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INTRODUCTION

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This issue of the *Stetson Law Review* is co-sponsored by the Center for Excellence in Advocacy at Stetson University College of Law.¹ Stetson takes great pride in training students not only to think like lawyers, but also to advocate like lawyers.² Additionally, Stetson takes seriously its responsibility to help promote the high standards of the legal profession through continuing legal education.³ With this symposium issue, Stetson continues its commitment to train and assist students and lawyers to professionally and effectively litigate for their clients.

This issue is solely dedicated to the subject of advocacy. It includes Stetson's first annual update on Florida advocacy case law. The update includes summaries of seminal cases over the last year in the areas of evidence, criminal, civil, and appellate proce-

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1. The Center was established in 2000 to combine the different aspects of advocacy and skills training at Stetson. The Center consolidates skills courses, clinical opportunities, competition teams, and continuing legal education programs to enhance Stetson's ability to train students and practicing lawyers in all areas of professional legal advocacy.

2. Black's Law Dictionary provides that an advocate is "[a] person who assists, defends, pleads, or prosecutes for another." *Black's Law Dictionary* 60 (Bryan A. Garner ed., 8th ed., West 2004). Stetson uses the term "advocacy" to refer to all the skills necessary to represent a client's interests from the initial client-intake interview to the representation of the client in post-judgment and appellate practice.

3. Stetson U. College of L. Off. for CLE, *Overview of CLE*, <http://www.law.stetson.edu/cle/overview.htm> (accessed Oct. 15, 2004). Stetson has been sponsoring seminars since the 1960s. Each year, Stetson presents more programs with more registrants than any other law school in Florida. In 2000, Professor Robert D. Bickel won the American Bar Association Harrison Tweed award in recognition of his work championing interdisciplinary CLE for his Higher Education Program. Stetson U. College of L., *Robert Dale Bickel*, <http://www.law.stetson.edu/faculty/bicke/default.htm> (accessed Oct. 15, 2004).

ture, and trial practice. Our hope is that practicing lawyers will find the update helpful for quickly accessing the current state of Florida law.

This volume also includes articles about some of the most contentious advocacy issues in Florida today. Judge O.H. Eaton, Jr.⁴ examines the criminal procedure rules in death penalty cases and how recent United States Supreme Court decisions impact Florida's procedures.⁵ This issue also contains an article by Professor Michael P. Allen⁶ on the use of the civil procedure rules in end-of-life cases, focusing on the Terri Schiavo case.⁷ The struggle between the Florida Legislature and the Florida Supreme Court in defining the Rules of Evidence as procedural or substantive is discussed in an article by Michael P. Dickey,⁸ the chair of the Florida Code and Rules of Evidence Committee.⁹ Finally, we have included the transcript of Lawrence J. Fox's¹⁰ speech from the William Reece Smith, Jr. Distinguished Lecture in Legal Ethics,¹¹

4. Judge Eaton is a Circuit Court Judge for the 18th Judicial Circuit in Florida. Eighteenth Judicial Circuit Court, *Judges' Biographies: Judge O.H. Eaton, Jr.*, http://www.jud18.flcourts.org/18th_stuff/seminole/jb_eaton.htm (accessed Oct. 15, 2004).

5. Hon. O.H. Eaton, Jr., *Capital Punishment: An Examination of Current Issues and Trends and How These Developments May Impact the Death Penalty in Florida*, 34 *Stetson L. Rev.* 9 (2004).

6. Professor Michael P. Allen is a professor at Stetson teaching courses in Civil Procedure, Remedies, Constitutional Law, and Complex Litigation. He is also co-coach of two of Stetson's moot court teams. Professor Allen has been awarded the Award of Excellence in Professionalism and Career Development and the Golden Apple Achievement Award. In addition, Professor Allen was named the Best All Around Professor. Stetson U. College of L., *Michael P. Allen*, <http://www.law.stetson.edu/faculty/allen.htm> (accessed Oct. 28, 2004).

7. Michael P. Allen, *Life, Death, and Advocacy: Rules of Procedure in the Contested End-of-Life Case*, 34 *Stetson L. Rev.* 55 (2004).

8. Michael Dickey is a partner at Barron, Redding, Hughes, File, Fensom, Sanborn, and Kiehn, P.A. in Panama City, Florida. Barron, Redding, Hughes, File, Fensom, Sanborn & Kiehn, P.A., *Michael P. Dickey: Partner*, <http://www.barronredding.com/dickey.htm> (accessed Oct. 15, 2004).

9. Michael P. Dickey, *The Florida Evidence Code and the Separation of Powers Doctrine: How to Distinguish Substance and Procedure Now That It Matters*, 34 *Stetson L. Rev.* 109 (2004).

10. Lawrence J. Fox is an internationally recognized trial lawyer at the Philadelphia firm of Drinker, Biddle, & Reath, LLP, which specializes in corporate and securities litigation. He is a fellow in the American College of Trial Lawyers and The American Bar Foundation, and a member of the American Law Institute. He was also chairman of the American Bar Association Standing Committee on Ethics and Professional Responsibility from 1996-1997 Drinkle, Biddle, & Reath, LLP; *Lawrence J. Fox*, http://www.dbr.com/attorney_bio.asp?lastname=Fox&Attorney=86&Office=&Status=PracticeArea=&I2=Search (accessed Oct. 28, 2004).

11. The William Reece Smith, Jr. Distinguished Lecture in Litigation Ethics is an

which evaluates the effects of the Enron scandal on attorney-client confidentiality.¹²

In our lead article, *Capital Punishment: An Examination of Current Issues and Trends and How These Developments May Impact the Death Penalty in Florida*, Judge Eaton surveys the procedural issues in death penalty cases.¹³ In 1976, Florida was the first state to attempt to enact a death penalty statute¹⁴ consistent with the United States Supreme Court ruling in *Furman v. Georgia*.¹⁵ Since the statute's enactment, fifty-nine people have been executed¹⁶ in Florida, making Florida fifth in the United States in total executions since 1976.¹⁷ Currently, 364 inmates are on death row in Florida.¹⁸

endowed lecture series honoring William Reece Smith, Jr. Stetson U. College of L., *Inaugural William Reece Smith, Jr. Distinguished Lecture in Ethics and Annual Inns of Court Banquet Set for Thursday: Lawrence Fox to Speak on Client Confidentiality in the Wake of Enron, Arthur Andersen Scandals*, <http://www.law.stetson.edu/communications/news.asp?id=54> (accessed Oct. 15, 2004) [hereinafter *Distinguished Lecture*]. Professor Smith has been a member of the Stetson faculty since 1957 and currently teaches Professional Responsibility. Stetson U. College of L., *Wm. Reece Smith, Jr.: Distinguished Prof. Lecturer*, <http://www.law.stetson.edu/faculty/smith.htm> (accessed Oct. 15, 2004). Professor Smith is a past president of the American Bar Association and a past president of the Florida Bar Association. *Id.*

The lecture occurred during the annual Inn of Court banquet on January 29, 2004. *Distinguished Lecture*, *supra* n. 11, at <http://www.law.stetson.edu/communications/news.asp?id=54>. The banquet is the last vestige of a lawyer-training program established at Stetson patterned on the concept of the historic English Inn of Court system. Under the plan, Stetson law students lived apart from non-law students and, during their period in residence, associated "around the clock" with experienced teachers. Each month, prominent lawyers would speak about current topics in law and ethics at an Inn of Court dinner. Although Stetson no longer requires students to live apart, we continue that tradition by holding an annual Inn of Court banquet. The Inn of Court banquet provides students the opportunity to network with some of the distinguished members of our local legal community and judiciary. *Id.*

12. Lawrence J. Fox, *Can Client Confidentiality Survive Enron, Arthur Andersen, and the ABA?* 34 *Stetson L. Rev.* 147 (2004).

13. Eaton, *supra* n. 5, at 9.

14. Ken Driggs, *A Current of Electricity Sufficient in Intensity to Cause Immediate Death: A Pre-Furman History of Florida's Electric Chair*, 22 *Stetson L. Rev.* 1169, 1207 (1993); Eaton, *supra* n. 5, at 12.

15. 408 U.S. 238 (1972).

16. Fla. Dept. of Corrections, *Execution List: 1976-Present*, <http://www.dc.state.fl.us/oth/deathrow/execlist.html> (accessed Oct. 15, 2004).

17. Fla. Dept. of Corrections, *Corrections Offender Network: Death Row Roster*, <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (updated Oct. 14, 2004).

18. Floridians for Alternatives to the Death Penalty, *Executive Statistics Summary-State and Year*, <http://www.fadp.org/exinfo.html> (accessed Oct. 15, 2004).

Judge Eaton discusses the potential impact of *Ring v. Arizona*¹⁹ on Florida's capital punishment law.²⁰ In 2002, the United States Supreme Court ruled that a jury must decide the aggravating circumstances in the death penalty phase beyond a reasonable doubt.²¹ Justice Anstead of the Florida Supreme Court has called this "the most significant death penalty decision from the U.S. Supreme Court in the past thirty years."²² The Florida death penalty statute²³ combines the use of a jury recommendation with the final penalty decision left to the judge's discretion.²⁴ The full impact of the *Ring* decision on imposing the death penalty in Florida is yet to be seen, but Judge Eaton explains the possible effects this ruling may have.²⁵

Additionally, the article discusses the effect of another recent Supreme Court decision, *Crawford v. Washington*.²⁶ In 2004, the United States Supreme Court turned the evidence world upside-down when it overturned twenty years of law on the impact of the Confrontation Clause on the use of hearsay in a criminal case.²⁷ Judge Eaton attempts to predict whether *Crawford's* new requirements will apply to the penalty phase and exclude hearsay evidence that has traditionally been admissible.²⁸

Finally, the article uses the recommendations of the Illinois Commission on Capital Punishment to formulate improvements to the Florida death penalty scheme.²⁹ Judge Eaton's nine recommendations include possible answers to the problems in the Florida scheme raised by *Ring* and *Crawford*.³⁰ The article suggests that if the Florida Legislature does not make the improvements, then Congress will.³¹

19. 536 U.S. 584 (2002).

20. Eaton, *supra* n. 5, at 30-35.

21. 536 U.S. at 609; Eaton, *supra* n. 5, at 27.

22. *Duest v. State*, 855 So. 2d 33, 57 (Fla. 2003); Eaton, *supra* n. 5, at 30.

23. Fla. Stat. § 921.141 (2004).

24. Eaton, *supra* n. 5, at 13.

25. *Id.* at 30-35.

26. 124 S. Ct. 1354 (2004).

27. Eaton, *supra* n. 5, at 38-39.

28. *Id.* at 39.

29. *Id.* at 42.

30. *Id.* at 52-53.

31. *Id.*

Although Florida does not have the corner on the market in end-of-life cases, it has certainly had its share. Professor Allen has written a comprehensive article entitled *Life, Death, and Advocacy: Rules of Procedure in the Contested End-of-Life Case*,³² which examines the effect of civil-procedure laws on the controversial Terri Schiavo case, which, as the author describes, is a case study in the use and abuse of the rules of civil procedure.³³ Professor Allen uses this extraordinary dispute to explore the ins and outs of the use of civil-procedure rules in an end-of-life case.³⁴

The procedural machinations discussed in Professor Allen's article cannot be adequately summarized in this introduction. The article focuses on three significant considerations for the litigator in these types of cases: choice of forum,³⁵ framing the requests for relief,³⁶ and use of appellate review.³⁷ Professor Allen explains how each of these factors can impact the litigation and urges the reader to be very familiar with the use and abuse of civil-procedure rules in these life-or-death cases.³⁸ Suffice it to say, the author does a brilliant job explaining the use of the rules to prolong or terminate life. Regardless of your opinion on the justness of either party's position in this controversy, you will enjoy learning how each side in this case used the rules to further its agenda.

Michael Dickey's article, *The Florida Evidence Code and the Separation of Powers Doctrine: How to Distinguish Substance and Procedure Now That It Matters*,³⁹ discusses the continuing debate over the characterization of rules of evidence as substantive or procedural.⁴⁰ This article defines why this distinction is uniquely important in Florida evidence law.⁴¹ The Florida Constitution clearly delegates to the Florida Legislature the authority to create substantive law⁴² and reserves to the Florida Supreme Court the

32. Allen, *supra* n. 7.

33. *Id.*

34. *Id.*

35. *Id.* at 82–84.

36. *Id.* at 84–87.

37. *Id.* at 87–89.

38. *Id.* at 82–91.

39. Dickey, *supra* n. 9.

40. *Id.*

41. *Id.* at 111.

42. See Fla. Const. art. III, § 8.

power to control procedure in Florida courts.⁴³ The legislature has limited authority in the area of procedural rules; it can veto or repeal rules, but not amend or replace them.⁴⁴ Until about two years ago, this scheme seemed to work without a problem in developing Florida's evidence law.⁴⁵ However, as the author points out, in recent years the Florida Supreme Court has begun to look suspiciously at evidence rules enacted by the legislature under the auspices of substantive law.⁴⁶ This distinction now makes a difference and creates the need to formulate a working test to distinguish which evidence rules are procedural and which are substantive, the subject of Mr. Dickey's thoughtful article.⁴⁷

Mr. Dickey's article also discusses five formulas for distinguishing rules as substantive or procedural.⁴⁸ He effectively makes the point that the framework courts use is primarily determined by the context in which the question arises.⁴⁹ For example, when courts attempt to determine whether a rule is procedural and, therefore, does not run afoul of the *ex post facto* provision of a state or federal constitution, courts have typically found most rules of evidence to be procedural.⁵⁰ The guidelines that currently exist, according to Mr. Dickey, are ill-suited to answer the questions created by the Florida legislative-judicial debate.⁵¹

Based on the inadequacies in those models, Mr. Dickey proposes a test based on the underlying policy that the rule seeks to further.⁵² The article explores the use of a functional approach to distinguish between procedural and substantive rules.⁵³ Mr. Dickey proposes the use of the language of Federal Rule of Evidence 102 as a basis for the test.⁵⁴ Procedural rules of evidence are those rules that further the administration of justice and, specifically, those that are "directed [at] the ascertainment of the

43. Fla. Const. art. V, § 2; Dickey, *supra* n. 9, at 111.

44. *Id.*

45. *Id.* at 109-110.

46. *Id.* at 110.

47. *Id.* at 111.

48. *Id.* at 120 n. 56, 121.

49. *Id.* at 113-114.

50. *Id.* at 114-115.

51. *Id.* at 115-116, 119, 123-124, 141.

52. *Id.* at 111, 140, 142.

53. *Id.* at 140-146.

54. *Id.* at 141.

truth.”⁵⁵ Therefore, in Florida they would be within the sole province of the Florida Supreme Court.⁵⁶ Evidence rules that are enacted to “advance public policy goals”⁵⁷ would be substantive and the legislature would be empowered to enact such laws.⁵⁸ Mr. Dickey makes a persuasive case for this proposed distinction, and this framework will assist in the important constitutional discussion in Florida.⁵⁹

Finally, this volume includes the comments of Lawrence Fox,⁶⁰ the William Reece Smith, Jr. Distinguished Lecture in Legal Ethics keynote speaker, entitled *Can Client Confidentiality Survive Enron, Arthur Andersen, and the ABA?*⁶¹ Mr. Fox takes a hard look at the effect of the Enron scandal, SEC legislation, and ABA Ethics 2000 Commission on attorney-client confidentiality.⁶² He paints a bleak picture for both attorneys and clients in this atmosphere of blame. Mr. Fox takes the reader (as he did the audience) on an amusing ride on the snowball that has rolled over the attorney-client relationship.

His remarks conclude with the observation that the role of the attorney is being altered.⁶³ He urges us to appreciate the different roles played by professionals in our society and not to mix those roles to the detriment of our clients.⁶⁴ Mr. Fox’s lecture was a wonderful tribute to its namesake William Reece Smith, Jr.

The Advocacy Center hopes that this issue is the first of many you will keep and use to assist you in representing clients.

55. *Id.* at 141–142.

56. *Id.* at 111, 142.

57. *Id.* at 142.

58. *Id.*

59. *Id.*

60. *Distinguished Lecture, supra* n. 11, at <http://www.law.stetson.edu/communications/news.asp?id=54> (accessed Oct. 10, 2004).

61. Fox, *supra* n. 12.

62. *Id.* at 150–157.

63. *Id.* at 158.

64. *Id.* at 158–159.

