court to know what the case is about. The intro is the first they will learn about the case from me. So it has to be good. I probably spend more time--per word--on the intro than on any other part of the brief."

Another practitioner stated that he uses an introduction to "help focus the court's attention on the posture of the matter and the key issues presented." His advice was to not include "argument or characterizations that approximate argument" because the brief will also contain a specific section summarizing the arguments.

Another contributor commented that it is "hard for any reader to start with either jumping right into the facts or jumping right into the procedural history of the case with no way to focus on what the issues are going to be." She stated that using the introduction makes her nervous "because it is not provided for in the rules," but she does so anyway because she believes "it is helpful if done right."

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Another began including an introduction after hearing a program by renowned writing instructor and author Bryan Garner. She states that Mr. Garner "always states the issue right up front and could not conceive that a brief would start without a statement of the issue." She noted that the Florida appellate rules appear to cover Mr. Garner's concern by requiring that the issues be set out in the table of contents, but she still includes an "Introductory Statement and Question Presented" section before the statement of the case and facts.

Several other contributors emphasized that a good introduction must be concise and focused. If the introduction is too long, it undermines its purpose and begins to resemble a misplaced summary of the argument. The acceptable length varied dramatically (from one to two sentences to three pages), although most believed that one to three paragraphs are enough.

Contributors had varying thoughts about how an introduction differs from the summary of the argument. One practitioner stated that "[u]nlike the summary of the argument, which I really use to boil down the legal arguments into a concise form, the introduction is more a chance to set the theme using the best facts and law." Another stated that the summary of argument "assumes a working knowledge of the facts in the case." She noted that in contrast with an introduction, the summary of the argument flows (a) from the statement of the case and facts, and (b) into the argument. Another stated that unlike the paragraph long introduction that he uses, "[a] summary of the argument is longer, more technical, and will perhaps make sense only after reading the statement of the case." He further noted that "sometimes judges read the summary of the argument before reading the facts, but with a good introduction they won't need to do that."

B. Those Who Use Separate Introductions Under Certain Circumstances

One practitioner stated that he always uses an introduction when representing an appellant, although he finds them "far less useful when representing an appellee." He wisely noted that you must know your audience: "The particular form of the introduction and its substance will vary with the particular court, based on my own view of the court's tolerance for what might appear to be some degree of argument at a place where a statement of facts or case is ordinarily expected."

Another practitioner stated that he would like to not use separate introductions given that they are not expressly authorized, but because his opponent often will have an introduction, sometimes he feels compelled to have his own. He generally tries to use a "one-paragraph introduction (always less than a page) that is not argument but tries to state the issue and a roadmap on how my Statement of the Facts will be organized." He believes that most introductions are just another summary of the argument.

One practitioner stated that he only uses a separate introduction section when he feels like he is "in trouble" and needs "to dramatically re-frame the appeal." He acknowledged that his introductions "border on the argumentative."

C. Those Who Seldom Or Never Use Separate Introductions

The most common comment of those who do not use introductions is that they are not expressly authorized under the state or federal rules. Several practitioners noted that introductions are largely superfluous "if everything one would have included in the introduction simply appears in the brief where it is supposed to appear."

Others believe that the purpose of a separate introduction can be accomplished at the beginning of the statement of the case and facts. As one practitioner put it: "I think a well-done Statement of the Case can introduce the issues in a sentence or two, so that what follows make sense." Another stated: "I only use intros in my statement of facts to give a general overview of the case so that the court knows where I am going. I make it neutral and cite to the record. I do not include an argumentative intro that precedes my facts . . . but I'm seeing them more and more."

So What Do the Judges Think?

Several of the current and former judges I spoke to had strong opinions that introductions are not appropriate in appellate briefs. Judge Peter Webster of the First District Court of Appeal said that he does not need an introduction because after see-

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ing the issues presented in the table of contents, he knows for the most part what the case involves. He believes that it is far more important for practitioners to keep their briefs brief. An introduction is just one more thing to read.[4] Moreover, Judge Webster's reading of Rule 9.210 is that it provides an exclusive list of what a brief should contain.[5] He sees the idea of using introductions as an end run around the rule requiring the summary of the argument to be after the statement of the case and facts. Judge Webster noted that most experienced appellate judges and law clerks will rarely pick up a brief and read it from front to back. The briefs are more often used as a resource to see the specific arguments of the parties. Thus, the intent behind including an introduction is often lost on the judges who rely upon the briefs only for specific purposes.

Judge Frank Shepherd of the Third District Court of Appeal agreed with Judge Webster's reading of Rule 9.210 as an exclusive list. He said that he commonly sees introductions in appellate briefs and finds them most often to be annoying and not helpful or persuasive. He stated that occasionally there might be a very complex criminal case involving multiple defendants and issues where an introduction could be useful. But most often he finds them unnecessary and indicative of a practitioner who is unskilled and unfamiliar with appellate advocacy or who has not focused on the thrust of his or her appeal or petition. He said that if any introduction of the issues is warranted, it can be accomplished in the beginning of the statement of the case and the facts. Adding a separate "Introduction" section unnecessarily lengthens the brief.

Larry Klein, a former judge on the Fourth District Court of Appeal, is also wary of introductions. He noted that most judges are going to rely on a bench memo of some sort to provide an introduction, which will often simply be an unbiased statement of the issues provided by the staff attorneys. It is more important for the briefs to correctly identify those issues and to concisely state the arguments. Judge Klein raised a good question for those who believe introductions are important: if they are so helpful to the courts, why are they not included in the appellate rules? Judge Klein does believe that it is important to insert a separate statement of the points on appeal at the beginning of the statement of the case and facts. By so doing, the brief informs the reader of the important issues before the reader delves into the facts.

On the other hand, a few appellate judges I spoke to have found introductions to be quite helpful if done correctly. Judge Ed LaRose of the Second District Court of Appeal said that he appreciates an introduction in the brief if it helps him focus on the key issues of what the case is about, therefore making it easier to understand what he is reading. He believes that an introduction is not helpful if it is long or overly argumentative.

Former Supreme Court Justice Raoul Cantero, who has returned to private practice and is the current chair of The Florida Bar's Appellate Practice Section, believes that the use of an introduction is "critical" to "provide context to the court for the facts they are about to read." He states that "the judges can't understand the facts unless they understand why they are reading them." His introductions usually include two paragraphs: one to discuss the general nature of the case and some basic background, and another discussing the issues on appeal.

Other judges were more ambivalent about the issue. Judge Chris Altenbernd of the Second District Court of Appeal believes that using a separate introduction is fine as long as it is brief and not overly argumentative, which can immediately turn the reader off. Judge Altenbernd noted that because most appellate judges (including those in the Second District) rely to some extent on a summary prepared by staff attorneys, the writer may want to put the introduction into the first paragraph of the statement of facts. If an introduction is placed in a separate section, it might not make the summary. In the Second District, the required portions of a litigant's brief are not edited so including a brief introduction in the statement of facts would necessarily be included in the staff summary.

Judge Richard Suarez of the Third District Court of Appeals does not have a problem with the use of an introduction in an appellate brief unless the intro is too argumentative or goes on for several pages. To be effective, Judge Suarez believes that the introduction should give a quick overview of what he is about to read. If done right, it allows him to connect ideas to the facts presented. If the introduction is too argumentative or long, he will usually skip over it. Judge Suarez cautioned those practitioners who incorporate an introduction into the statement of facts to be careful not to undermine the statement of facts by including argument. In his opinion, the statement of the facts should provide an objective, straight-forward assessment of the facts pertinent to the appeal based precisely on what the record reflects.

Judge Alan Lawson of the Fifth District Court of Appeals emphasized that, whether done in a separate introduction or at the start of the statement of the case and facts, it is important to let the reader know what the case is about in order to put the statement of the facts in context. Judge Lawson often reads the parties' briefs before he receives the memorandum from court staff, but has not noticed many stand alone introductions. He feels that the purpose of a separate introduction can be accomplished through a good statement of the case and facts.

What About the Law Clerks?

Prior to starting private practice, I served as a law clerk for two years. Unfortunately, I am far enough removed that I cannot even remember whether I saw introductions in ap-

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pellate briefs much less whether I felt that they were helpful and persuasive. I did, however, keep copies of a few briefs that I considered to be outstanding examples of legal writing. Half of them contained introductions and the other half did not. The briefs that contained introductions tended to be longer and involved more complex civil issues, whereas the ones that did not were typically shorter and more straightforward.

Other current and former law clerks I spoke to were generally receptive to the use of separate introductions. One former clerk for the Eleventh Circuit Court of Appeals said that he liked introductions because they allowed him to get a quick assessment of what the case was about and what the parties were going to argue. The introductions or lack thereof would sometimes dictate whether he worked on a particular case or set it aside in favor of another.

A current Florida Supreme Court law clerk who has worked for several different justices thinks that introductions are great in that they give the reader a snapshot of the case and the issues. She said that she surprisingly does not see them that often in briefing to the Florida Supreme Court. A similar comment was made by a former Florida Supreme Court law clerk. She stated that introductions were not common and that she even distinctly remembers a couple of cases where she wished introductions had been used. That said, this former law clerk felt that introductions are not appropriate for all appellate briefs. Only those appeals involving difficult, complex issues or nuanced areas of the law actually merit a quick overview of the case or the law at issue.

A law clerk currently working at the Fifth District Court of Appeal said that she prefers a quick snapshot of the case in a separate introduction as opposed to in the opening paragraph of the statement of the case and facts. She believes that having a separate introduction eliminates the possibility that argument can show up in the statement of the case and facts, which causes her to be less trusting of the author's statement of the facts. She emphasized that the introduction should not exceed a paragraph. In her opinion, if the introduction goes beyond a paragraph or includes too much argument, it becomes distracting.

So What's An Appellate Practitioner To Do?

A practitioner's brief is likely to be read by several different people (including the client), all of whom have their own ideas about what the brief should or should not contain. Nearly every reader seems to agree, however, that introducing the case or the issues in some manner before providing the facts is helpful. Whether you do this through a separate introduction or not is, to some extent, a matter of style and personal preference. As long as your ultimate goal is to make the reader's job easier (as opposed to simply rebuking your opponent with repetitive argument), the reader should appreciate your efforts.

If you decide to use a separate introduction, keep it short and make it more informative than argumentative. The ultimate goal is to help the reader better receive and understand the information and arguments contained in the more detailed portions of your brief. An overly argumentative or lengthy introduction is likely to create more confusion than clarity.
If you have concerns about using a separate introduction, an alternative approach is to provide a paragraph in your statement of the case and facts that succinctly introduces the issues presented and what your client is ultimately requesting of the court. That information is, after all, purely factual. If you go this route, take care not to be too argumentative in framing the issues. The last thing you want to do is have the reader lose trust in your statement of the case and facts because you were overzealous in its opening paragraph. Remember that when dealing with the statement of the case and facts, understated advocacy works best.

Lastly, know your audience. Develop a sense of what works where. Unless the rules are amended to require a specific type of introduction in appellate briefs, each practitioner will have to make up his or her own mind as to how to approach this issue given the circumstances presented. What may work well in one case or court, may not work well in another.

In closing, I would like to thank everyone who contributed to this article. If you would like to comment on this subject, please email me at *lcurry@hwhlaw.com.* If I receive enough comments, I'll try to provide an update in a later edition of *The Record.*

Lance Curry *practices commercial and appellate litigation at Hill Ward Henderson in Tampa, Florida. Prior to joining Hill Ward Henderson in 2003, Lance served as a staff attorney to Justice Charles T. Wells at the Florida Supreme Court. Lance is an honors graduate of the University of Florida College of Law, where he served as a member of the Florida Law Review.*

Endnotes:

1 Fla. R. App. P. 9.210(b)-(c). Rule 9.210 states in pertinent part:

(b) Contents of Initial Brief. The initial brief shall contain the following, in order:

(1) A table of contents listing the issues presented for review, with references to pages.

(2) A table of citations with cases listed alphabetically, statutes and other authorities, and the pages of the brief on which each citation appears. See rule 9.800 for a uniform citation system.

(3) A statement of the case and of the facts, which shall include the nature of the case, the course of the proceedings, and the disposition in the lower tribunal. References to the appropriate volume and pages of the record or transcript shall be made.

(4) A summary of argument, suitably paragraphed, condensing succinctly, accurately, and clearly the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged. It should seldom exceed 2 and never 5 pages.

(5) Argument with regard to each issue including the applicable appellate standard of review.

(6) A conclusion, of not more than 1 page, setting forth the precise relief sought.

(c) Contents of Answer Brief. The answer brief shall be prepared in the same

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manner as the initial brief; provided that the statement of the case and of the facts may be omitted.

2 The "introduction" discussed in this article is not to be confused with what some practitioners call a "preliminary statement," a section used to identify the parties and the manner in which the record is cited. An introduction in an appellate brief—in the eyes of most who use them—provides a short statement of the issues and key arguments on appeal at the outset of the brief.

3 Rule 28 of the Federal Rules of Appellate Procedure states in pertinent part:

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(4) a jurisdictional statement . . . ;

(5) a statement of the issues presented for review;

(6) a statement of the case briefly indicating the nature of

the case, the course of proceedings, and the disposition below;

(7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));

(8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(9) the argument . . . ;

(10) a short conclusion stating the precise relief sought; and

(11) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)–(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts; and

(5) the statement of the standard of review.

4 One practitioner noted that her partner, a former judge on the First District, also disliked introductions and considered their use as one of his pet peeves.

5 A former judge from the Eleventh Circuit Court of Appeals had a similar reading of the federal rule. He stated that under the federal rule, "no 'introduction' [is] permitted."

Appellate Mediation in Florida

by R. Lainie Wilson Harris, Esq.

On July 1, 2010, The Florida Supreme Court adopted five new rules of appellate procedure relating to mediation rules, eligibility for mediation, mediation procedures, appointment and compensation of the mediator, and completion of appellate mediation.[1] Although the rules are new, in Florida, the concept of appellate mediation is not new. The First and Fourth District Courts of Appeal initiated in-house appellate mediation programs in the mid-90s, and the Fifth District started a program in 2001. The benefits of appellate mediation have long been apparent, but in the face of budgetary constraints both the First and Fourth DCA programs were shut down in 2000 and 2001, leaving the Fifth DCA with the only functioning mediation program. [2]

The First DCA's now-defunct program was started in 1996 and patterned after the successful program utilized by the United States Court of Appeals for the Eleventh Circuit in Atlanta.[4] The First DCA program was operated in-house by the court, such that the Court employed first one, then two mediators who reviewed, selected, and mediated cases.[5] The program was successful, settling approximately seventy-five percent of the cases selected for mandatory mediation.[6] Like in the Eleventh Circuit, the process was mandatory for those cases selected as eligible and free to participants. In contrast, while the process is also mandatory for cases selected, the Fifth DCA does not conduct mediation itself, and participants must share the certified mediator's fee.[7]

As of July 1, 2010, there are new rules for appellate mediation applicable throughout the state and in all the district courts of appeal. Rule 9.700 sets out appellate mediation rules, beginning with the application of the rules not just to district courts of appeal and the Florida Supreme Court, but also to circuit courts exercising review jurisdiction under Florida Rule of Appellate Procedure 9.030(c). Different from the DCA in-house mediation programs, pursuant to the new rule, appellate mediation is not mandatory. Instead, the court or a party may refer a case to mediation and either party may object to the referral.[8] The Florida Supreme Court modified the rule to allow for mediation to be delayed, if requested by the parties, until after briefing has been completed. It was observed that:

> Unlike an initial proceeding . . . a controversy on appeal has been resolved in favor of one party over the other, [and] [t]he viability of [appellate] mediation . . . may not be apparent to the parties. Instead, that may not occur until after the briefs have been filed, reflecting the issues upon which review is sought as well as the strengths and weaknesses of the parties' arguments. To accommodate the distinction between trial court and appellate mediation, proposed appellate rule 9.700 including subdivisions (c)(Applicability) and (d)(Referral), is modified to permit the parties to agree to postpone mediation until after the time for filing briefs has expired.[9]

There is a significant timing effect on appellate proceedings under the new rules. Specifically, a motion for mediation filed within 30 days of the notice of appeal tolls all deadlines under "these rules" until it is ruled upon. And, "all times under these rules for the processing of cases shall be tolled for the period of time from the referral of a case to mediation until mediation ends pursuant to section 44.404, Florida Statutes."[10]

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If a party does not wish to participate in mediation, she may move to dispense with mediation pursuant to Rule 9.700(e). The motion may be based only on an assertion that the case is not eligible for mediation as described in Rule 9.710 or "other good cause shown," and must be served not later than 10 days after "the discovery of the facts which constitute the grounds for the motion."[11]

Rule 9.710 sets out several categories of cases that may not be referred to appellate mediation, including: criminal and post-conviction cases, habeas corpus and extraordinary writs, civil or criminal contempt, involuntary civil commitments of sexually violent predators, collateral criminal cases and other matters as may be specified by administrative order.[12] At the time this article was drafted, none of the Florida District Courts of Appeal had executed administrative orders, pursuant to this rule, relating to eligibility.[3] Rule 9.710 demonstrates a departure from the eligibility for the Fifth District Court of Appeal in-house mediation program, which according the Fifth DCA website is available for all final civil and family appeals where both parties are represented by counsel.[14]

Rule 9.720 sets out appellate mediation procedures, beginning in subpart a), with Appearance. Aside from establishing the threshold requirement for an appearance by a public entity required to conduct its business pursuant to chapter 286, the rule generally establishes appearance in person as the default, unless the parties agree to participate electronically.[15] This is a deviation from the First DCA in-house appellate mediation model, which was largely accomplished by telephone conference. Generally, the rule is patterned after the trial court mediation rule, adding that appearance requires the presence of either a party's trial or appellate attorney, but not both.[16]

Rule 9.730 relates to the Appointment and Compensation of the Mediator. Just like trial court mediation, the parties may agree to a mediator or the court will appoint one for them. The committee note clarifies that the rule is not intended to limit the parties' right to select a neutral and expressly explains that prior to the court's order of referral, the parties may select "an otherwise qualified non-certified appellate mediator" and may "pursue settlement with a non-certified appellate mediator even within the ten-day period following the referral."[17] However, "once the parties agree on a certified appellate mediator, or notify the court of their inability to do so," the parties can satisfy the referral only by appearing for mediation conducted by a supreme court certified appellate mediator.[18]

Finally, Rule 9.740 sets out the procedure for completion of mediation. If there is no agreement, the mediator reports the lack of an agreement to the court within 10 days.[19] If a partial or complete agreement is reached, then "it shall be reduced to writing and signed by the parties and their counsel, if any." And, again within 10 days, the mediator shall file a separate report "on a form approved by the court," confirming the agreement.[20]

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Endnotes:

1. Fla. R. App. P. 9.700, 9.710, 9.720, 9.730 and 9.740 (2010); *In re Amendments to the Florida Rules of Appellate Procedure and the Florida Rules for Certified and Court-Appointed Mediators*, 41 So. 3d 161 (Fla. 2010).

2. *Administrative Order 02-1*, District Court of Appeal, First District, January 9, 2002; *Administrative Order In re Appellate Mediation,* District Court of Appeal, Fourth District, August 1, 2001, *www.5dca.org/Mediation/mediation.shtml*

3. *Appellate Mediation at the First District Court of Appeal: How and Why It Works*, by Donna Riselli, Florida Bar Journal 75 Fla. Bar J. 58, 59 January 2001.

4. *Id.*

5. *Administrative Order 02-1*, District Court of Appeal, First District, January 9, 2002.

6. www.5dca.org/Mediation/mediation.shtml

7. Fla. R. App. P. 9.700(b) (2010).

8 .*In re Amendments to the Florida Rules of Appellate Procedure and the Florida Rules for Certified and Court-Appointed Mediators*, 41 So. 3d 161, 162 (Fla. 2010).

9. Fla. R. App. P. 9.700(d) (2010).

10. Fla. R. App. P. 9.700(e) (2010).

11. Fla. R. App. P. 9.710(a)-(f) (2010).

12. *www.1dca.org; www.2dca.org; www.3dca.org; www.4dca.org; www.5dca.org*

13. *www.5dca.org/Mediation/mediation.shtml*

14. *See* Fla. R. App. P. 9.720 (2010).

15. *Id.*

16. Fla. R. App. P. 9.730 (Committee Notes) (2010).

17. *Id.*

18. Fla. R. App. P. 9.730(a) (2010).

19. Fla. R. App. P. 9.730(b) (2010).

court record. Point One for the Court.

The Privacy Committee's report[2] is a wonderful collection of philosophical thoughts on the issues and a prescient listing of recommendations (and objections thereto) about what is needed before our court records can be published across the internet for all to see. One principal recommendation was for the Court to construct a system that, in an electronic world, would allow documents to come into the court system and be "sorted" into those that are confidential by law – exempt from public access – and those that have no such protection from public view.

To accomplish the construction of this sorting system, the Committee on Access to Court Records (Access Committee) was appointed by the Court in 2006 and asked to get an electronic records system ready to hit the digital road. Point Two for the Court. In conjunction with the several rules committees of the Florida Bar, the Access Committee has now produced amended Rule 2.420 to make a step in that direction. This rule is a detailed, if perhaps not perfect, attempt at creating the sorting rules that will allow Florida's courts to enter the electronic age someday soon, providing almost unrestricted public access to court records while fully protecting legally recognized confidentiality. Rule 2.420, Public Access to Court Records, approved by the Court on March 18, 2010, begins to groom the playing field for the entrance of a digitalized court system. Point Three for the Court.

The 21st Century slides its nose under our courts' tent and it began to do so on October 1, 2010.

III. Why Do Appellate Lawyers Need to Know About Rule 2.420?

Appellate lawyers need to know about the working provisions of Rule 2.420 because this rule, effective October 1, 2010, applies to every single document filed in every court (county, circuit, DCA or Supreme Court) and in every division of the court (civil, criminal, probate, juvenile, dependency, traffic, small claims, etc.) and thus permeates the obligations of every lawyer (and non-lawyer) filer of documents in those courts today. The rule clarifies the obligations of lawyers when filing documents, provides for sanctions if those obligations are not met, provides a new procedure for the review of all orders entered by the lower tribunal on matters relating to the confidentiality of documents, and applies equally to original proceedings or appeals in all appellate courts.

In short, appellate lawyers in their own appeals work, and as "lawyers' lawyers" in litigation support roles, need to become fully familiar with the provisions of this rule since the judiciary is still playing catch-up on educational programs relating to Rule 2.420 and many of the other lawyers among the 88,000 in the Bar have yet to devote any substantial time to finding out what this rule requires.

IV. The Basic Application of Rule 2.420

Since the vast majority of documents that enter Florida's court system do so at the county court or circuit court level, the amendments to Rule 2.420 spend a great deal of time describing general principles and procedures that are to be used in a circuit court/trial court to protect confidential documents. The basic procedures and concepts, however, apply similarly in appellate proceedings or original proceedings in an appellate court.

A. The Possible Players Who Can Protect The Confidentiality of Records

The Supreme Court, in the administrative order accepting the Privacy Committee's report, recognized there are three major players who have potential roles in protecting confidential documents from the controlling constitutional principle of public access.[3] Those individuals are the judges, the clerks of court, and the lawyers (or other filers). Although ultimately judges should be and are the final arbiter of legal issues concerning whether a particular document or a piece of information is confidential or should be open to public view, the reality is that judges do not interact with recently-filed documents on a regular basis, or quickly enough, to be an effective "sorter" of the wheat from the chaff. As a result, the role of the judicial officer comes much later in the process, too late to filter the bulk of documents filed in court.

At the beginning of the court filing procedures, however, the other two groups are regularly involved, the clerks and the lawyers (or other filers). Although the clerks' offices in the 67 counties of Florida have well-trained staffs of individuals with substantial working knowledge of the types of documents that have been held to be confidential in the past,[4] the Court also correctly recognized that clerks are ministerial officers and are not vested with discretion (nor given legal training) sufficient to draw fine lines as to whether a particular document or piece of information is confidential or is not. Thus, the role given the clerk in Rule 2.420 as a "decider" of confidentiality issues is a very limited one.

Instead, the principal protector of both the public's right of access to the court's records and of the confidentiality of certain portions of those records was properly placed upon us – lawyers – who are now charged under Rule 2.420 with a specific obligation to know what is (or may well be) confidential and what is not. And when we act, we do so under pain of possible sanctions if we are wrong.[5]

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B. The Document-Filing Procedure Itself

1. The New "Notice of Confidential Information Within Court Filing"

The first thing that a lawyer has to do is determine whether the document to be filed, or any material in the document, is confidential under any one of the 19 designated categories of "automatically" confidential material contained in Rule 2.420(d)(1)(B). In setting up this rule, the Court wanted the Access Committee to identify from over 1,000 possible statutory bases for confidentiality, a much smaller group of documents that could be "readily identifiable" as confidential and whose confidential status was "appropriate" in the court context. AOSC06-20 at 7. The result was a list of 19 types of documents (or specific information contained in documents) that all lawyers are charged with being familiar with. When filing any document containing any of this information, all lawyers are required to bring this to the attention of the clerk, whether in a trial court or in an appellate court, by using a new form entitled the "Notice of Confidential Information Within Court Filing." When this document is attached to a filing reasonably thought to contain confidential information, it draws the clerk's attention to it so that the information contained therein can immediately be kept confidential, i.e., kept away from public access (or from the internet at some point in the future), until such time as the document is finally determined to be confidential or not confidential.

If the clerk (who has a corresponding and independent obligation to recognize these same 19 categories) agrees with the lawyer, that document is then maintained as confidential in the court file, not available for public access, and remains so throughout the proceeding and any appeals unless an order from a judicial officer changes that status.

On the other hand, should the clerk disagree with the filer and feel that the document or the information contained therein is not protected by any of the 19 categories, then the clerk is required to so notify the filer in writing within five days and to keep the document or information confidential for an additional ten days. This period of time allows the lawyer or filer seeking confidentiality an opportunity to ask for protection from a judicial officer.[6]

If the lawyer still wishes to press the point, a Motion to Determine Confidentiality of Court Records must be filed within ten days. The filing of that motion requires the clerk to hold the materials as confidential until such time as the court finally rules on the motion and any appeals are resolved.[7]

2. The Motion to Determine Confidentiality of Court Records[8]

The motion to determine confidentiality is not only used when a disagreement with the clerk occurs. It is also the required vehicle to be used by an attorney each and every time there is a claim that the filing contains confidential information, but that the information does not fall within any of the 19 enumerated "automatic exemptions." Under those circumstances, the lawyer is required to file a motion to determine confidentiality, attach it to the document that is sought to be determined to be confidential, and file the document. The rule then, implicitly or explicitly, places on the filer/movant several additional obligations.

The first is to make certain that the judge assigned to that case is aware of that filing and schedules a hearing on that motion (within 30 days in civil and most other matters, 15 in certain defined criminal matters).[9] The filer/movant is also required to ensure that at the hearing on that motion, a record is created and preserved, either by electronic recording or court reporter or otherwise.[10] No actual transcript is required to be created, but a record of the hearing must be preserved so that the unsuccessful

continued, next page

party can seek review of the trial court's decision. When a hearing is held on the motion to determine confidentiality, the hearing is normally open to the public but any party is entitled to ask the court to hold it *in camera*.[11]

It should be noted that the motion to determine confidentiality and the notices of confidential information in court documents are themselves not confidential and caution should be exercised with respect to the information disclosed in those documents. The case docket will have an entry for each filing, even if the document itself is confidential. The exact title of the motion should be used to bring the issue to the clerk's attention.

In the basic application of the rule, the respondent to such a motion is not expressly allowed to file any written response, although the rule itself does not prohibit it. It is simply silent on the provision for any sort of a written response. I would file one if I opposed the motion and had anything to say. There will be a steep learning curve on these confidentiality matters.

After the court has a hearing (or otherwise agrees with an unopposed motion), an order is required to be filed within 30 days in most proceedings (within 10 in certain defined criminal matters) and must contain certain information: the nature of the confidentiality, the material found to be confidential, those individuals entitled to have access to the document while held in the court file, and other particulars.[12] The order itself is then required to be published by the clerk on the clerk's website and also posted in the courthouse.[13]

One new requirement of Rule 2.420 is that "affected non-parties" who are identified by name in the court filing and who may have an interest in whether or not the information is kept confidential from the public are required to be given notice by the movant so that they may appear and participate in the initial hearing and in any subsequent hearings or review with respect to whether a particular piece of information is indeed confidential.[14]

V. Application of Rule 2.420 in Appellate Proceedings

Rule 2.420 is designed and intended to apply to an appellate court as fully as it does in a trial court. This means that any attorney filing documents in a circuit court on appeal from the county court or from local governmental agencies, in the district courts of appeal (whether appeals or original writs) and the Supreme Court in all types of cases must be mindful of their obligations under Rule 2.420. There are, of course, some obvious differences between the Rule's procedures in trials versus appeals and that is where the rubber meets the road.

First of all, the biggest question that appellate lawyers have is what is their obligation with respect to a trial court record that contains numerous documents filed prior to October 1, 2010, filled with a wide variety of confidential information. The short answer is, with respect to the record on appeal, *an appellant's lawyer has* ***no obligation*** *to scour or cleanse the trial court record coming up to the appellate court to ensure that all confidential matters have been appropriately protected,* irrespective of when the documents were filed in the court below. The effect of this is quite simply that since the appellate courts in Florida may get their records on appeal digitalized sooner than other courts, there may well be confidential information that is at least available online which has never been properly protected by the court below or by clerks or by lawyers below.

Nothing whatsoever stops an appellate lawyer from reviewing the record on appeal and filing a motion to determine the confidentiality of portions of a trial court record after they get up to the appellate court. There is, however, no obligation to do so and the attempted protection of the information contained there is at the discretion of the appellate lawyer.

Since the record on appeal is not technically "filed" by the appellant, there is no opportunity to utilize the new notice form in drawing confidential information to the attention of the clerk. Rather, it appears that if you do wish to scour the trial court record and bring certain confidentiality issues to the appellate court's attention, you will need to do so by filing a motion to determine confidentiality. You cannot re-litigate confidentiality issues lost below, but will be limited to those issues never tested before.

Obviously, appellate courts do not normally hold actual court hearings on any (or at least many) motions. The appellate portion of Rule 2.420 explicitly provides that the non-movant may serve a "response" within ten days of the service of the motion. The rule does not provide for a reply, but similarly it does not expressly prohibit an attempt to serve or file a reply. After the papers have been submitted, the court will review the motion and the response if one is filed and determine the confidentiality of the requested information. Unlike the proceeding in trial court, there is no deadline for the filing of an order by an appellate court.

When an appellate lawyer seeks to have a portion of the record determined to be confidential, which has never been reviewed by the lower tribunal, it is the obligation of the appellate lawyer to inform the trial court clerk of the actions with respect to the confidentiality of that document.[15] The purpose of this is to ensure that if the document is found to be confidential at the appellate level, then any copy retained in the original record of the trial court or returned to that clerk is also similarly designated as confidential so that it is not available for public review.

The foregoing comments specifically apply to confidentiality issues found in the record on appeal itself. As an appellate lawyer takes information or a document from the record on appeal and uses it in a brief or attaches it to a motion or a brief as an appendix, the lawyer then becomes responsible for the protection of the confidentiality of information

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contained therein. It should not be assumed that the confidentiality has been "waived" because that same document otherwise exists in the record on appeal in a non-protected state. It is the continuing obligation of the lawyer to protect confidential information whenever it is filed in a court.

There are relatively few occasions when an appellate lawyer will file a document in an appeal which has not first been filed in the lower tribunal. That said, there certainly will be documents filed in *original* proceedings and could conceivably be documents filed in "Brandeis-brief" situations that will need to be scrubbed for confidential information. There are also a small number of original-type proceedings (such as Bar disciplinary matters) which begin at the DCA or the Supreme Court level. Documents filed in those proceedings have to be protected in exactly the same manner as if they had been filed first in a trial court. The form notice provided in amended Rule 2.420 is presented in a circuit court "format," but the information contained in the form itself can easily be applied to an appellate context by simply changing the designation of the court.

VI. Special Application of Rule 2.420 in Certain Criminal Appeals

In general, Rule 2.420 applies with equal force in all trial level criminal matters, just as it does in civil and other subject matter proceedings in the lower tribunal. There is, however, one important area of criminal practice that was hotly debated before the Supreme Court and that may well still be the subject of further debate.

Prosecutors were particularly concerned about the possibility that information concerning (or even the existence of) plea agreements, substantial assistance agreements, or information regarding a confidential informant might become public knowledge on the street if the courts did not keep the existence and terms of such deals confidential for at least a limited period of time. The Court did not fully agree with the prosecutors and at least the existence of motions seeking confidentiality of such matters will be public on court dockets, even if the court later agrees to hold the information itself confidential. If the motion is filed with respect to agreements such as those noted above, the trial court proceedings are expedited and have to reach a hearing within 15 days. The order has to be issued within 10 additional days, and the rule provides for the "sealing" of such information for specifically limited periods of time, unlike other determinations of confidentiality, which generally last until the end of the case or until reversed by some later court order.

If a substantial assistance agreement or plea agreement is entered into *pending* an appeal, and there is an interest in holding those documents to be confidential, the timetable for that process is not found in Rule 2.420(g) dealing with appellate proceedings. Rather, it is found in Rule 2.420(f)(2) (the criminal subsection), which expedites that process and requires a response within ten days of service of the motion in the appellate court and requires that the appellate court issue a written ruling on the matter within ten days after the response or ten days after the filing of an uncontested motion.

VII. Review of Lower Court Determinations on Matters of Confidentiality

In determining how orders on matters involving confidential documents should be reviewed, the drafters of the Rule 2.420 looked to the closest analogy that existed in the Florida Rules of Appellate Procedure and that was Rule 9.100(d). This subdivision was originally available only to seek review of orders *excluding* the press or public from otherwise public proceedings. Rule 9.100(d) has now been rewritten to apply equally to orders *granting* access to proceedings or documents or *denying* such access to a hearing or a confidential document. This is consistent with the Supreme Court's recognition that the rule revisions must balance the issues of public access and privacy protection.

The process is still called a "petition to review," but the rule has been rewritten to some extent to provide that (1) such petitions explicitly have to be filed within 30 days; (2) the appellate court has to immediately consider the petition to determine whether any stay is appropriate (even if no motion for stay is filed); (3) any motion for stay has to have a certification that the motion is made in good faith and supported by a sound factual and legal basis; (4) the reviewing court is required to hold the subject documents confidential until the resolution of the motion for stay, and (5) all proceedings for a review of such orders under this rule now have to be expedited by the reviewing court. The provision for oral argument was eliminated from the rewritten 9.100(d), not because there is no opportunity for oral argument, but because it was felt that Rule 9.320 allows any party in any proceeding, including a 9.100(d) petition, to request oral argument.

In substance, the rewrite of Rule 9.100(d) is consistent with the overall revision of Rule 2.420. The rule has attempted to strike a very careful balance, demonstrating a concern with the public's constitutional right of access to its records maintained within the court system, while simultaneously and equally protecting an individual's right of privacy if that confidentiality is recognized by Florida law.

VIII. The "Take-Away" from this Article

In my opinion, maybe the most important thing to appreciate from a seminar or from an article is what is the key take-away point.

From this article, you might conclude that this is a terribly tedious rule with serious repercussions if you fail to comply with it … which is

correct; but that is not the take-away. You could conclude that the process of converting our paper system into a functioning electronic court record system will be a difficult one, which is correct; but that is also not the take-away. Or you could conclude that it will be years before the buildup of confidential information inappropriately placed in court files will work its way out so the court records actually being used are scrubbed of confidential information. That also is true, but that is also not the take-away.

The take-away is that Rule 2.420, as well as at least one other rule (Rule 2.425) that is coming down the pike, are designed to make the practitioner, in every field of law and in every court, think twice and then think yet again, about whether it is essential that a particular piece of confidential information (or even just private, sensitive information about another person) needs to be in a court pleading. Many of us have used forms or old complaints or old briefs to draft current pleadings and many of those "forms" include a welter of such things as social security numbers, account numbers, phone numbers, home addresses and the like which, in the future, may allow that information to be published across the internet. If this article accomplishes nothing else other than to remind appellate practitioners in Florida that there usually is no need to put down a person's date of birth, bank account number, social security number, or other private, sensitive information in a pleading or brief, then this article will have accomplished its larger purpose. Rather than creating a lot of work under Rule 2.420 for lawyers and judges to scrub confidential information off of the public record, the real goal of this process is to educate lawyers what is confidential and sensitive and therefore what should be kept out of briefs or pleadings if at all possible.

Paul Regensdorf *is a commercial and healthcare litigator at Stearns Weaver, where he also maintains an active appellate practice. He has chaired the Appellate Court Rules and the Rules of Judicial Administration Committees, and served on the Access Committee which was principally charged by the Supreme Court with drafting Rule 2.420. He also is on the Florida Courts Technology Commission, which currently oversees the development of this rule and e-filing in Florida's courts.*

Endnotes:

1 Appellate lawyers should be aware that although no one is putting a firm date on it, the appellate courts in Florida are putting a hard push on to be the first court system in Florida to have full electronic filing and access. The First DCA is far down that road, the Fifth is catching up, and the rest could go electronic sometime in 2011.

2 The Privacy Committee's report is available on the Florida Supreme Court's website under the heading Public Information linked to the March 18, 2010 decision in the Rule 2.420 case.

3 *See* AOSC06-20.

4 Over the years, most clerks' offices had developed a "common law" of confidentiality that allowed them, usually with the acquiescence if not agreement of judges and lawyers, to keep certain types of documents confidential from certain types of public inspection. After October 1, 2010, there should be a major shift in how documents are determined to be confidential when filed.

5 One quirk or glitch in Rule 2.420 is that at the trial court level, a lawyer can be sanctioned for either over- or under-protecting the confidentiality of a document. *See Fla. R. Jud. Admin.* 2.420(e)(6)). But at the appellate level, the only stated sanction authority is for a lawyer who over-protects a document. *See Fla. R. Jud. Admin.* 2.420(g)(8). The glitch was unintended and should not be relied upon.

6 *Fla. R. Jud. Admin.* 2.420(d)(2).

7 *Id.*

7 Because the motion itself is not confidential, and to ensure that the clerk recognizes, easily and immediately, the legal significance of the motion, it should be styled exactly as noted in Rule 2.420.

9 *Fla. R. Jud. Admin.* 2.420(e)(2).

10 *Id.*

11 *Id.*

12 *Fla. R. Jud. Admin.* 2.420(e)(3), (f)(1)(B).

13 *Fla. R. Jud. Admin.* 2.420(e)(4).

14 *Fla. R. Jud. Admin.* 2.420(d)(4).

15 *See Fla. R. Jud. Admin.* 2.420(g)(3), (6).

Historical Society and Dade County Bar Honor Third District Court of Appeal Judge Gerald B. Cope, Jr.

By Judge Frank A. Shepherd, Third District Court of Appeal


JUDGE COPE

In an elegant yet bittersweet ceremony, graciously hosted by the Third District Court of Appeal Historical Society and the Dade County Bar Association, more than one hundred colleagues and friends of the Honorable Gerald B. Cope, Jr. packed the courtroom of the Third District Court of Appeal in Miami on Friday afternoon, October 22, 2010, to honor and thank Judge Cope for his more than twenty-one years of tireless service to the people of Florida. As one of the longest serving judge on any District Court of Appeal in the state, Judge Cope joined the appellate practice group of the Miami-based Akerman Senterfitt law firm on November 1, where he serves as its co-chair.

Third District Court of Appeal Chief Judge Juan Ramirez, Jr., introduced the program and spoke of the high honor it had been for him to serve on the court with Judge Cope. In accordance with court custom, Chief Judge Ramirez presented Judge Cope with a picture collage of all judges with whom Judge Cope served during his tenure (twenty-three out of a total of thirty-two since the founding of the court in 1957), and nine bound volumes containing all opinions authored by him while on the bench. A prodigiously hard worker and prolific author, Judge Cope was affectionately known by his colleagues as "copious Cope" during his service.

Third District Court of Appeal Historical Society President Lucinda A. Hofmann, who moderated the ceremony, presented Judge Cope with a beautiful engraved clock and also thanked him for his years of service and being such a good friend to the Society. Dade County Bar Association President Steve Davis added his sincere thanks on behalf of the lawyers of Dade County and presented a plaque from the Appellate Court Committee of the Dade County Bar Association. Judge Cope has been a continuous member of the Dade County Bar Association since 1978.

Judge Cope's chosen speakers for the ceremony were former Third District Court of Appeal Judges Phil Hubbart (1977-1996), and Rodolfo Sorondo, Jr. (1997-2002). Judge Hubbart saluted Judge Cope as "an appellate lawyer's dream." Hubbart remarked, "he was the first one to arrive at the Courthouse in the morning and the last to leave." "No case was too small for Judge Cope," said Hubbart. He "reviewed every brief, examined the record, and consulted all of the necessary case law to reach his decisions." Judge Hubbart also remarked on some of Judge Cope's scholarly achievements which no doubt brought Judge Cope to the attention of Governor Bob Martinez as a candidate for appointment to the court, in 1988, including an influential note and law review article in the Florida State University Law Review, *see* "Note, Toward a Right of Privacy as a Matter of State Constitutional Law;"[1] and "To Be Let Alone: Florida's Proposed Right of Privacy,"[2] which influenced the addition of article I, section 23, Florida's right to privacy provision to the Constitution's Declaration of Rights in 1980. Florida is today one of just five states to have such a provision in its constitution. A month before his retirement, Judge Cope authored the widely recognized decision of the court, *Florida Department of Children and Families v. In re: Matter of Adoption of X.X.G. and N.R.G.*,[3] declaring unconstitutional Florida's 1976 law banning gay persons from adopting children. The state has foregone its right to appeal the decision to the Florida Supreme Court.

Former Third District Court of Appeal Judge Rodolfo Sorondo, Jr., currently the chair of the appellate practice group at Holland & Knight, further attested to the many noble qualities which distinguished Judge Cope as a member of the Third District Court of Appeal: integrity, intellect, temperament, and work ethic. "These are the characteristics we expect of any judge," said Sorondo. "Judge Cope absolutely exemplified these characteristics." Then, employing the humorous format in soliloquy for which he has become known in the South Florida legal community, Judge Sorondo entertained Judge Cope and the audience with his insight into the new world of private practice upon which Judge Cope recently has embarked.

Judge Cope thanked the attendees and himself recounted some of his fond memories of his years on the bench and the high honor of serving the community. He praised the "immense work" done by the trial judges in the district and throughout the state, recognizing that unlike appellate court judges, trial judges have no law clerks and usually a limited time to reflect before making a decision. He also took the opportunity to implore the incoming Governor and Legislature to hold the judicial branch harmless from further budget cuts. He beamed with pride as he expressed his anticipation of once again practicing as a member of such a fine legal community.

Judge Cope received his undergraduate degree from Yale University in 1968 and his Juris Doctor from the Florida State University College of Law in 1977, where he graduated first

in his class and served as the Editor-in-Chief of the Florida State University Law Review. He received an LL.M degree from the University of Virginia School of Law in 1992. He was appointed to the Third District Court of Appeal by Governor Bob Martinez in December 1988, and was retained in office by merit retention elections in 1990, 1996, 2002, and 2008. He was elected Chief Judge by his peers and served in that capacity from July 1, 2005, through June 30, 2007. He is an Adjunct Professor of Law at the University of Miami School of Law, where he teaches a course in state and federal arbitration.


JUDGE SHEPHERD

Judge Frank A. Shepherd was appointed to the Third District Court of Appeal in September 2003 by Governor Jeb Bush. He received his undergraduate degree cum laude from the University of Florida in 1968 and his law degree from the University of Michigan in 1972. From 1972 to 1999, he was a trial and appellate attorney in private practice. Prior to his appointment, he served as the Senior Attorney for the Florida Office of the Pacific Legal Foundation. He presently serves as the court liaison to the Third District Court of Appeal Historical Society.

Endnotes:

1 5 *Fla. State University Law Review* 631 (1977).

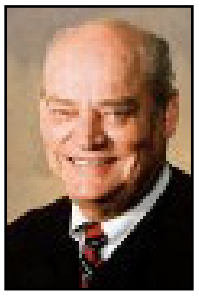
2 6 *Fla. State University Law Review* (1978)

3 45 So. 3d 79 (3d DCA 2010).

IN MEMORIAM

A Tribute to Judge Thomas H. Barkdull, Jr.

By W. Dexter Douglass


JUDGE BARKDULL

This is my tribute to a great friend who I was fortunate to know through most of our adult lives. More than that, he was one friend that commanded my attention when I needed some advice or support. I'm certain many reading had a similar relationship with him. He was always non-judgmental, understanding, and best of all, completely frank.

With that preface these few words will be, at best, a feeble attempt to capture the real Tom I knew and loved.

Our mutual friend, the late Mallory Horne, once told me if you don't like sometimes blunt, sometimes carefully chosen words that you don't want to hear, don't ask Tom's advice. That is what you will get. I found that to be true but I also found he was never demeaning or super critical but advice was given with uncanny understanding and respect and most often the correct, ethical, and honorable course you could take.

Tom Barkdull was a person who was graced with uncommon common sense. This allowed him to quickly reach the right decisions, without frills or editorial restriction.

Common sense also allowed him to see things with clarity and with the ability to find the right path in his personal life and also in the practice of law, his first and last intellectual love. He brought that to the bench.

He was quickly an expert equal to any "specialist" lawyer that appeared before him. This was quite unexpected on the part of such a lawyer and that quickly punctured any facade of superiority, if one existed.

Before his judicial career he was practicing law that was rooted in the continuing post-World War II growth and vitality of Miami and Florida. Tom was sought out for all kinds of large cases and transactions. As a young lawyer he was relied on by many of his seniors. He instilled fierce loyalty in his clients.

Tom never forgot those who gave him his opportunity, particularly the great Marion Sibley.

Those of you who knew Tom knew he loved great seafood. We teased him about that and when accused about representing some of the premier restaurants on Miami Beach, and despite his normal inexpensive eating habits, he received favorable prices which he assumed everybody else paid.

One of my great memories was going to an unpretentious seafood restaurant every Monday in Wakulla County with Tom and Mallory Horne. We told many stories. It was a treat to be with two icons of Florida history: Tom, the great judge. And Mallory, the most influential person to serve in the Florida Legislature.

As everyone reading knows, for 30-plus years he served and led the Third District Court of Appeal in suggesting changes as to how it operated. Primarily because of his efforts, the Third District was considered the most efficient and most reliable of our appellate courts. The other appellate courts adopted many of the practices which this Court established.

Tom really respected Judge Schwartz and often referred to him in his deferential norm as the brains

continued, next page

JUDGE BARKDULL
from previous page

of the court – I told him he should be careful doing that because Judge Schwartz might believe it. He assured me he already did!

Tom was the only person who was a member of all three Constitutional Revision Commissions. In 1998 he was appointed by the Governor. I served with him on the 1978 Commission when he was an appointee of the Chief Justice. On the 1998 Commission, which I chaired, he was the Commission's most knowledgeable member. It was on his advice and by his influence that the rules were crafted and the key to success, as it turned out, was he and I working together, succeeding in a required 3/5 vote to place anything on the ballot. We knew at least one set of appointees were controlled by the House which made it clear this was going to be a partisan fight as far as they were concerned. The Senate members, appointed by Senator Jennings, were given the same free rein to vote their conscience as the three judicial appointments and the Governor's appointees were given.

The actual political party breakdown gave a one-vote margin to the combined democrats, the non-partisan judges, and the Attorney General, a member by designation in the Constitution.

The nine House appointees were instructed how to vote on many issues. The Senate appointees were given instruction to vote their conscience.

As Rules Chair and with a painful memory of the failed 1978 Commission Tom Barkdull, with my cooperation, proposed a rule that would require twenty-two yes votes to put anything on the ballot – this created a non-partisan result.

I can testify that many members worked very hard to produce a sound revision, none harder than Tom Barkdull. Without his experience, respected and completely informed service, it would have been a forerunner of the present party-line voting which has stymied the U.S. government and eliminated a true balance of powers between the three branches of government.

We must take all of our remembrances and walk away today. He loved this place, the Third District Court, almost as much as he loved the Keys and his life-long pleasures fishing those waters.

Another area of importance that he helped establish that beneficially improved our system of justice was the Judicial Qualifications Commission.

I represented a judge in a high level trial in which the JQC, led by Tom's reasoning, decided the judge should be removed from the bench. In an appeal to the Supreme Court my client was fortunate and he was given a reprimand by the Court. I must say it was not my brilliance that achieved that result, it was the difference of philosophy of a majority of the Court to that of Judge Barkdull and his fellow members of the JQC.

As he said in one of our last conversations, he was glad to be back home and to the Keys where his father and grandfather taught him to fish. He passionately loved fishing there with his son and grandchildren. He hoped they love it as much as he did and will pass that on to their progeny. To that end his ashes were committed to those lovely waters where he was most happy.

As Theodore Roosevelt said:

> Only those are fit to live who do not fear to die; and none are fit to die who have shrunk from the joy of life and the duty of life. Both life and death are parts of the same great adventure…unless men are willing to fight and die for great ideals, including love of country, ideals will vanish, and the world will become one huge sty of materialism…


D. DOUGLASS

We all say "we love you Tom and thanks for making our lives better."

Writing a Shorter Brief

By Wendy S. Loquasto[1]


W. LOQUASTO

I believe I am safe in saying that, as appellate lawyers, we are pretty good writers. We were "stars" in our Research & Writing Classes. Many of us were law clerks and wrote for publication. Others have published articles in *The Record* and *The Florida Bar Journal*. Some of us have taught legal writing or appellate advocacy courses. We may have bookshelves full of legal writing books. Dictionaries and thesauri are our friends. Most of us even like *The Bluebook*.

Over the years, we have all attended numerous appellate practice CLEs, and at each and every one of those CLEs, we hear the same thing from the appellate judges: "Write shorter briefs." "Write clear and concise briefs." We all nod our heads in agreement, but under our breath we paraphrase T.S. Eliot — "If I had more time, I would have written a shorter [brief]."

I do not make New Year's resolutions, so I can't claim that I started 2010 with a goal of writing shorter briefs. My resolution came to me instead through the "perfect storm" of events. First, I co-chaired "The Art of Appellate Advocacy in Workers' Compensation" for the Section in October 2009. First DCA Judges Webster and Kahn were on the faculty, and they spoke about how workers' compensation briefs are some of the longest they read. Criminal defendants serving long prison sentences have shorter briefs with fewer issues. I labeled myself "guilty as charged" based on my 40+ page workers' compensation briefs.

This past February, I prepared an appellate practice training seminar for some lawyers at Legal Services of North Florida, Inc., with the aim of encouraging them to pursue appeals. In the process of developing the materials, I reviewed a number of legal writing books and articles and crafted my own materials. First DCA Judge Van Nortwick contributed and offered a time calculation that demonstrates appellate judges have an average of only about two hours for each case. So we included the usual advice to write short, concise briefs.

Then, in March, I had the opportunity to attend a writing seminar hosted by Stetson University College of Law, which featured Bryan A. Garner, who presented "The Winning Brief," based on his book by the same name.[2] In that day-and-a-half seminar, Garner reviewed his "100 Tips for Persuasive Briefing in Trial and Appellate Courts," and there it was again — "Try to come in well under the relevant page limit."[3]

Finally, in May, I attended a CLE on professionalism, which encouraged me to visit The Florida Bar's website and all of its professionalism resources.[4] This led me to the Henry Latimer Center on Professionalism and the "Ideals and Goals of Professionalism" adopted by the Board of Governors of The Florida Bar on May 16, 1990. One of those aspirational guidelines is "endeavoring always to enhance one's knowledge and skills."[5]

It was at this point that the "perfect storm" arrived with a clap of thunder. As someone who strives for professionalism in my practice, I began to ponder how I could trim my briefs down to that 30-page limit I hear the Solicitor General's staff talk about. So I pulled out my autographed copy of *The Winning Brief* and my notes from the Bryan Garner writing seminar I had attended just a few months before.

Madman, Architect, Carpenter & Judge

Through his presentation, Mr. Garner provided tips on composing briefs in an orderly, sensible way and conveying the big picture. Garner uses a "madman," "architect," "carpenter," and "judge" approach to writing.[6]

The "madman" is the brain-storming aspect of writing. Rather than thinking about writing as a simple matter of finding the law and getting it down, instead approach each brief as an opportunity for creativity. This initial consideration is when thoughts and ideas should free-flow from your mind. Think expansively and jot down ideas as they come to you.[7] Always remember, however, that the madman does not get to write the brief.

Exit madman, enter architect. The architectural aspect of writing is planning and stating the issues. Garner points out that this step is the most frequently short-changed one. People simply begin to write too soon — well before they have developed a good working statement of the issues. Writers tend to "knock out" some portions of a brief, thinking they are getting rid of some of the preliminaries before they start on the core of the brief. (Once again, I'm "guilty as charged.") Garner warns that such writing talks around an issue without piercing to its center. He counsels that one should not compose sentences or paragraphs until a good working statement of the issues is completed.[8] This is where his "deep issue" statement comes into play, which I will talk about more below.

Once you have drafted your issue statements, do more research, taking notes as you go along. Tweak or rewrite your issue statements. This stage switches back and forth between madman and architect. As you read a case, think creatively about how it fits into what you are writing. Tie cases in with other cases that relate to your subject. And while you are in this stage, you need to write case briefs — don't just print the cases and highlight portions of them, because that's too passive.[9]

Then it's time to combine the madman and architect by outlining your issues. Garner likes to use a "whirlybird," which is a kind of nonlinear outline. He finds that linear outlines, with the usual Roman numeral listings, can lock a writer in. With the whirlybird, you start with a circle in the center of the page with the name of your project ("Jones AB"). Draw four curvy "wings" off the circle, each with one of the major points written on the line. Then you draw a series of lines off each wing — "feathers," which list everything you can think about that relates to the points, including pertinent case law.[10] (There are diagrams in the book.)

Once you have a whirlybird full of ideas, you turn to the architect, who will study the whirlybird, determine which point will be your lead, and then begin to build a more traditional, hierarchical outline, picking and choosing which "feathers" to include. The point is that the architect works to arrange the material — there's no pressure to write at this point. It's all brainstorming and planning.[11]

Once your outline is done, the "carpenter" arrives to "build" the brief. The carpenter uses the plan and writes. Garner advises to write a draft straight through without stopping to edit. Carpenters need to work unimpeded, and "judges," who represent the editing aspect of writing, can be a nuisance at this point. He thinks that a great secret of writing is keeping the judge out of the way while the carpenter works. Learn to write rapidly, and once the writing is done, let it rest.[12]

The judge then polishes and edits the project. Garner points out that writing and editing are separate functions and that the best writers are rarely the best editors and vice versa. In your role as judge, you'll look at the words with a different eye, as well as with a different aim.[13] This is where you'll revise and eventually get down to eliminating all those "ly" words.

Finally, there's proofreading. It's difficult to do when you have already read through the brief several times as a judge. Garner recommends a fresh pair of eyes, including other lawyers, as well as support staff.[14]

The Deep Issue

In putting Bryan Garner's tips to work for me, I found his "deep issue" statement to be the most useful. Why? Because a deep issue statement goes back to the architect stage — developing your issue before you begin to write. I find that actually writing an issue statement as Garner suggests helps me to focus on what's critical to my argument. It also helps me to present the argument in a planned, logical manner.

So what is a deep issue statement? According to Garner, it's a means of making your primary point within 90 seconds — framing the issue so that the court understands the basic question, the answer, and the reasons for that answer, all within 90 seconds.[15] The deep issue is the ultimate, concrete question that the court needs to answer to decide the point your way. "Deep" refers to the deep structure of the case, not deep thinking. The deep issue is the final question you pose when you can no longer ask "And what does that turn on?"[16]

Garner has a formula for writing a deep issue. It should be composed of separate sentences and should not start with the word "whether."[17] It should be limited to 75 words — he's adamant about not exceeding 75.[18] It should be written fairly, but persuasively, so it only has one answer.[19] It should be cast as a syllogism. You will remember this from your training in logic:

> All men are mortal. [Major premise]
> Socrates is a man. [Minor premise]
> Therefore, Socrates is mortal. [Conclusion][20]

Finally, weave facts into your issue to make it concrete.[21] So, a deep issue is a series of statements, limited to no more than 75 words, that weaves fact and law together so as to logically lead to only one answer, which is in your favor. Garner says it a little differently, but that's the idea.

My experience in writing deep issue statements is that it takes time — lots and lots of time — so much so that I began to fear I'd never get my brief done. I often start out with 100+ words. I tweak and trim and I'm still at 80 or 90. Garner comments that some people think their issues are too complex to be reduced to 75 words. His response: "Don't kid yourself."[22] As I said, he's adamant about the 75-word limit.

I found, however, that the more I tweaked and tinkered, the more focused I became on the ultimate issue. And, as a consequence, the more focused my argument became. And, lo and behold, my argument was more concise and I was able to write a three-issue brief that was 31 pages! In the end, I decided that spending more time writing the issue leads to less time and fewer pages when writing the brief. Garner's quote of Herbert Wechsler of Columbia University on this point is reassuring: "Half my time in writing a brief is spent framing the issue."[23]

So, you may ask, are my briefs now "The Winning Brief"? Time will tell, but with an affirmance rate at around 85-87 percent, I'm not expecting miracles. Practicing law is more than just winning cases, however, it's about being a better, more professional lawyer — enhancing your skills. On that score, I have won, because my briefs are now shorter, clearer, and more concise.[24]

Wendy S. Loquasto *is a shareholder and managing partner in the Tallahassee office of Fox & Loquasto, P.A. She is board-certified in Appellate Practice and works in the areas of workers' compensation, family, civil, and criminal law. She serves on the Executive Council of the Appellate Practice Section and on the Appellate Court Rules Committee.*

Endnotes:

1. Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* (2d ed., Oxford Univ. Press 2003).
2. *Id.* at Tip 94.
3. *See* "Professional Practice" on the sidebar of The Florida Bar's website (www.floridabar.org).
4. Visit the Henry Latimer Center for Professionalism on The Florida Bar's website at *http://www.floridabar.org/tfb/TFBProfess.nsf*

A SHORTER BRIEF
from previous page

/5D2A29F983DC81EF85256709006A486A/70A2904F12D21F4785256B2F006CD781?OpenDocument, and you'll find the Ideals listed there.

5. Bryan A. Garner, *The Winning Brief* (2d ed., Oxford Univ. Press 2003), at Tips 2-6.

6. *Id.* at Tip 2.

7. *Id.* at Tip 3.

8. *Id.* at Tip 4.

9. *Id.* at Tip 5.

10. *Id.*

11. *Id.* at Tip 6.

12. *Id.*

13. *Id.* at Tip 7.

14. *Id.* at Tip 8.

15. *Id.*

16. *Id.* at Tip 9.

17. *Id.* at Tip 10.

18. *Id.* at Tip 11.

19. *Id.* at p.87.

20. *Id.* at Tip 12.

21. *Id.* at Tip 10, p.80.

22. *Id.* at Tip 8, p.56.

23. You'll notice a lot of dashes in this article. That's Tip 57. Garner recommends "Em-dashes" — three hyphens make an em-dash — for interruptive phrases, rather than parentheses. *Id.* at Tip 57, pp. 273-74.

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Comments from the Chair, Appellate Practice Certification Committee
Roy D. Wasson, Miami

8:50 a.m. – 9:05 a.m.
Overview of Appellate Certification Examination Specifications
Christopher Carlyle, The Villages

9:05 a.m. – 9:50 a.m.
Florida Civil Appellate Practice: Part I
Steven L. Brannock, Tampa

9:50 a.m. – 10:00 a.m.
Break

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Florida Civil Appellate Practice: Part II
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Paul Morris, Miami

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John R. Hamilton, Orlando

3:15 p.m. – 3:25 p.m.
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