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APPELLATE ADVOCACY SYMPOSIUM

INTRODUCTION

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A few years back, a distinguished Florida judge complained to me that law-review scholarship was largely irrelevant to what he did as a judge. His view is shared by other notable jurists, who lament the decline of scholarship that is useful, or even understandable, to the practicing profession.¹

In this symposium, we hope to “swim against the current” by publishing a series of articles that the judiciary and the bar will find useful. When we solicited writers, we invited them to address legal issues relevant to the appellate bar but also welcomed them to share their personal insights into appellate practice. What follows is a combination of both.

The first article is by Judge Charles R. Wilson of the United States Court of Appeals for the Eleventh Circuit. His subject is *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit*.² Judge Wilson offers valuable in-

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1. See Richard A. Posner, *Legal Scholarship Today*, 115 Harv. L. Rev. 1314, 1320 (2002). In a more whimsical moment, Judge Posner has suggested that the apparent wastefulness of legal scholarship might be understood by analogizing to salmon breeding. In the wild, some 6,000 salmon eggs must be produced to yield two fish capable of living to maturity. Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 Mich. L. Rev. 1921, 1928 (1993).

2. Hon. Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 Stetson L. Rev. 247 (2003).

sights into the process by which appeals become opinions. His article examines, for example, the procedures through which the court determines whether to grant oral argument,³ the processing of cases in which oral argument is granted,⁴ the method the court uses to decide whether to write and publish an opinion,⁵ and the structure and style used by Eleventh Circuit judges in writing opinions.⁶

Appellate lawyers Sylvia Walbolt and Joseph Lang, Jr. offer a fascinating treatment of amicus briefs in *Amicus Briefs: Friend or Foe of Florida Courts?*⁷ Particularly valuable is the authors' survey of several distinguished jurists and appellate lawyers concerning the best use of the amicus brief.⁸ According to the authors, many amicus briefs are of little use to the courts.⁹ Amicus briefs often attempt to "weigh in" on one litigant's side, thereby diluting their value, when they might provide the court perspective on the implications of a decision.¹⁰ The authors expand on their subject by providing empirical data on the use of amicus briefs in Florida and federal courts.¹¹ In concluding, the authors advocate procedural change in the courts' use of amicus briefs, including recognition of the role for such briefs when the Supreme Court makes its initial jurisdictional decisions.¹²

The next article is by Judge Philip Padovano, who is widely known as the leading authority on Florida appellate practice. Judge Padovano serves on the First District Court of Appeal and authored *Florida Appellate Practice*.¹³ In this symposium, Judge Padovano offers an overview of *Motion Practice in Florida Appellate Courts*.¹⁴ He covers an array of subjects, ranging from the

3. *Id.* at 250–250.

4. *Id.*

5. *Id.* at 253–257.

6. *Id.* at 257–266.

7. Sylvia Walbolt & Joseph Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?* 32 Stetson L. Rev. 269 (2003).

8. *Id.* at 276–281.

9. *Id.* at 269.

10. *Id.*

11. *Id.* at 281–283, 285–286.

12. *Id.* at 307–308.

13. Hon. Philip Padovano, *Florida Appellate Practice* (2001–2002 ed., West 2001).

14. Hon. Philip Padovano, *Motion Practice in Florida Appellate Courts*, 32 Stetson L. Rev. 309 (2003).

procedures to be followed in filing a motion,¹⁵ to the forms of relief available by motion.¹⁶

Tracy Raffles Gunn next offers a useful discussion of *Original Proceedings in Florida's Appellate Courts*.¹⁷ The author describes the special purposes for each of the writs falling within the Florida courts' original jurisdiction.¹⁸ She also addresses the special procedures that apply in original proceedings, and the particular documents filed to initiate and respond to writ petitions.¹⁹ In concluding, Ms. Gunn addresses the preclusive effects of writ proceedings and methods of appealing writ decisions.²⁰

Steven Brannock and Sarah Weinzierl discuss the oft-criticized per curiam affirmance (PCA) in *Confronting a PCA: Finding a Path around a Brick Wall*.²¹ The authors address situations in which a PCA may not be the end of the line. Among the suggested paths to further review are filing consolidated motions for a panel rehearing and a rehearing en banc;²² asking the court to write an opinion;²³ asking the court to certify an issue to the Florida Supreme Court;²⁴ and appealing, in special circumstances, to the Florida or United States Supreme Court.²⁵ The authors stress that these paths are "rarely appropriate (and rarely successful),"²⁶ but they provide valuable insight into the uncommon situations in which a PCA is not the end to appellate review.

Barbara Green next discusses the numerous practical problems that may arise when enforcing an appellate court's decision.²⁷ In *Cracking the Code: Interpreting and Enforcing the Appellate Court's Decision and Mandate*, Ms. Green explains that a trial court's implementation of the "ministerial" mandate may not

15. *Id.* at 311–323.

16. *Id.* at 324–346.

17. Tracy Raffles Gunn, *Original Proceedings in Florida's Appellate Courts*, 32 Stetson L. Rev. 347 (2003).

18. *Id.* at 349–356.

19. *Id.* at 356–363.

20. *Id.* at 363–365.

21. Steven Brannock & Sarah Weinzierl, *Confronting a PCA: Finding a Path around a Brick Wall*, 32 Stetson L. Rev. 367 (2003).

22. *Id.* at 375–381.

23. *Id.* at 381–385.

24. *Id.* at 385–387.

25. *Id.* at 387–391.

26. *Id.* at 375.

27. Barbara Green, *Cracking the Code: Interpreting and Enforcing the Appellate Court's Decision and Mandate*, 32 Stetson L. Rev. 393 (2003).

always be simple.²⁸ She discusses the peculiar problems that arise when applying the doctrines of “the law of the case” and judicial waiver.²⁹ Ms. Green emphasizes that correct implementation of an appellate court’s decision depends on two factors: careful drafting by the appellate court, and careful interpretation by the lower court.³⁰ The author considers what trial courts can and cannot do on remand and offers especially valuable comments about implementing fee awards in dissolution-of-marriage cases.³¹

The next article is by Judge John M. Scheb, Senior Judge for the Second District Court of Appeal, and Raymond T. (Tom) Elligett, Jr., authors of *Florida Appellate Practice and Advocacy*.³² Their article, *Stating the Case and Facts: Foundation of the Appellate Brief*, emphasizes guiding principles when presenting the facts to an appellate court.³³ Drawing on their own considerable experience and the wisdom of other appellate experts, the authors discuss such timeless drafting themes as: avoiding needless detail,³⁴ stating the facts in light of the standard of review,³⁵ and balancing the desire to advocate with the obligation to remain objective.³⁶

The final article is written by Stuart Markman.³⁷ The author was “commissioned” to answer the question of how best to respond to a lawyer who engages in questionable briefing practices. Mr. Markman’s response focuses on two regrettably common situations — the lawyer who departs from the record,³⁸ and the lawyer who uses inflammatory language.³⁹ Mr. Markman provides insight into the relative merits of informally contacting the offending lawyer with the hope that he will remedy his own

28. *Id.* at 395.

29. *Id.* at 395–400.

30. *Id.* at 402.

31. *Id.* at 400–407.

32. Raymond T. Elligett, Jr. & Hon. John M. Scheb, *Florida Appellate Practice and Advocacy* (2d ed., Stetson U. College of L. 2001).

33. Hon. John M. Scheb & Raymond T. Elligett, Jr., *Stating the Case and Facts: Foundation of the Appellate Brief*, 32 *Stetson L. Rev.* 415 (2003).

34. *Id.* at 416.

35. *Id.* at 419.

36. *Id.* at 420–421.

37. Stuart C. Markman, *Responding to Appellate Lawyers Who Cross the Line*, 32 *Stetson L. Rev.* 425 (2003).

38. *Id.* at 425–429.

39. *Id.* at 429–430.

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transgressions, filing a motion to challenge the transgression, and addressing them in one's responsive brief. The author's suggested responses are a blend of professionalism and good strategic sense. Mr. Markman also states the case for purging the appellate vocabulary of words like "fallacious," "specious," "incredible," "misrepresent," "disingenuous," and "misleading."⁴⁰

I hope that appellate lawyers and judges will benefit from the articles as much as I have.⁴¹

40. *Id.* at 430.

41. Additional articles concerning appellate advocacy will be published in the Fall 2003 issue of the *Stetson Law Review*.