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The Record

JOURNAL OF THE APPELLATE PRACTICE SECTION

www.flabarappellate.org

Volume X, No. 4 **THE FLORIDA BAR** **June 2002**

Brief Writing: True Confessions of a Legal Grease Monkey

Reprinted and edited with kind permission of the author, Judge Chris W. Altenbernd

JUDGE ALTENBERND

The step-by-step approach that I recommend in this outline is similar to the approach I used as a practicing attorney. As a lawyer, however, I often wrote briefs in excess of forty pages. Since becoming a judge, I have developed a fondness for the short brief. I am convinced that almost any long brief would be more persuasive if edited to reduce its length by at least 20%. I am more convinced than ever that success as an advocate is not measured in pages, but in ideas effectively transmitted to another human mind. Sloppy legal writing is merely a symptom of sloppy legal thinking. Sloppy thought is not persuasive.

SIXTEEN STEPS TO AN EFFECTIVE BRIEF:

1. Establish the Proper Frame of Mind.

Your goal when writing a brief is to advocate a legal position for the benefit of your client. Your audience is the court. If you are trying to achieve some other goal, think again. If you are writing for your client, your adversary, or the newspaper, send your brief to them, not to the court.

Remember:

A. Judges are very busy. They read mounds of material.

B. Appellate courts are lawfully constrained by:

1. jurisdiction;

2. the proper scope of review;

See "Brief Writing," *page 10*

In Memoriam: Paul Mendelson, Head of the Legal Department, Dade State Attorney's Office

by Roberta Mandel[1]

Most of his neighbors thought Paul was just a pleasant guy who came out wearing that same old robe day after day to retrieve the morning newspaper. His friends knew him as a good guy who treated everyone well, as a friend who they could always call upon for needed advice, as a pretty decent tennis player, as a gentle man who loved to laugh, as a good father and a very happily married man.

It wasn't until Paul passed away on January 26, 2002, at the age of 49, that his friends, neighbors and even

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INSIDE:

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Message from the Chair:

The Demise of Appellate Mediation: Fact or Fiction?

I naively assumed nothing dramatic would occur during my reign as the Appellate Practice Section chair. After all, appellate practice rarely engenders the type of controversy or change our sister sections routinely encounter. I assumed wrong. Appellate attorneys witnessed -- albeit unknowingly -- a fundamental change in our practice this past year.

Over the last ten years, appellate mediation slowly expanded in our state appellate courts. This year, two district courts of appeals suddenly disbanded their mediation programs. Another district instituted appellate mediation, but with a financial twist.

In short, appellate mediation is transforming.

The Beginning

Your first appellate mediation likely occurred in the federal appellate system. The Eleventh Circuit Court of Appeals has a long standing and much imitated appellate mediation program. The program's chief mediator, Lowell Garrett, is based in Atlanta. Other mediators are stationed in Miami and Tampa. The Eleventh Circuit mediators select cases for mediation, and conduct the entire process, including extending the time to file briefs. The court is unaware what cases have been sent to mediation, or the result of it. The court funds the program.

The Eleventh Circuit program has been wildly successful and a model for other mediation programs throughout the country. Lowell Garrett assigned three factors contributing to its success:

(1) the quality of the mediators, who are respected by the appellate bar;

(2) the court has consistently supported the efforts of the mediation center, because it believes mediation is an integral part of the appellate court process; and

(3) the program has not been treated as a numbers game for the benefit of the court.

Garrett summed up the program's success by describing the court's philosophy: the program provides a forum for the parties to consider settlement, not just a process to clear the court's docket.

The Followers

With the success of the Eleventh Circuit program, state court appellate mediation soon followed. Yet these appellate mediation programs touted easing appellate court congestion.

In July 1996, the First District Court of Appeals piloted the first appellate mediation program approved by the Florida Supreme Court. The program was run through a separate mediation office. The mediators selected cases for mediation. The mediators were employees of the court and the program was funded by the court. Like its Eleventh Circuit counterpart, parties did not pay to participate in the program.

In early 1999, the Fourth District implemented appellate mediation. The program was run by two full-time state funded mediators. The clerk's office was minimally involved in the program. The mediators screened the cases for suitability and participation was mandatory once selected. The court was generally not made aware of cases elected for mediation.

An analysis was ultimately conducted to determine the efficacy of the Fourth District's program. The statistics revealed that judges more cost-effectively disposed of cases than mediators. In July 2001, the Fourth District voted to discontinue its appellate mediation program. However, the court agreed to monitor the Fifth District's pilot appellate mediation program. The First District has also discontinued appellate mediation.

The New Wave of Appellate Mediation.

Beginning July of 2001, the Fifth District instituted its pilot program for civil appeals originating from the Ninth Judicial Circuit. Unlike its predecessors' programs, two judges certified in mediation select cases for mediation. Once selected, mediation is mandatory and must be completed within 45 days so that the appeal can move forward.

The Fifth District's program is unique because the mediators are not state funded court personnel; the cases are mediated by private mediators the parties choose from a list of qualified mediators. If the parties cannot agree, the court appoints one.

The program is set to expire at the end of this bar year, but will continue if successful. According to Judge Sharp of the Fifth District, the court has asked the Florida Supreme Court to extend the program for one year and will soon vote on whether to expand the pilot program to all circuits in the Fifth District. This expansion is needed to enlarge the pool of mediation cases, and to make a better informed evaluation of the pilot program.

Running a Successful Appellate Mediation Program

The experience of the various appellate courts is somewhat simplistic: appellate mediation success depends on the program's purpose. Court funded programs that seek to save a court money may not achieve this goal. Statistics disclose that appellate courts can more cost-effectively resolve appeals than state funded mediation. If money is the object, the future might be privately funded appellate mediation.

— Siohban H. Shea, Chair

Mechanics of a Petition for Writ of Certiorari to the United States Supreme Court: A Brief Overview

by Ron Renzy, Section Member

Once you get an adverse ruling from a United States Court of Appeals or a State Supreme Court, the next decision is whether or not to file a Petition for Writ of Certiorari to the United States Supreme Court. This is an important decision. The appellate practitioner must consider the cost and time of doing a petition as well as the likelihood that it will be granted.

The process of writing a petition is largely rule based. The rules state that a "petition for a writ of certiorari will be granted only for compelling reasons." Rule 10, while not exclusive, gives guidelines as to the kinds of cases that the Court will consider when looking at petitions. There are three types of cases more likely to be considered by the Court.

The first is where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this [Supreme] Court's supervisory power". Whether this kind of certiorari may be granted can best be determined by researching various cases, both at the court of appeal level and at the states' highest courts regarding federal law. Of course whether it is an "important matter" is debatable, one must try to imagine what a Supreme Court justice thinks is "important", even though that is difficult. The same could be said for those cases that have "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." This is one of those cases that, hopefully, you will know it when you see it.

The second basis for certiorari review is where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals". This is also conflict certiorari, except this portion of Rule 10 applies to review of a state court decision, whereas the first part deals with a court of appeals. Otherwise, the research process should be the same.

The final basis for certiorari review is where "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this [Supreme] Court, or has decided an important federal question in a way that conflicts with relevant decisions of this [Supreme] Court." Here, prior decisions of the Supreme Court become relevant. One must look to see if the Court has ruled on the issues contained in the practitioner's case and whether of not there is any conflict. If there is none, one must determine whether the question of law is important enough that the Supreme Court should decide that issue. Once again, since granting a petition for writ of certiorari is discretionary, one must try to envision what the justices will think about the case and its issues. It should be also be remembered that certiorari will not be granted just because the lower court was wrong, no matter how a particular party is affected. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Once it is determined that certiorari may be available, how does one get it? This is done by filing a petition for writ of certiorari with the Clerk of the Supreme Court, within 90 days of the final judgment of the court from which you are seeking review. Within those 90 days 40 copies of a petition must be filed that comply with the Rules of the Court.

Rule 14 governs the contents of the petition, as well as the order of those contents. The appellate practitioner, prior to beginning the petition, should carefully study this Rule. After the cover page, the first inside page is the questions presented for review. This should be a short and concise statement of the legal question, or questions, for which the petitioner is seeking review. These statements cannot be argumentative or repetitive. The question presented will be assumed to include every subsidiary question fairly included therein. Only the question presented will be considered by the Court.

After the question presented comes a list of all parties to the lower court proceeding, unless the caption contains all of the names. A list of parent companies and non-wholly

continued, next page

This newsletter is prepared and published by
the Appellate Practice and Advocacy Section of The Florida Bar.

Supreme Court of Florida Discussion Open to Attendees of The Florida Bar's Annual Meeting

The Supreme Court of Florida's open discussion with members of The Florida Bar is hosted each year by the Appellate Practice Section. The meeting with the Supreme Court Justices provides a rare opportunity to ask questions in an informal setting. Past discussions have included a broad range of questions and answers, including trends in constitutional law and theory, the merits of PCA decisions, the use of computer technology in the practice of law, and individual justice's experiences on the bench.

The Discussion with the Supreme Court is open to all attendees of The Florida Bar's Annual Meeting. Please come, ask questions of the Court and encourage others to join us. This year's discussion will be held on Thursday, June 20, 2002, from 3:30 p.m. to 4:30 p.m. at the Boca Raton Resort and Club.

Later Thursday night, the Appellate Practice Section hosts its annual dessert reception, at which the Adkins award and the Section's first Pro Bono Award will be presented. The reception features a cordial bar, large selection of desserts, and an ice cream bar for kids of all ages! We look forward to seeing you and your families at the annual meeting.

WRIT OF CERTIORARI
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owned subsidiaries must be included. This is followed, assuming the petition is over five pages, by the table of contents. Next comes a table of citations, official and unofficial, of all final orders and opinions entered by courts and agencies in the case. This would be the ruling for which one is seeking review plus all prior final orders and opinions. There will likely be several, because a lower appellate court, prior to seeking review from the Supreme Court, would almost always have already reviewed the case.

A statement of the basis of jurisdiction comes next. This is to be a concise statement, including the judgment sought to be reviewed, the date of any rehearing and the statutory provision jurisdiction. A verbatim statement of the constitutional provisions, treaties, statutes, and ordinances follows this, along with reference to regulations involved in the case. If there are lengthy they may be in the required appendix.

The next section of the petition is a statement of facts. This should also be concise. If the petition is from a state court judgment, one must specify how and when the federal issue was raised. This is for both the state appellate court as well as the trial court or administrative tribuneral of first instance. How the federal question was passed on by those courts must also be specified with specific references to the record. If the relevant portions of the record are voluminous, they should be included in the appendix. If review is sought from a U.S. court of appeals, the basis of federal jurisdiction in the trial court must be stated.

After the statement of facts is the most important part of the petition -- the argument. This is where the appellate practitioner gets to persuade the justices to hear the case. This may be the only chance to persuade the Court. This is also where style and creativity come into play. In a few pages it must be argued why the highest court in the land should consider a case and the important issues that it represents. Generally, the petition must persuade the readers, the justice's and their staff, that a clear and irreconcilable conflict exists between the case at hand and another. Then certiorari is appropriate.

After the argument is the mandatory appendix. The appendix contains reprinted verbatim versions of all opinions, orders, findings of fact and conclusions of law in the case from the beginning of the case to the present, as well as other material essential to understand the petition. The material should be placed in reverse chronological order, starting with the most recent, and working backwards.

After the petition is constructed, formatted, printed and sent to the Court and the opponent, it is now up to the Court. The Court may: (1) summarily dispose of the case: (2) may grant the petition and schedule the case for briefing and oral argument, or; (3) deny the petition.

This article is intended to be brief overview of the petition mechanics. As with any other area of practice, one must study the rules. Sweeping changes in the law must start someplace.

PAUL MENDELSON
from page 1

some of his family members learned of Paul's many accomplishments and his tremendous impact on Florida's criminal justice system. The headlines just gave a glimpse of the man who was the head of the legal division of the Miami-Dade State Attorney's Office.

I was fortunate to have Paul as both a friend and as a colleague. Paul Mendelson was the man to consult whenever anyone needed to make a tough legal decision. Paul advised not only all of the prosecutors in his office, and the trial judges, hundreds of people who gathered for Paul's funeral learned that Paul also advised defense attorneys and anyone else who needed his sage advice. He was the lawyer who was trusted to draft bills that the Legislature would then turn into the laws that would later be used in trials throughout the State. Paul Mendelson, in fact, was one of the primary authors of the Florida Punishment Code, as well as the primary author of the Constitutional Amendment on the sale of guns at gun shows.

Paul was born in New York and left the Big Apple to attend law school at the University of Miami. He often joked that he moved to Miami, since he would never have to shovel snow in Florida! Paul graduated from law school in 1978 and from there went to work at the Florida Attorney General's Office, where he worked until 1984. In this capacity, Paul argued cases before every level state court, including the Florida Supreme Court. Paul also handled cases in the United States District Court, and argued cases before the United States Court of Appeals for the Eleventh Circuit. After a short time in private practice, he was hired by Janet Reno who at the time was Miami-Dade State Attorney.

In 1993, Miami-Dade State Attorney, Katherine Fernandez Rundle, asked Paul to assume the responsibility of being the lawyer for all the lawyers, all 300 of them and to the State Attorney. Paul enthusiastically accepted his new position and immediately put his brilliant legal mind to good use.

After assuming the position of head of the legal division at the Miami-Dade State Attorney Office, Paul Mendelson became involved in just about every major case. He recently was one of the two prosecutors involved in O. J. Simpson's road rage trial. Other notable cases Paul worked on include Joyce Cohen's murder trial and post conviction motions; Willie Brown (murdered a police officer's wife); Harold Snowden (police officer accused of sexual battery on children); Douglas and Dennis Escobar (murdered police officer Victor Estefan); Labrant Dennis (murdered a University of Miami football player and his girlfriend); Sabretech (airline company held criminally responsible for the death of many people due from sub standard safety procedures in the ValuJet crash); Joe Carollo (mayor who was charged with domestic violence battery against his wife).

Paul's appellate experience was put to good use, as Paul was the person to see if one of the assistant state attorneys wanted to pursue a state appeal. Paul would discuss the merits of pursuing the appeal. Paul, was also the person who I personally spoke with whenever I was working on a direct appeal, and I felt that the State had to concede, because the defendant's argument was valid. If there was any question, Paul always took the high road. Paul didn't believe in making any arguments that weren't meritorious. Paul's integrity was never questioned.

Paul, died on his way home after putting some extra hours at his office, on the weekend. It didn't matter that it was a Saturday, when work needed to be done, Paul would do it. Miami-Dade State Attorney Katherine Fernandez Rundle was quoted in the newspaper as saying, "That was Paul, If a police officer called him in the middle of the night to ask him how to act, he was willing to help. He never said no."

Paul Mendelson was held in such high regard that his funeral was standing room only, with hundreds of others finding no parking close to the chapel and having to walk several blocks, only to have to then stand outside of the chapel. Paul's young widow, Debbie, one of my closest friends, spoke eloquently of the man that she married twenty- two years before. In fact, Debbie wrote an editorial in the Miami Herald thanking members of the legislative and legal community for their support, as there were so many people who offered their condolences, it was impossible to personally contact each.

Paul Mendelson was also a devoted father to his two children who he adored, Rachel and Daniel. He was also a loving son and brother.

Paul gave willingly of his time and energy and never sought (indeed avoided) any credit or acknowledgement of his efforts. The day before he died, in the midst of investigating two high profile murders, Paul was assisting Senate and House staff in the crafting of legislation to reenact the "Three Strikes," law that had recently been struck down. The State of Florida lost a loyal, trusted and hard working public servant. Those who personally knew Paul, lost a true friend. Paul Mendelson might have lived a short life, but he leaves a long list of accomplishments.

Roberta Mandel *is an Assistant Attorney General in the Miami Criminal Appeals Division of the Department of Legal Affairs. She graduated from the University of Miami School of Law in 1984. She is a member of the Criminal Procedure Rules Committee.*

Do you like to WRITE?
Write for *The Record!!!*

The Record relies on submission of articles by members of the Section. Please submit your articles on issues of interest to appellate practitioners to Susan Fox, Editor, P.O. Box 1531, Tampa, FL 33601, or e-mail to *SusanFox@ macfar.com.*

The Appellate Certification Examinaton: Arbitrary? Capricious? Impossible?

by Nancy C. Wear, Coral Gables

Back in November 2001, I wrote to the Florida Bar *News*, suggesting that the present process of Appellate Certification was seriously flawed. In February, 2002, I received a letter from the Board of Governors affirming denial of Appellate Certification, a review process begun when I failed the 2000 Appellate Certification exam. Imagine, it took two years after the exam to reach a point where I could even petition the Supreme Court! And I had fully expected to do so, but, after seeing that the 2001 exam showed a passing rate that was triple that in 2000, I decided not to proceed further. This greatly enhanced passing rate, I thought, had occurred because two of my substantive concerns had been both addressed and remedied. The 2002 results show that my optimism was premature.

My decision not to carry on to the Supreme Court may have been a mistake, because the very secrecy that continues to surround the certification process has allowed the Board of Legal Specialization and Education ("BLSE") and/or the Appellate Certification committee to duck the real need to examine the process, and to take a serious look at whether the examination is indeed arbitrary and capricious, and, ultimately, one which frustrates most of the skilled and talented appellate practitioners who take it. That the Appellate Practice Section has a major stake in the legitimacy (or illegitimacy) of the certification process is, of course, obvious. Indeed, my major recommendation to the Appellate Practice Section is: study certification, and play an active role in the qualification and examination process. Or, if the Section decides not to do that, withdraw support for Appellate Certification, and remove the Secton from such activities as sponsoring the Certification Review course.

What is clear is that the present one-foot-in, one-foot-out, stance cannot be honestly sustained, because the present position of the Section separates Section members into "good appellate practitioners" — that is, those who are Board-certified — and "bad" ones, a separation which is both irrational and illogical.

As I wrote to the *News*, the "Appellate Certification Review Seminar" sponsored by the Section and scheduled for February, 2002, was a great idea in theory, but valueless, in view of the persistently low passing rate on the Appellate Certification exam. Of course, the Board of Legal Specialization and Education ("BLSE") and/or the Appellate Certification committee should examine why that is so, but neither entity is willing to do so.

Here's the factual background for the foregoing statements. I bought and reviewed the 1999 Review outline materials, attended the 2000 Certification Review course, and took and failed both the 1999 and 2000 Appellate Certification exams. Admitted to the Florida Bar in 1974, my practice since 1977 has been almost exclusively devoted to appeals, various quasi-appellate proceedings, writs, and post-conviction matters, at every level of state and federal court. I have been board-certified in Criminal Appeals since 1992, and have concentrated intensively in complex civil appeals since 1996. (Appellate Certification began in 1994.) Based on my own experience (and that of many other attorneys in the same boat as I am) I have to question seriously the Review course's utility. First of all, it should be noted that BLSE absolutely repudiates the Review course, making it a point to say that BLSE does *not* endorse it. On the other hand, the Appellate Practice Section also includes a caveat that examinees should not suppose that mastering the material in the Review course is likely to ensure passage of the exam, a disclaimer quoted by the BLSE in its Response to my appeal.

I cast no aspersions on the skills and talents of those who have so far passed the exam, but I know from my own experience, and from the experiences of others who have not passed and have given up, and who have taken and failed the exam a second time, that there is something wrong with the Appellate Certification exam, its contents, and its grading. There is something wrong, when an exam meant to test the abilities of 5-year lawyers stumps people with 20 and more years of concentrated, relevant, sophisticated, and complex appellate experience.

My 2000 score was actually worse than my score on the 1999 test, which was troubling, in view of the extensive studying I had done, my dedicated review of the Section's Certification Review materials, and my attendance (and attention) at the 2000 Certification Review course. On examination of the questions and "model answers," I made a detailed request to the Panel on Grade Review to change many of the scores. The Panel on Grade Review (which BLSE considers the only substantive review of questions and answers, and thus the only real "appeal"), made up of Appellate Certified lawyers, responded with large point increases on a few questions, but the Panel ignored most of my arguments.

Once I had received the Panel's response, I was not surprised to see that it had not changed more of my scores. That is so, because, although I had to wait six months (from June to November) for the Panel to act, its members spent a total of *one day* reading *all* objections from *all* examinees (I was not the only one to seek Panel review), reviewing the "model answers," and issuing its findings.

Yet my net score was still worse than it had been in 1999 — despite diligent preparation, including attendance at the 2000 Review Course. I then petitioned for review by a Committee consisting of members of the Board of Governors who are all Board-certified in various areas.

In its Response brief, the Appellate Certification committee, through BLSE counsel,[1] informed me for the first time that it was using a grading system that was other than that expressly described and approved by the Supreme Court of Florida. The only pronouncements on the subject are published in two cases, *The*

Florida Bar re: Williams, 718 So. 2d 773, 776 (Fla. 1998), and *The Florida Bar re: Ines*, 718 So. 2d 779 (Fla. 1998), where the Supreme Court discussed, defined, and approved only the "holistic" method of grading, the same as that which is used for the bar exam. I had based my arguments on the reasoning, holding and citations in *Williams* and *Ines*. It turns out that while BLSE cites them, it does not feel bound by them.

In its Response brief, the BLSE suddenly[2] claimed that, alone among certification areas, Appellate Certification purports to use a different grading system, neither defined nor approved by the Supreme Court, one known as "analytic" grading. As I argued in my Reply brief, this was news to me, and, I suspect, every other certification examinee who failed the exam.

At oral argument before the Certification Committee — again, reciting as a fact matters neither revealed to examinees, pre- or post-examination, nor briefed by BLSE — BLSE's attorney Mr. Ervin informed the Committee (and me!) that the Appellate Certification Committee's reason for using "analytic" grading was that there was a very small number of examinees for Appellate Certification. I don't think that can be right. If the number of examinees per test session determined the mode of grading, why would the court have approved "holistic" grading for real estate and for marital and family (the fields in *Williams* and *Ines*)? Marital and family, the area graded "holistically" in *Ines*, had only 25 examinees in 2001, versus 20 Appellate examinees, according to the June, 2001, Florida Bar *Journal* report of committees. Real estate, the area graded "holistically" in *Williams*, had 23 examinees in 2001. The fact is that nearly every area of specialization has a small number of examinees each time the test is offered; Business Litigation, for example, had 6 examinees in 2001; Aviation Law had 3; even Civil Trial, probably the largest, had only 50 examinees. How can the 20 Appellate Certification examinees, alone, somehow be too few? Under BLSE's theory, all of those other sections should also be using the "analytic" method, yet I have no reason to believe that they do.

Until I heard the results of the 2002 Appellate Certification exam, I believed that some of the problems had been solved, with the move to "holistic" grading. Additionally, in *Williams* and *Ines*, the court approved initial grading of the exam by a *panel of board-certified-attorneys*. The BLSE revealed in my appeal that the Appellate Certification committee had until 2001 been using a paid grader who was admitted to the Bar in 1986. The individual was only identified as an "Associate Professor of Law." As such, he or she was not even a practicing attorney (let alone a practicing *appellate* attorney). I argued on appeal that, having chosen to use a paid grader, and one who was not a practicing attorney, an appellate attorney, or board-certified, the Appellate Certification committee violated both *Williams* and *Ines*.

Although the BOG Committee was unmoved by my argument, the Appellate Certification committee in 2001 for the first time commenced to have its exams initially graded by a panel of attorneys who are board-certified in this area of specialty. The immediate result of the change was that the pass rate *tripled* from 3 of 19 examinees in 2000 to 9 of 20 examinees in 2001. That is an increase in passing from 15 % to 45 % — still not good but far better than before.

In 2002, 15 took the exam, and nine passed. That seems to be a passing rate of about 60%, but that passing figure does not take into account that, of the 15 who took the exam, as many as 9 of them were taking it for the second time. And, once again, and to the shame of the BLSE and the Appellate Certification committee, at least some of the second-time test takers did *not* pass. Here are the passing figures, since Appellate Certification commenced in 1994:

- 1994 – 52 admitted, including an unknown number of those who were "grandfathered" in
- 1995 – 29 admitted
- 1996 – 16 admitted
- 1997 – 11 admitted
- 1998 – 9 admitted
- 1999 – 9 admitted, 10 (or 53 %) failed
- 2000 – 3 admitted, 16 (or 84 %) failed. All those admitted were from the 14 taking the test for the first time. None of the 5 second-timers passed.
- 2001 – 10 admitted, 10 (or 50%) failed. Eleven originally failed, of which seven were first-time examinees and two were second-time examinees. Eight failed for the first time and three failed for the second time)
- 2002 – 9 admitted, 6 (or 40%) failed. But nine applied to take the exam who had also applied for the 2001 exam. *See* Florida Bar *News*, 11/1/00 and 12/15/01).

The very nature of appellate practice, and the special qualities of appellate lawyers, make such a low passing rate suspect. As I wrote in my appeal:

> When it is considered that appellate lawyers are universally the "folks in the back room," who spend their days poring over rules, statutes, court decisions, and law review commentaries [and writing about them in a clear and persuasive fashion], a 15% pass rate on the 2000 appellate certification examination should have set off alarm bells, but if it has, Petitioner has no information that an investigation has been opened. Yet this abysmal pass rate was even worse than the 50% pass rate in 1999's appellate certification examination, when only nine of about 21 examinees passed. And in 2000, *none of the second-time examinees passed*, for a failure rate of *100%*. Something is clearly wrong with this picture.

Thus, the conclusion is hard to escape that, as I truly believe, the Appellate Certification process is highly suspect, and the potential examinee should know that whether he or she will pass is still a crapshoot. For example, I answered every one of the 16 short essays, 5 morning long essays, 2 afternoon long essays, and 40 multiple choice questions which made up the 2000 exam. (There were no options: you had to answer everything).

I got several 0 scores on essays, even where I had the answer right. (By the way, how do you give a 0 score on an essay, if the question is answered, and is even partially correct?) Other attorneys have described similar experiences. While told at the Certification Review

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CERTIFICATION EXAM
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course that we should include, where they arose from the questions, ethical issues, page limits, briefing schedules, and other appellate minutiae, no credit was given for any such inclusions. Omission of cases cited in the "model answers" cost points, except when and perhaps even if the drafter made a note to the grader saying that leaving out the citation should not lower the grade.

Taking the exam a second time seems to be no help (and only adds to suspicions about its fairness). As noted, in 2000, *none* of the second-time examinees passed: that is a *failure* rate of 100%. Statistically improbable? I would say so.

When I did not pass the Criminal Appellate examination the first time I took it, I could see, on reviewing the test, how to improve my performance to suit the graders, whether I agreed or not. I could not see that in the case of either of the Appellate Certification exams I took, and the experienced appellate practitioner who reviewed the 2000 exam for me could not, either. I think that the examination process, as now formulated, is badly and prejudicially flawed. Practitioners would be well advised to save their application fees until the Appellate Certification exam itself is significantly revised and its grading brought into compliance with the court's pronouncements in *Williams* and *Ines*.

One of the reasons that no study of the process has been made heretofore, I believe, is that the certification process, especially among appellate practitioners, is veiled in secrecy. Not surprisingly, leading practitioners do not want to admit that they could not pass a test that should, after all, be an accessible accomplishment — if not a cakewalk — for people who do research and writing all day long, and for whom the details of appellate procedure are a way of life. The Appellate Certification committee has, apparently, no interest in examining how it is that the failure rate was statistically so high, and no desire to undertake either study or correction.

I am glad if my advocacy has led to holistic grading by a panel of Board-certified attorneys. But until the exam is changed, and both the content and the grading are made fairer, applicants for certification should be aware that attendance at the Appellate Certification Review Course is a doubtful investment. As such, it is hard to see any purpose in continued participation of the Appellate Practice Section in the process, and no utility at all in sponsorship of the Appellate Certification Review course.

Endnotes:

[1] BLSE's counsel in my case, Thomas Ervin, is not Board-certified in any area. He was also BLSE's counsel in *Williams* and *Ines*.

[2] This was a new position, first revealed in BLSE's brief. BLSE later claimed that, during my initial post-examination review, I should have known that "analytic" scoring was used, because there is a paper in the file showing the mode of grading allegedly used by the "contract grader." That paper says nothing about "analytic" grading.

ABA Council of Appellate Lawyers Schedules Conference with Appellate Practice Institute:

Second Annual National Bench/ Bar Conference in Reno, Nevada

by Siobhan Helene Shea, Co-Editor of the Record

On October 4 - 6th in Reno, Nevada, the Council of Appellate Lawyers (CAL) will convene its Second Annual Bench/Bar Conference in conjunction with the Thirteenth Annual Appellate Practice Institute. This meeting will draw some of the most skilled appellate advocates and articulate appellate judges from all over the country. The meeting will offer almost every type of program of interest to an appellate lawyer, including an address by the Solicitor General of the United States, workshops on improving your appellate skills, sample moot courts by some of the nation's top appellate lawyers, academic sessions on constitutional law, and courses designed to help build and manage an appellate practice. The CAL program includes numerous opportunities to network with other appellate lawyers and judges, committee meetings for CAL members.

In 2001, I had the rare opportunity to get involved on a formative ABA enterprise: the Council of Appellate Lawyers, which is a standing committee of the Appellate Judges Conference (AJC) of the American Bar Association. Our first meeting was in New York City last fall and was a fantastic educational and networking event, attended by chief appellate judges and appellate lawyers from all over the country.

The Reno, Nevada program is the second Annual Meeting of the Council and is being held in conjunction with the 13th Appellate Practice Institute.

A sampling of the CAL program includes the following programs: A panel of appellate judges, moderated by Alan Morrison, Past President of the American Academy of Appellate Lawyers will explore the different jurisdictions' rules for permitting interlocutory appeals. Appellate lawyers from solo, small firm, large firm and government settings will reveal their secrets to creating, marketing and managing appellate practices. The panelists will also discuss creating and managing an appellate department in a law firm or government office. Breakout groups following the panel discussion will offer an opportunity for in-depth discussion with appellate attorneys in comparable situations. Michael A. Berch, professor of law, and Arizona Supreme Court Justice Rebecca White Berch will present a lively run through of the most pressing ethical issues in appellate practice. CAL participants can also participate in writing workshops and model oral arguments, breakfasts, luncheons, receptions, and dinners and roundtable discussions.

If you have not yet joined the Council of Appellate Lawyers, an application is included in this edition of the Record. Brochures for the Conference in Reno will be available in June on the internet at *http://abanet.org/jd/ajc/cal02brochure.html*. A link will also be posted on the CAL webpages at *http://www.abanet.org/jd/ajc/calweb.html*.

Membership Application
Council of Appellate Lawyers

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Pursuing Justice

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Date Admitted to Bar	**State**

Birth Date (optional) **Female** ☐ **Male** ☐

Please consult the Dues Schedule on the reverse side of this form to calculate your dues.

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Appellate Judges Conference

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Chicago, IL 60611
sehstedm@staff.abanet.org
312-988-5704 (Phone)
312-988-5709 (Fax)

JACAL

Council of Appellate Lawyers (CAL)

CAL is a Standing Committee of the Appellate Judges Conference (AJC), which is one of six conferences of the Judicial Division (JD). It costs $35.00 to be a member of CAL/AJC/JD. ABA Dues are additional.

The "Reduced DUES" are for lawyers in government service. If your present financial circumstances do not permit you to pay the full amount of these dues, please complete the "ABA Dues Waiver" section which follows the Dues Schedule. Please note that the "Dues Waiver Program" does not apply to CAL dues.

ABA and CAL Dues Schedule

Years since original admission to the bar as of next Jan. 1	ABA DUES	Reduced DUES	CAL/JD DUES**	TOTAL DUES
Less than 1 year	free	free	$35.00	$35.00
1, 2 or 3 years	$95.00	$71.25	$35.00	$130.00/ $106.25
4 or 5 years	$125.00	$93.75	$35.00	$160.00/ $128.75
6, 7, 8 or 9 years	$195.00	$146.25	$35.00	$230.00/ $181.25
10 years or more	$295.00	$221.25	$35.00	$330.00/ $256.25

ABA Dues Waiver

I certify that my financial circumstances this year are such that full payment of ABA dues would constitute a substantial hardship for me. (This applies to ABA dues only. There is no exemption for CAL dues.)

I am unable to pay the ABA dues as outlined above, but I am able to pay $ _____
($20 minimum for ABA, plus $35 for CAL)

Signature (Required)

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Top Ten Lapses of Professionalism in Appellate Practice

by The Honorable William D. Palmer
Judge of the Fifth District Court of Appeal

With apologies to David Letterman (whose top ten lists are much funnier than mine), I offer my comments on the top ten lapses of professionalism in appellate practice observed from the bench. Although the vast majority of lawyers who appear before our court are competent and professional, the lapses noted here occur often enough to justify comment.

1. Handling an appeal when not competent to do so.

Unfortunately, our court occasionally receives filings which reveal that the filing lawyer has not become adequately educated or familiarized with appellate rules and procedures. Rule 4-1.1 of the Rules Regulating the Florida Bar (the "Rules") states that a "lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Certainly a lawyer need not be a specialist in appellate practice in order to properly handle an appeal. In fact, the comment to Rule 4-1.1 notes that a lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. However, it is incumbent upon the lawyer to become educated and familiar with the rules, procedures, deadlines, and requirements of the appeal process in order to competently and professionally represent a client.

2. Failing to abide by court procedures and deadlines.

An attorney's failure to abide by court procedures and deadlines can not only be detrimental to the client's case, but can also constitute a violation of Rule 4-1.3 which requires that a lawyer act with reasonable diligence and promptness in representing a client. The comment thereto notes that "perhaps no professional shortcoming is more widely resented than procrastination." Although the court is generally liberal in granting reasonable extensions of time when requested for good cause (at least the first time requested in a case), certain lawyers repeatedly violate or ignore the deadlines imposed upon them. Lawyers should recognize that, in the most egregious of cases, the court can impose monetary sanctions on those who are guilty of repeat violations. Such repeated violations can also result in referrals to the Florida Bar for grievance proceedings.

3. **Making disparaging comments concerning the court or judges on the court**.

The Rules of Professional Conduct Preamble to Chapter 4 of the Rules provides that a lawyer should "demonstrate respect for the legal system and those who serve it, including judges, other lawyers, and public officials." The Oath of Admission to the Florida Bar calls on each lawyer to "maintain the respect due to courts of justice and judicial officers." The Creed of Professionalism further requires that lawyers uphold the dignity and esteem of the judicial system. Comments made to news media, letters forwarded to other lawyers, or motions filed with the court which attack the character, honesty, integrity, or intelligence of any judge constitute not only a lack of professionalism, but also a potentially grieveable offense. *See 5-H Corp. v. Padovano*, 708 So. 2d 244 (Fla. 1997)(referring an attorney to the Florida Bar for setting forth disparaging remarks in a motion for rehearing). Beyond the lapse of professionalism, such conduct is an act of bad judgment in the event that the lawyer intends to practice before the same judge or court in the future.

4. Directing discourteous comments or conduct toward opposing counsel or opposing party.

As noted above, the Preamble to Chapter 4 of the Rules includes "other lawyers" among the persons entitled to receive respect from lawyers. As the motto currently being promoted by the Orange County Bar Association states, "professionalism demands courtesy." Similarly, the Oath of Admission to the Florida Bar calls on all lawyers to abstain from all offensive personality, and the Creed of Professionalism calls on each lawyer to abstain from engaging in rude, disruptive, disrespectful, and abusive behavior and, at all times, to act with dignity, decency, and courtesy. The Ideals and Goals of Professionalism, aspirational guidelines adopted by the Board of Governors of the Florida Bar in 1990, similarly provide:

A lawyer should treat all persons with courtesy and respect and at all time abstain from rude, disruptive and disrespectful behavior. The lawyer should encourage the lawyer's clients and support personnel to do likewise even when confronted with rude, disruptive and disrespectful behavior.

While some lawyers may succumb to temptation and resort to discourteous conduct in the heat of battle during a hearing or trial, such situations should not arise in appellate proceedings, where oral arguments are scheduled well in advance and highly structured.

5. Failing to acknowledge or to disclose controlling principles of law.

Controlling case law which is contrary to a party's asserted positions on appeal must be disclosed forthrightly, perhaps coupled with either an attempt to distinguish the cases on their facts or an argument as to why the law as expressed in the cases

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should be changed. Candor towards the tribunal is mandated by Rule 4-3.3 which states that a lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. Lawyers should understand that, given the work done by the court's law clerks, the reality of the situation is that adverse authority, even if not disclosed by the opposing party in the briefs, will likely be discovered in the research leading up to the clerk's preparation of the bench memorandum and, accordingly, will be known to the court. Under these circumstances, it is far more effective, as well as professional, for lawyers to attempt to distinguish away the controlling case law or to argue for a change in the law instead of simply ignoring the cases, thereby leaving the court with the impression that controlling authorities are being hidden or that counsel is being less than candid with the Court.

6. Requesting a rehearing for the sole purpose of trying to get the court to change a decision already made.

Florida Rule of Appellate Procedure 9.330 specifically provides that a motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended and shall not present issues not previously raised in the proceeding. Motions for rehearing which simply reargue what has already been argued in the original appeal are an improper waste of the client's money, and uniformly unsuccessful.

7. Failing to provide an adequate record for appellate review.

The appellant, having the burden of proof, is required to provide the court with a sufficient record to support the appeal. In the absence of a sufficient record, the trial court's ruling must be presumed correct. *See Chereskin v. Chereskin*, 790 So. 2d 496 (Fla. 5th DCA 2001); *Pedroni v. Pedroni*, 788 So. 2d 1138 (Fla. 5th DCA 2001). In certain circumstances, a lawyer's failure to provide an adequate record may violate the requirement of Rule 4-1.1 to provide competent representation.

8. Presenting arguments not presented or preserved below.

The role of the appellate court is to determine whether the trial court made an error as to an issue presented to it. Accordingly, a claim of error not raised or preserved at the trial level (unless fundamental) cannot prevail on appeal, since the trial cannot be found to have committed error by failing to rule on a issue not presented to it. *See Gonzalez v. Largen*, 790 So. 2d 497 (Fla. 5th DCA 2001). Rule 4-3.1 prohibits a lawyer from asserting an issue unless there is a basis for doing so which is not frivolous. Presenting issues which clearly have not been preserved below will, in certain circumstances, violate this rule.

9. Citing to matters outside the record.

The role of the appellate court is to make a legal determination based upon the record properly before it. It is improper and unprofessional for a lawyer to present matters to the appellate court which are not part of the record on appeal. Importantly, a deficiency in the record can not be cured by simply making the document an attachment or appendix to a brief, since putting a document in an appendix does not make the document part of the record. Instead, a motion to supplement the record can properly be utilized to add documents which were omitted from the record on appeal. In no event can a lawyer move to submit documents for appellate review which were not part of the record below. *See Altchiler v. State, Dep't of Prof'l Regulation*, 442 So. 2d 349 (Fla. 1st DCA 1983) (noting that it is fundamental that an appellate court reviews determinations of lower tribunals based on the records established in the lower tribunals, and publicly reprimanding an attorney and referring him to the Florida Bar for including an appendix to a brief which contained matters outside the record, after the attorney's previous brief was stricken and he was ordered to file an amended brief which conformed to the record below).

10. Improperly citing to the record.

When a record cite is made, the references must be accurate, not taken out of context, and not presented in a misleading fashion. Since the court's law clerks thoroughly review the record and check the record cites set forth in the parties' briefs, if a portion of the record is misstated or taken out of context so as to be misleading, that fact will be made readily apparent to the judges.

In closing, I note that other lapses occur beyond those set forth in this article but hopefully this list will be helpful to lawyers who are striving to maintain a professional appellate practice.

The comments contained in this article are those of the author alone, not of the Fifth District Court of Appeal. This article is submitted on behalf of the Professionalism Committee of the Orange County Bar Association, but does not necessarily reflect the views of the committee.

3. precedent;
4. the record;
5. the established remedies.

If you forget these facts, your briefing will suffer. In a proper frame of mind, you will write:

1. a concise, objective statement of the facts;
2. a well-researched, easy-to-understand argument;
3. a clear request for an available remedy.

2. Start with the Record.

First, you need to obtain the record. Read rule 9.200. If you do not obtain an adequate record, you cannot write an adequate brief. Remember that the record is the material in the trial court file that is transmitted to us. It is not the stuff in your file. If part of the trial proceeding is not in our file and you need to rely upon it, move to supplement the record.

Second, read the record. Especially if you were the trial lawyer, read the record. It may seem like someone else's trial when reduced to a transcript, but it is the case on appeal. Don't distract yourself by reading depositions and documents that are outside the record on appeal unless you have the ability to include them within the record.

Finally, outline the record. Develop and use your own shorthand to quickly summarize the witnesses, the objections, and the rulings on each page of the record. This outline will help you include proper citations to the record in your brief. Six months later, you can quickly read the outline in preparation for oral argument.

When outlining the record, you may wish to create separate documents in which to make notes about possible issues and concerns for briefing and oral argument. Especially in a major case, I believe the lawyer who writes the brief must outline the record. It is dangerous to delegate this task to another lawyer or a paralegal.

3. Identify the Possible Issues.

Almost every record has at least one plausible issue. Make a list of these issues. Try to be practical about the issues that warrant attention, but keep an open mind to an issue that might seem tenuous at first. Consider whether each issue is preserved for appeal or is truly fundamental if unpreserved. In complex cases and capital cases, it is a good idea not to discard any plausible issue during the identification stage. It is also a good idea to keep a copy of this list for future reference.

4. Do Some Preliminary Research.

Even if you researched some issues at the time of trial, spend a little time in the library going over each of your possible issues. Some may look better than you thought. Others may fall to the library floor. This step may take an hour or several days.

5. Select the Issues for Use in Your Brief.

Not every possible issue is worth briefing. List your issues in the order of their strength. If you want to argue more than four issues, try to talk yourself out of it. If you can convince yourself to write on only two issues, you will probably improve your chances. (Sometimes you will have peripheral issues, such as costs or fees that will not be affected by this rule.)

Draft a point on appeal for each issue. The appellate rules do not require that you provide points on appeal. Points on appeal in civil cases are left over from the pre-1978 rules concerning assignments of error. Fla. R. App. P. 3.5(c) (1977). Although not mandatory, a one-sentence statement of your argument is very helpful to the court and to you.

I think I usually developed a better point on appeal if I wrote several versions of the point at this stage of the appeal. Do not pick the best version at this time. For now, be content with a good working description of the issue.

6. Prepare an Outline.

We have delayed this step as long as we could. Normal people hate outlines more than taxes. Outlines force you to think logically and concisely. They help you sort out what is essential to an argument and what is not. They help you notice things you have overlooked. For example, I am writing this section with the use of an outline. I hate outlines with such a passion that I omitted mentioning outlines in my outline! (Don't laugh, I'm telling you the truth.) Having an outline helped me discover the error of my ways.

7. Write the Draft Summary of the Argument.

Yes, I am not following the order described in rule 9.210. Just trust me on this. The first draft of the summary of the argument is a valuable tool to help you focus on your overall brief. The summary should briefly state the facts, the legal argument, and the requested relief. Keep it under 2 ½ pages in length.

The draft summary may cause you to adjust your outline. Do that now. (If you skipped step 6, shame on you. Go back one giant step and prepare your outline.)

8. Write the Statement of the Case and Facts.

This statement **must** be objective and **must** cite to the record. If you are challenging a jury verdict, the evidence must be presented in the light most favorable to that verdict. It requires great discipline to write a good statement of the facts.

In a complex case or in a case involving the manifest weight or sufficiency of the evidence, you may wish to separate the statement of the case from that of the facts. Normally, the court prefers a combined statement.

You must not be argumentative in the statement of the facts. Overstated facts cause the reader to mistrust your presentation. If you begin your argument in the statement of the facts, you will hurt your advocacy.

On the other hand, the common law is fueled by facts. If you omit necessary facts, the reader may become confused and lose interest. Well-written, objective facts are **naturally** persuasive. If you present your facts clearly and effectively, experienced judges will see the issues in the facts and may already favor your legal position before they reach the legal argument.

Stay inside the record and cite to the record. Nothing is more distracting or less persuasive than a statement of the facts that wanders outside the record or provides no record cites to prove that the infor-

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mation is in the record. On the other hand, long quotations from the trial transcripts are rarely effective.

9. Write the Argument for Each Point on Appeal.

Pick your best point on appeal. Go back to the library and double check your research to make sure you have finished the task. After you have finished the research, examine your outline to make sure the structure of your argument still looks effective. (You **still** don't have an outline? Back to step 6.)

"Front load" all legal writing, especially legal arguments. This means you should inject as much important material early in the argument as the human mind can quickly absorb. (My own opinions usually have a first paragraph that could serve as a very short opinion in the case.) Readers get distracted, especially if you bore them early in the brief. Tell them what they need to know up front and hope this method keeps them interested to the end. Even paragraphs and sentences should be front loaded.

An argument is not argumentative. It must present a position that another lawyer would objectively accept as a rule that should apply in one of her future cases. An argument should have a concise structure. It needs adequate precedential support, but it does not need string cites for common propositions.

If you draw a writer's block concerning the first point on appeal, go on to the second point and see if you can build up some momentum to carry you back to that first point.

10. Write the Conclusion.

This is the easiest section to write, other than the certificate of service. Just tell us precisely what relief you are requesting. Do not summarize the argument. You already did that in step 7.

If you want relief in the alternative, explain the alternatives. (E.g., I really want a new trial, but I could live with a remittitur.)

You can write a typical conclusion in five lines. The rules proscribe a conclusion in excess of one page.

11. Rest.

This is a very important step. You need to distance yourself from this brief before you can edit effectively. This is a good time to write that outline that you skipped in step 6.

12. Edit Number 1.

Begin at the beginning of the brief and read to the end. In this edit, look for the big picture if you can. (If you are the type who is really compulsive about spelling and punctuation, go ahead and edit for these items before you begin the first edit.)

You will want to develop your own list of questions for inclusion in your first edit. The questions depend on your own personal strengths and weaknesses as a writer. Ask yourself:

1. Do I need more facts? Fewer facts?
2. Are the facts objective?
3. Are the words describing my facts reasonably neutral, or are they loaded with improper connotations? Are they too flowery or complex?
4. Do I have enough cites to the record?
5. Which version of my draft point on appeal is the best version to compliment my argument? (Maybe it's a new version.)
6. Is the draft summary of the argument still adequate? It will usually require some tinkering because your reasoning process has improved since you wrote this first step. If it is still OK, you are either a superb writer or you are getting a little lazy as the service deadline approaches. Be honest with yourself.
7. Are all of the issues necessary? Have I presented them in the best order? Normally, the strongest argument should go first, but you may justify a different order in some cases.
8. Is the brief too long? Are the paragraphs too long? Are the sentences too long? Fifteen words without a period and you are getting close to the edge. (That sentence was thirteen words.)
9. Is each footnote necessary? The structure of footnotes causes many readers to skip them, at least during the first trip through a brief. Is the information in the footnote something the judges can safely skip? There are some details and some house cleaning items that can drop to the bottom of the page.[1] If you try to hide a weak fact or a weak argument in a footnote, it will crawl out in the night and appear as a featured attraction in your opponent's argument.
10. Did I front load my writing? (Should I mention front loading first?)

13. Rest Again.

This is the fun part. Your brief needs to get a little stale again. If you want to, you can spend this time reading *The Lawyer's Guide to Writing Well* by Tom Goldstein and Jethro K. Lieberman (McGraw-Hill Publishing 1989). In my experience, it is the only book on writing that is actually well written. I do not use all of the suggestions in that book, but I use most of them.

14. Edit Number 2.

In this second edit, I go for detail. I still may think about the big picture, but I try to intentionally examine:

1. Punctuation.
2. Spelling.
3. Grammar.
4. Active verbs; passive tense. Although there is a role for passive tense in a brief, it should be used intentionally. As a general rule, try to use strong, active verbs.
5. Special weaknesses. We all have certain bad habits that develop in our individual writing styles. I check my opinions for adverbs because they tend to be argumentative. (E.g., the adverb "obviously") I only manage to place the word "only" in its proper position on the second or third try. Or is that on "only the second or third try"? Unless you are a great editor, you will need to repeat edit 1 and 2 to produce a refined piece. The art of writing well is the art of outlining well, followed by the discipline (and time) to edit well. (Over the last six years, I have edited this document at least ten times.)

15. Give your Brief to an Innocent Bystander.

Give it to another lawyer if you

must. Try to give it to someone who will be objective and honest. Try to be open to criticism or this step will not help. If this person does not understand your brief, chances are the judges won't either.

If you can find a layperson who is willing to read your draft, beg them to read it. (My judicial assistant reads all of my drafts. Rumors that she actually writes this stuff are not true. OK, they are exaggerated.) When a person's mind has not been deformed by law school, he asks great questions and does not understand things that real people do not understand. If you can write so that a person with a high school education can read and understand your brief, there is a fifty-fifty chance I can too.

By the way, if the innocent bystander does not understand your argument, try to write the outline that you still have not written. Chances are you will discover that the outline does not make any sense or simply cannot be written. Now edit that outline and try again to write a brief that is organized!

16. Edit Number 3.

Assuming that the bystander took long enough to read your brief so that it has become a little stale in your mind, do a final edit. When in doubt, trust the suggestions and criticisms of the bystander. This should be a time to look for any error you can find and any improvement you can make. Focus. By now it is getting a little hard to keep rereading your own work.

This is the edit when you check your cites. Remember Shepards and Key Cite were invented so you would not look like a fool at oral argument. We Key Cite your citations before oral argument. It is in your best interest to check your citations before you sign your brief.

THE ANSWER BRIEF

Most of the rules for writing an answer brief are the same as those for writing the initial brief. Several special circumstances warrant comment:

1. The Statement of the Facts.

Rule 9.210(c) gives you the option to omit the statement. Once upon a time, the rule prohibited you from providing a statement unless there were specific areas of disagreement.

We receive (and as a lawyer, I wrote) many appellee's briefs that completely restate the facts. There is no easy rule on this subject, except for one. DO NOT REJECT AN ARGUMENTATIVE SET OF FACTS MERELY TO PROVIDE YOUR OWN ARGUMENTATIVE FACTS.

Lawyers frequently do not appreciate how much the court enjoys a good factual presentation. When a lawyer presents the facts professionally, even when some of the facts are not helpful to his or her case, the lawyer is viewed with respect by the bench.

2. An Answer Brief is Responsive.

Occasionally, a lawyer will write an answer brief that does not remotely mirror the appellant's brief. Even when the appellant's brief is poorly written, you are generally better off to structure your arguments around the appellant's. For example, when the appellant's brief has three points on appeal and the appellee has two, it is harder for a judge to keep track of the arguments on both sides. Humans tend to consider one argument at a time. Believe it or not, judges are human. Respond directly to each argument.

This may seem silly, but read the appellant's brief with care--read it several times--before you write an appellee's brief. It is hard to respond to an argument that you have not read with care. Especially if the appellant's argument is good, it may be hard for the opposing advocate to read it objectively.

THE REPLY BRIEF

The reply brief is designed to reply to the answer brief. If you wrote your initial brief with care, this document is normally very short. If you wrote a sloppy initial brief, odds are it cannot be salvaged in fifteen pages. The effectiveness of a reply brief is inversely related to its length. Brevity works.

SIX ENEMIES OF THE WELL-WRITTEN BRIEF

1. Attila the Hun.

This lawyer attacks the other lawyer and party, using every substitute for profanity known to the legal mind. This lawyer probably insults the court in the process. This lawyer is so concerned with the emotional issues, that his brief does not adequately address the legal issues. Civility is the key, not only to professionalism, but also to effective advocacy in the appellate court.

2. William Faulkner and the Bronte Sisters.

These lawyers graduated from college with a degree in English literature, only to discover that Burger King was not hiring. They went to law school because their fathers forced them. Now they try to sell the great American novel to the Second District on a regular basis. A brief can have some color and flair and an occasional good analogy, but briefs are primarily a vigorous form of logical writing. You cannot have as much fun writing a brief as I am having writing this article. Excessive humor or drama is not effective advocacy.

3. Albert Einstein.

This lawyer knows his subject inside and out. He is a recognized expert in his field. Unfortunately, he is writing his brief to three of the handful of general practitioners left in Florida. He writes without adequately explaining his ideas. Frequently, he uses jargon that we do not understand. He turns very nice short words, especially verbs, into very long nouns. Then he hooks them together with boring, passive verbs. (This is called "nominalization," which is itself a nominalization.)

Appellate judges are truly general practitioners. We believe the law will be better if it remains simple. (I know you think we are simpletons, but there really is more to it than that.) The rule is KISS. Keep It Simple, Stupid.

These bad habits can be avoided if you give your brief to that innocent bystander.

4. Tricky Dicky.

This lawyer once sold used cars. A nice tan and a plaid sport coat are useful accessories, but not essential. His statement of the facts is a fabrication of half-truths and matters outside the record. His citations have been overruled, do not exist, or stand for propositions other than those described in his brief. Be very careful, this reputation can be earned quickly, and it is very hard to overcome.

continued, next page

BRIEF WRITING
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5. The Pack Rat.

This lawyer believes that 50 pages in a brief is a moral obligation, if not a fundamental rule of nature. Her statement of the case explains when every discovery motion was filed, even though no issue relates to discovery. She describes the evidence at trial in detail, only to challenge a sentencing issue or a costs issue unconnected to the evidence at trial.

Normally, this lawyer presents nine to eleven issues on appeal. Ecstasy for this lawyer is filing a brief with a dozen issues. Every judge hopes that this lawyer's cases will be assigned to younger judges with better eyes, who can read the 87 footnotes at the end of the brief. Clients all think she is great because the "towits" and "heretofores" render the product all-inclusive and entirely indecipherable.

6. The Great Ground Sloth.

Last, but not least, we have this rare creature. This lawyer was going to think about his brief after he got his fourth extension, but he forget about it during something else, whatever it was. He is upset that we did not buy a transcript for his client. How can he win an appeal on this flimsy record that the clerk "automatically" sent over? Admittedly, his brief is not fifty pages long and it has only one issue. He did not distract our thoughts with footnotes or citations to either the record or any case law. The single issue that he raises is a multifaceted complaint that the jury should have believed his client instead of the other three witnesses, that the standard jury instructions were inadequate and the judge should have reconvened the jury to give them the other instruction that he orally suggested, and it was fundamental error not to grant his client a directed verdict, even if he did not ask for it. This lawyer will file a motion for rehearing and an uncertified motion for rehearing en banc on grounds that his case is one of great public importance for no disclosed reason. He will never understand the PCA that he receives in the mail.

I am proud to say that the sloth is rare in the Second District, but it does exist. It is frightening to realize there is a client somewhere who thinks this person is a lawyer and that every lawyer is like this person.

CONCLUSION

You may not always have a case that requires complete obedience to the sixteen rules. Occasionally, time and economics will interfere. Even with a simple case, you should perform an abbreviated process similar to these steps. Before you omit the time and the care required by these steps, make certain that the omissions are justified. Neither your client nor your professional reputation can afford many cases that are briefed in the style of an enemy of the well-written brief.

Edited for reprinting in The Record *by* ***Valeria Hendricks*** *of Davis & Harmon, P.A., Tampa, and former staff attorney to Judge Altenbernd.*

Endnotes:

[1] But not many details because it distracts the eye.

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