Rules of Judicial Administration
Subcommittee "A" Report and Recommendations —
Three vs. One-Judge Circuit Appellate Panels

At the last meeting of the Rules of Judicial Administration Committee on Thursday, June 22, 2000 in Boca Raton, Subcommittee "A" was asked by outgoing chair Judge Scott Silverman to look at the issue referred to the Committee by the Supreme Court in Florida Power & Light Co. v. City of Dania, 25 Fla.L.W. S461 (6/15/00). Specifically, the Court had noted a disparity among local rules in various circuits throughout the State in their provisions for first-tier certiorari review, some providing for a single judge, some for a three-judge panel, and others for four judges. The Court specifically stated: "In light of this disparity, we refer this matter to the Rules of Judicial Administration Committee of The Florida Bar for study."

Subcommittee A, supplemented by two volunteers, District Court of Appeal Judges Davis and Webster, considered: (1) the subject opinion; (2) extensive survey data from each of the circuits, provided by Miami-Dade County Judge Mark King Leban; and (3) a copy of an amicus brief provided by Robert S. Glazier, together with additional information provided by subcommittee member Circuit Judge Goldenberg, consisting of a memorandum from Broward County Chief Circuit Judge Dale Ross and two orders, by Circuit Judges Ross and Burnstein, both denying motions to designate three-judge review panels (where the Circuit's rules provide for review by a single judge). The materials provided a reasonably complete record of the disparity to which the Supreme Court referred in its opinion, with respect to all appeals from county to circuit courts.

Subcommittee A met by telephone on August 17, with Judges Davis, Dell, Eaton, Goldenberg, Webster, and Wessel, and subcommittee chair Bruce Berman, participating. The members had reviewed the circulated materials, heard Judge Davis report on the history of the Supreme Court's treatment of local circuit court rules and administrative orders (which specifically delegated the issue to the individual circuits, because of the great diversity among the circuits in their judicial and related resources, implicitly condoning the very disparity which the Court now brings to our attention) and discussed the subject matter at some length.

Ultimately, the Subcommittee unanimously agreed to recommend to the full Committee that we report to the Supreme Court our proposal that *there be no change in the system as it presently operates*. In essence, given the fact that there are small circuits which cannot practicably provide three judges for every appeal (absent some unexpected legislative largesse), the Subcommittee sees only two options: either (a), for purposes of uniformity, to require that all appeals from county to circuit courts be heard by a single judge; or (b), because of the impracticability of requiring three-judge panels everywhere, to leave things as they are. Because it was our collective view that three-judge panels are generally preferable to single judge panels, a view that appears to be shared in the lawyer community, we did not see the objective of uniformity as sufficient, alone, to justify a recommendation that the many counties that presently afford three-judge panels be required to reduce the number of judges to one.

For your information, Judge Davis indicates that she expects to be present at the September meeting to report at greater length upon the historical aspects of the issue, if necessary. Bruce Berman has a complete set of the materials identified above. Committee members desiring to view these materials (the survey materials are quite extensive) should contact Bruce at (305) 347-6530 or bberman@mwe.com.

MINUTES OF THE RULES OF JUDICIAL ADMINISTRATION COMMITTEE
SEPTEMBER 17, 2000

I. CALL TO ORDER

The Meeting was called to order by Chair Judge Charles Kahn, Jr., at 1:05 p.m. A quorum was present. (See attached attendance list.) The minutes of the June 22, 2000, meeting were approved.

II. REPORTS

A. Chair's Report:

1. Kayla McKean Act--still pending on rehearing.

2. Oral Arguments on 4-year Cycle--only comment was from Henry Trawick in regards to the local rules amendment. Nothing unusual at oral arguments.

B. Status of Rule 2.052 Paul Regensdorf:

Last year the Committee did not approve a rule setting priorities. The issue went to the Florida Supreme Court, and in a 4-3 vote the Court declined to adopt Frank Kreidler's emergency amendment. The Court, however, stated that it wanted a 9-month study to look into priorities. A motion for rehearing is still pending on instituting a rule in the meantime.

III. PENDING MATTERS

A. Paul Regensdorf's report on 2.052(a) in regard to attorney conflicts and priorities:

The Supreme Court has ordered the Committee to look at all cases to determine priorities in a 9-month study due in April 2001. The Subcommittee met and sent out an e-mail. Timing is a problem since there is only one scheduled meeting before April and that is in January 2001. The Subcommittee invited Sarah Bohr to participate, and she is now on the Subcommittee. There are many statutes and rules that establish some priorities, and these would have to be found. Some people think priorities should be up to the trial courts' discretion. Once rehearing is resolved, the Supreme Court should be contacted as to what it wants from this 9-month study.

Mr. Regensdorf listed possible things the Committee could do in a memo sent out on September 10, 2000. Mr. Kreidler has submitted his own recommendations in a letter dated September 11, 2000.

The main problem is that attorneys are caught between two judges who will not budge. An additional problem is trial courts having to decide what to prioritize.

There was a lengthy discussion on whether or not this was a problem or just one or two bad instances that are now driving the desire for a rule change. It was pointed out that in juvenile dependency cases the delays were not caused by conflict but by a

lack of judges. Judge Renee Goldenberg, the Family Law Section liaison, stated the Family Law Section recommends the law stay the way it is and let the judges keep their discretion.

The following steps are to be taken at this time:

1. Survey statutes and rules to see what types of priorities are set forth.

2. Survey the trial courts via a letter to see if this is a problem across the board.

B. Bruce Berman's report on 3 vs. 1 judge circuit appellate panels:

Subcommittee A recommended that everything remain the same with each jurisdiction deciding how it will handle county-to-circuit appeals. The Subcommittee's report (pg. 23 of agenda) was adopted, but the sentence on which type of panel is better was to be deleted. Judge Kahn will send a letter to the Supreme Court summarizing and endorsing the report.

C. Letter from Supreme Court requesting Committee report on whether to create or amend any rules as noted in Jackson v. Florida Dept. of Corrections: The request has a September 29, 2000, deadline; but the case is still pending on rehearing. Judge Kahn will send a letter requesting an extension for 30 days until after opinion is final. The issue was assigned to Subcommittee C.

D. Paul Regensdorf's report on Article V funding:

The Subcommittee adopted the report from the Steering Committee which proposed a rule. The Supreme Court adopted the rule and asked for comments by October 16, 2000. Judge Kahn is to send a letter by October 15, 2000, saying the Committee has no objection to the proposed rule.

E. Judge Gross' report on cameras in the courtroom--Rule 2.170:

The Subcommittee is still meeting in order to clean up language in the rule that would allow a court to limit videotaping of jurors and deal with how many cameras would be allowed in the courtroom. A proposal is expected for the January 2001 meeting.

IV. NEW BUSINESS

A. Recommendations of the Florida Supreme Court's Family Court Steering Committee for A Model Family Court for Florida:

It appears that section 2(b) of the recommendations is directly related to the Rules of Judicial Administration Committee. It was decided that Judge Kahn would send a letter to the Florida Supreme Court pointing this out but also pointing out that other parts of this report also affect our Committee. If the Supreme Court intends to act on the proposal in 2(b) or other parts of the report, the Rules of Judicial Administration Committee would ask the Court to send it to this Committee for further consideration.

B. Robert Korschun's letter (pg. 37 at agenda):

The letter asked when does the attorney-client relationship end. The Committee decided to have Judge Kahn send a letter to Mr. Korschun say that at this time there is no need to amend the rules. The door is open, however, for our Committee to consider this issue again should Mr. Korschun wish to submit a proposed rule.

C. Paul Regensdorf's request on electronic filing:

Mr. Regensdorf suggested that a subcommittee look into rule 2.090 to see if it needs fine-tuning. The Committee decided to do nothing at this time. It will be passed on to January 2001's agenda.

D. Creation of Executive Committee within the Rules of Judicial Administration Committee:

In order to deal with Florida Supreme Court questions that need a quick response, it was proposed that an Executive Committee be created. This would require an amendment to the internal operating procedures; and an Ad Hoc subcommittee was formed to report on this issue consisting of Eaton, Regensdorf, Berman, Carey, and Webster.

V. NEXT MEETING

Scheduled for January 18, 2001, at the Hyatt Regency in Miami from 1 p.m. to 5:30 p.m.

Respectfully submitted,

Deborah K. Brueckheimer

Deborah K. Brueckheimer,
Acting Secretary

DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
TALLAHASSEE
32399-1850

September 20, 2000

Chief Justice Charles Wells
The Supreme Court of Florida
The Supreme Court Building.
500 South Duval Street
Tallahassee, Florida 32399-1925

RE: First-Tier Certiorari Review

Dear Chief Justice Wells:

In Florida Power and Light Company v. City of Dania, 761 So. 2d 1089 (Fla. 2000), the Court noted a disparity among local rules in various circuits throughout the State in their provisions for first-tier certiorari view. Some circuits provided for a single judge, some for a three-judge panel, and others for four judges. The Court specifically stated, "[I]n light of this disparity, we refer this matter to the Rules of Judicial Administration Committee of The Florida Bar for study." As Chair of the Rules of Judicial Administration Committee, I offer to the Court the results of our examination of the issue.

On June 22, 2000, the Chair of the Rules of Judicial Administration Committee requested a subcommittee, headed by Attorney Bruce Berman, to conduct the study and make recommendations to the Committee as a whole. Accordingly, the Subcommittee considered:

1. the subject opinion;

2. extensive survey data from each of the courts, provided by Miami-Dade County Judge Mark King Leban;

3. a copy of an amicus brief provided by Robert S. Glazier; and,

4. information provided by Circuit Judge Renee Goldenberg, consisting of a memorandum from Broward County Chief Circuit Judge Dale Ross and two orders, by Circuit Judges Ross and Burnstein, both denying motions to designate three-judge review panels (where the circuit's rules provided for a review by a single judge).

The subcommittee also considered a report from Judge Ditti Davis. Judge Davis explained the history of the Supreme Court's treatment of local circuit court rules and administration orders. These orders specifically delegated the issue under study to the individual circuits, because of the great diversity among the circuits in their judicial and related resources.

In its report to the full committee, the subcommittee unanimously recommended that no change be made in the system as it presently operates. The subcommittee noted that Florida has small circuits that cannot practicably provide three judges for every appeal. In essence, the subcommittee noted only two options:

A. for purposes of uniformity, a requirement that all appeals from county to circuit courts be heard by a single judge; or

B. because of the noted impracticability of requiring three-judge panels everywhere, leave the situation as it now stands.

The subcommittee opted for the latter position.

The full rules committee took up the report of Mr. Berman's subcommittee meeting on September 14, 2000. The full committee unanimously approved the subcommittee report. Accordingly, I report to you that the Rules of Judicial Administration Committee of The Florida Bar recommends that, despite the disparity noted in City of Dania, no changes be made at this time in the method of first-tier certiorari review in the various circuits of Florida.

Sincerely,

Charles J. Kahn, Jr., Chair
Florida Rules of Judicial Administration

cc: Bruce Berman, Esquire
Craig Shaw, Esquire

Supreme Court of Florida

500 South Duval Street
Tallahassee, Florida 32399-1925

October 20, 2000

The Honorable Charles J. Kahn, Jr.
First District Court of Appeal
First District Court of Appeal Building
301 Martin L. King, Jr., Boulevard
Tallahassee, Florida 32399-1805

Re: Rules of Judicial Administration Committee

Dear Judge Kahn:

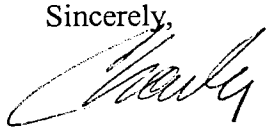
This is in response to your letter dated September 20, 2000, regarding review in the circuit courts of county court orders. The Court discussed this review at its conference on October 17, 2000. We understand the concerns leading to the subcommittee's conclusion that it is impractical to require three-judge panels everywhere. However, the Court concluded that three-judge panels should be further considered for all such reviews. We want to fully hear from interested persons on this subject.

In order that the Court can further consider three-judge panel review, we request that your committee draft a proposed rule which would implement three-judge panels for all such reviews. We ask that you please send the proposed rule to the Appellate Rules Committee and to the appropriate committees of the Circuit and County Judges Conferences for their comments back to your committee. After consideration by your committee of the input from the rules committee

and conferences, please forward a proposed rule and any further recommendations to us. We ask that the date for sending this to us be April 9, 2001.

Thank you very much for undertaking this important work.

Sincerely,



Charles T. Wells

CTW/pb

cc: The Honorable Leander J. Shaw, Jr.
Liaison, Judicial Administration Rules Committee
The Honorable Barbara J. Pariente
Liaison, Appellate Procedure Rules Committee
Mr. Tom Hall
Clerk, Florida Supreme Court

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JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

HOLLY M. STUTZ
EXECUTIVE DIRECTOR

PLEASE REPLY TO

DEBORAH K. BRUECKHEIMER
APPELLATE DIVISION DIRECTOR
863-534-4324
dbrueckheimer@pd10.state.fl.us

MEMORANDUM

TO: John Crabtree, Chair General Subcommittee

FROM: Deborah K. Brueckheimer, Chair Appellate Court Rules Committee

RE: 3-judge Appellate Panels in Circuit Appeals

DATE: November 8, 2000

Enclosed please find a copy of a letter asking for our Committee's input on this issue. Time is short, but you may want to contact Mr. Berman and indicate we need more time to respond. I will be at that Judicial Administration Committee meeting in January and can hand deliver anything that might be prepared at the last minute. I can also deliver any message you might want me to orally present. Of course, anything that is submitted will also have to be presented at our meeting the day after in January; but I doubt if there will be any problems. This is only a recommendation situation at this point.

I note that Susan Fox is not on your subcommittee, but she was instrumental in getting Hillsborough County's Circuit appeals situation straightened out. You might want to contact her about this.

/dkb

Deb Brueckheimer
Chair

F-D
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MCDERMOTT, WILL & EMERY

Bruce J. Berman
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October 27, 2000

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1320 N.W. 14 Street
Miami, Florida 33125

Re: 3 Judge Circuit Court Appellate Panels

I am presently chairing a subcommittee of the Rules of Judicial Administration (RJA) Committee of The Florida Bar, which had been asked by the Supreme Court to look at the question of inconsistencies in the number of judges empanelled in the Circuit Courts to hear appeals within that court's jurisdiction. The subcommittee's initial recommendation, adopted by the full committee, had been to leave things as they presently are, for a variety of reasons.

What prompts this letter is advice from the Supreme Court, in response to the committee's recommendation, that a rule requiring 3-judge appellate panels nevertheless be prepared, a task that has fallen to me. It was suggested to me that, in your respective roles in the Criminal and Appellate Sections and Appellate Rules Committee of The Florida Bar, you might have an interest in proposing how such rule might best be drafted, which we would want to consider before submitting our final report to the full RJA committee.

If you should have such a suggestion, please forward it to me as quickly as possible. Our committee meets next at the mid-year meeting of the Bar in January, our agenda materials are due by the beginning of January, and we will need some time to confer in December. Accordingly, any input to the subcommittee would need to be received before the end of November.

Naturally, I would be delighted to discuss the issue with any of you or your delegatees if you like.

Sincerely

Bruce J. Berman

BJB/sa

V-D
73

MCDERMOTT, WILL & EMERY
Miami

MEMORANDUM

TO: All Members, Rules of Judicial Administration Committee of The Florida Bar

DATE: December 29, 2000

FROM: Bruce J. Berman, as Chair of Standing Subcommittee "A"

RE: Request of the Chief Justice to Draft a Proposed Rule to Implement Three-Judge Panels for Review in the Circuit Courts of County Court Orders

Our Committee's Charge

The Committee's Chair asked Subcommittee "A" to consider and report to the full Committee on the written request of Chief Justice Wells, "regarding review in the circuit courts of county court orders" that we "draft a proposed rule which would implement three-judge panels for all such reviews," the Florida Supreme Court have "concluded that three-judge panels should be further considered for all such reviews."

We are asked, after preparing such a proposed rule to send it "to the Appellate Rules Committee and to the appropriate committees of the Circuit and County Judges Conferences for their comments back to [our] committee" and then, upon consideration of such comments, to forward our proposal "and any further recommendation" (presumably based on input received from the recipients) to the Court by April 9, 2001.

Background - The First Round

This issue first came to us from the Court through its June 15 opinion in *Florida Power & Light Co. v. City of Dania*, 761 So.2d 1089, 1094 (Fla. 2000), which arose out of a single circuit judge's review of a city commission's action on a zoning application, which the Supreme Court referred to as "first tier certiorari review." The Supreme Court wrote:

> In the Seventeenth Judicial Circuit (where the present case arose), the local court rules permit a single qualified judge to function as the circuit court when conducting first-tier certiorari review. In

> contrast, the local rules in several other judicial circuits call for the circuit court to sit in multi-judge panels in such cases. No statewide criterion exists at this time. In light of this disparity, w refer this matter to the Rules of Judicial Administration Committee of The Florida Bar for study.

Id. (footnotes omitted; emphasis added).

Our subcommittee gathered the substantial materials prepared by interested parties that established the extent of the disparity among the circuits, but also indicated that there are circuits in which the empanelling of three circuit judges for an appeal would reportedly be a practical impossibility.

Based upon such data, and recognizing that the Supreme Court has historically approved the use of local rules specifically to deal with the differences in the circuits, and concluding that uniformity of application, if it were to require single judge circuit appeals statewide, would be comparatively less beneficial than permitting three-judge panels where practicable, the Committee overwhelmingly decided to go back to the Supreme Court with a "no action" recommendation.

The result was the Chief Justice's letter, above.

The Second-Round

Now charged with the responsibility to write the rule, your subcommittee canvassed, in advance, the proponents of the three-judge panels and representatives of criminal and appellate rules committees, circulated some of our own suggestions among ourselves and participated in various telephone conversations aimed at better understanding the issues.

The result was some uncertainty over our mission, for the reason that the Circuit Courts' jurisdiction prescribed in appellate rule 9.030(c) encompasses three categories: appeal jurisdiction (subdivision (1)); certiorari jurisdiction (subdivision (2)); and original jurisdiction (subdivision (3)). And the first category includes not only appeal of final and non-final orders "of lower tribunals" (county courts), but also administrative action to the extent provided by general law. *See* Rule 9.030(c)(1)(C), Fla. R. App. P.

And so we have the Supreme Court's explicit concern last summer in the *City of Dania* case over the disparity in the treatment of circuit court first tier certiorari review, followed by a specific charge to address circuit court appeal jurisdiction only.

Subcommittee Proposals for Consideration

Because your valiant subcommittee is determined to rise to the task, irrespective of our confusion, we present three alternatives for the full Committee's review, more for the purposes of prompting discussion than of recommending a particular course.

The first alternative, for a new Rule 2.045 is mine; the second, for a new Rule 2.050(i) is from Robert Glazier (appellate rules subcommittee); the third, for an amendment to appellate rule 9.030(c)(1) is Judge Wessel's.

The Second (Glazier) Proposal: My own personal view, not necessarily that of any subcommittee members, is that the Glazier proposal's concept that circuits unable to have three circuit judges sit on review panels should have some relief from a three-judge panel requirement makes sense, but I do not like the idea of putting this in Rule 2.050, which is already very long and which, from its initial subdivision, is clearly aimed at other subject matter. Nor do I like the idea of creating a new procedure to obtain a "waiver" when we already have procedures long written into these rules, for local court rules to accomplish such local purposes. I do not know, incidentally, whether this proposal, by reference to "final appeal" is intended to address only appellate jurisdiction from final orders or something else.

The First (Berman) Proposal: This concept arises really from a modification of the Glazier proposal. It keeps the provision in the RJA only because Rule 2.040(a)(1) is where the rules provide for three judges in the DCAs' exercise of jurisdiction, and I have matched the language used there in the first sentence. The bracketed portion of the proposal presents a local rule option to accomplish Glazier's purpose in which I personally think is a more practical, already existing way. The reference to review of county court orders represents an attempt to stay true to the Supreme Court's charge, taken literally from the Chief Justice's letter.

The Third (Wessel) Proposal: By placing the three-judge panel requirement directly in the appeal jurisdiction subdivision of the appellate rule, Judge Wessel's proposal addresses the Supreme Court's charge (but for the administrative action review component of that subdivision). Whether or not such provisions should be in that rulebook or ours presents an interesting question. This would obviously be a change, however, given the provision of RJA 2.040(a)(1), which would suggest that any recommendation to place such provisions in the appellate rules should be made uniform.

Finally, whichever variation is appealing to the Committee, we might want to consider recommending a broader application than that suggested in the Chief Justice's letter, if we think the limitation may have been inadvertent or if we think that the benefits of three-judge panels should be extended. I suspect, however, that we would find widespread agreement that three-judge panels should not be mandated (or permitted) for the exercise of original jurisdiction under appellate rule 9.030(c)(3) and civil procedure rule 1.630.

Rule 2.045. CIRCUIT COURT REVIEW OF COUNTY COURT ORDERS

Three judges shall constitute a panel for review of each county court order within the circuit court's appellate and certiorari jurisdiction under Rule 9.030 (c) (1) and (2), Fla. R. App. P. [The requirements of this rule may be excused by local court rule, in accordance with the procedures set forth in rule 2.050(e), in any circuit in which compliance with this rule is not feasible or would create a hardship or otherwise interfere with the judicial function in the circuit.]

Rule 2.050. TRIAL COURT ADMINISTRATION

(i) **Circuit Court Appeals.** Every final appeal to the circuit court appellate division shall be assigned to a panel of three circuit court judges. If the chief judge of the circuit believes that it would be unfeasible for such appeals to be assigned to three judges, the chief judge may file a petition for waiver in the Supreme Court. The petition must be filed by July 1 of each year. If the petition is granted, the circuit shall for the following calendar year be excused from the requirement that circuit court final appeals be assigned to a panel of three judges. Petitions for waiver will be looked upon with disfavor, and will be granted only upon proof that it would not be feasible for the circuit to assign three judges to a final appeal.

Rule 9.030. Jurisdiction of Courts

* * *

(c) Jurisdiction of Circuit Courts.

(1) *Appeal Jurisdiction.* The circuit courts shall review, by appeal before a panel of three circuit judges

(A) final orders of lower tribunals as provided by general law;

(B) non-final orders of lower tribunals as prescribed by rule 9.130;

(C) administrative action if provided by general law.

(2) *Certiorari Jurisdiction.* The certiorari jurisdiction of circuit courts may be sought to review non-final orders of lower tribunals other than as prescribed by rule 9.130.

(3) *Original Jurisdiction.* Circuit courts may issue writs of mandamus, prohibition, quo warranto, common law certiorari, and habeas corpus, and all writs necessary to the complete exercise of the courts' jurisdiction.

Florida Rules of Judicial Administration Committee
Thursday, January 18, 2001
1:00 p.m. - 5:30 p.m.
Hyatt Regency, Miami

AGENDA

I. **CALL TO ORDER**

A. Attendance roster - roll call

B. Introduction of guests

C. Approval of minutes of September 14, 2000, meeting

II. **REPORTS**

A. Chair's report
1. Status of decisions re: Kayla McKean Act; Trial Court Budget Commission

B. Report from Supreme Court Liaison Justice Leander Shaw

C. Report from Board of Governors Liaison Michael Kranz

D. Report from Florida Bar Liaison Craig Shaw
1. Timetable for revised two-year cycle
2. 2001 edition of Rules of Judicial Administration pamphlet

III. **DISCUSSION OF REPORTS/UNFINISHED BUSINESS**

A. Proposals Pending Final Approval

1. Subcommittee E (Judge Raymond Gross)

a. Amendment to Rule 2.170 re: restrictions on televising/photographing jurors and revision or elimination of appendix to rule

B. Proposals Pending Action by Subcommittee

1. Subcommittee A (Bruce Berman)

a. Proposal in response to request by Supreme Court for recommendations re certiorari review in circuit and district courts

2. Subcommittee D (Paul Regensdorf)

a. Proposed rule re: ways to ensure expedited trial-level processing of parental rights cases and other time-sensitive matters

C. Letter requesting Committee report on whether to create or amend any rules to implement policies expressed in Jackson v. Fla. Dept. of Corrections

IV. NEW BUSINESS

A. Committee response to letter from Clerk of Supreme Court dated October 27, 2000, re: amendments to Rule 2.130 (Menendez)

B. Review of Rule 2.070 in light of decision in Greene v. State (Scott Silverman)

C. Letter from Robert Korschun re: proposed rule to address termination of attorney-client relationship

D. Letters from Tom Elligett re: amending rule 2.060(k)

E. Letter from Court dated 9/21/00 re rules 2.070(e) and 2.060(b) (can be handled in regular cycle; to be referred to subcommittee)

F. Letter from Court Clerk dated 12/12/00 re: rule 2.160 and opinion in Fuster-Escalona v. Wisotsky (can be handled in regular cycle at Committee's discretion; to be referred to subcommittee)

G. Creation of Executive Committee within RJA Committee (P. Regensdorf)

H. Committee response to recommendations of Family Court Steering Committee to create Model Family Court

V. ANNOUNCEMENTS

A. Upcoming meetings:

Feb./March 2001 (if these matters are not resolved at January meeting) – To issue final reports on: (1) Kreidler petition; (2) certiorari review issue; and (3) amendments to Rule 2.130. (All three reports are due to the Supreme Court in April 2001.)

June 21, 2001 – Marriott's Orlando World Center

B. Other announcements

C. Adjournment

MINUTES OF THE RULES OF JUDICIAL ADMINISTRATION COMMITTEE
MEETING - THURSDAY, JANUARY 18, 2001
HYATT REGENCY - MIAMI

I. CALL TO ORDER

The meeting was called to order by Chair Judge Charles Kahn, Jr., at 1:35 p.m. A quorum was present. All members present introduced themselves. Guests included Tom Elligett; Judy Everman, President, Everman & Associates, Inc.; Tom Hall; and Robert Korschun. See attached attendance list. The minutes of the September 17, 2000, meeting were approved.

II. REPORTS

A. Chair's Report: 1. The Kayla McKean Act - the Florida Supreme Court recently denied motion for clarification. 2. Trial Court Budget Commission - no objections to the rule creating the Commission; Commission's action is already underway.

III. DISCUSSION OF REPORTS/UNFINISHED BUSINESS

A. Proposal Pending Final Approval - Rule 2.170 re: restrictions on televising/broadcasting jurors and elimination of appendix. Judge Gross moved (seconded) to adopt the amended rule. There was some discussion about including a commentary or committee note to the amended rule. Judge Gross accepted a friendly amendment by Judge Webster (seconded) to approve the rule but refer it back to Subcommittee E to draft a committee note. The amended motion carried unanimously.

B. Proposals Pending Action by Subcommittee - Proposals in response to request by supreme court for recommendations re: certiorari review and appeals from county court by three judge panels in circuit court. Bruce Berman discussed the background of how this matter came before the committee and actions taken so far. See memorandum dated December 29, 2000 (pp. 14-18 of agenda). There was lengthy discussion of this issue. The discussion began with whether the committee could once again recommend to the supreme court that no action be taken. Judge Kahn spoke with the chief justice days before the meeting and the chief justice indicated that it was acceptable for the committee to recommend no action again as long as such decision was supported by a rationale.

Judge Eaton stressed that because this is a rule of state-wide application we should review how it affects the administration of the circuit courts. His experience with three judge panels is that they waste resources, waste time, and are awkward. There was discussion about limiting the three judge panels to appeals of county court orders and not including original certiorari jurisdiction.

Judge Eaton moved (seconded) that we reiterate our previous position of no action to the supreme court and in the alternative, provide a rule that limits three judge panels in circuit court

to county appeals of criminal cases only. Judge Silverman moved (seconded) to amend the motion by providing in the alternative that three judge panels in circuit court be limited to appeals from county court, both civil and criminal. The amended motion carried 15-8.

Discussion then focused on the wording of the proposed rule. Judge Webster suggested the rule be placed in the judicial administration rules rather than the appellate rules because it affects judicial resources in the circuit court. Judge Eaton moved (seconded) to accept the proposed Rule 2.045 (Berman proposal). The motion carried 22-2.

Judge Eaton then moved for Judge Kahn's response letter to the supreme court discussing the rationale for taking no action to include: a) the rationale of the previous letter to the supreme court; b) waste of judicial resources; c) delay; d) awkwardness of three judge panels; and e) in certiorari cases it seems wrong to require three circuit judges to decide a zoning matter when a single circuit judge can sentence a person to death. This motion carried 17-3.

C. Letter requesting committee report on whether to create or amend any rules to implement policies expressed in Jackson v. Florida Department of Corrections (procedure for requesting leave to proceed *in forma pauperis*) - Judge Webster advised that the supreme court just issued a revised opinion in this case and that Subcommittee C will report back in June 2001.

IV. NEW BUSINESS

A. Committee response to letter from clerk of supreme court dated October 27, 2000, re: amendments to Rule 2.130 - Judge Menendez explained that in response to the supreme court's direction, Subcommittee B proposed an amendment to Rule 2.130 regarding pending rules cases. The proposed amendment provides: a) all documents in rules cases shall be filed with the clerk of the supreme court; b) who else should receive notice of comments filed; and c) publication of proposed rules shall occur before they are filed with the clerk. Judge Jorgenson moved (seconded) to accept this proposed amendment in concept. There was discussion about the difficulty in changing dates for consideration of proposed rules by the Board of Governors and the Florida Supreme Court. Discussion also involved whether publication of all comments was too burdensome. Judge Webster moved (seconded) to approve the proposed amendment to Rule 2.130 in concept. The motion passed unanimously. Judge Menendez will report back in March 2001.

B. Review of Rule 2.070 in light of decision in Greene v. State - Judge Silverman advised the fourth district court of appeal in Greene on rehearing ruled that court reporters must report audio tapes as they are being played during a court proceeding. The court stated: "Any change that allows a court reporter not to report the proceedings must be made by rule or by opinion of the supreme court." Judge Silverman recommended no action be taken. The committee agreed.

C. Letter from Robert Korschun re: proposed rule to address termination of attorney-client relationship - Guest attorney Robert Korschun shared an experience on why

APPELLATE COURT RULES COMMITTEE
MINUTES

January 19, 2001

ATTENDANCE

See attached sign-in sheet.

I. CALL TO ORDER

The chair, Deborah Brueckheimer, called the meeting to order.

II. APPROVAL OF MINUTES

Minutes of September 15, 2000 were unanimously approved with the following attendance corrections: Barbara Eagan was present, and Karen Curtis and Katherine Pecko were excused.

III. CHAIR'S REPORT

A. Florida Supreme Court's Adoption of Amendments effective 1-2-01 and Chair's Letter

The chair reported that the Supreme Court of Florida rejected or altered several of the Committee's four-year cycle proposals. Unsure of whether the change was needed, the court rejected the Committee's *Anders* brief proposal and sought additional input. The chair accordingly sent letters seeking input to every district court of appeal judge, appellate department of the public defender's offices (other than her own), and appellate department of the attorney general's offices. She also asked the Florida Bar Journal to publish the letter in an upcoming edition.

The court rejected the Committee's font rule proposal. The court was receptive to the Committee's proposal to have the records in death penalty cases placed on computer disks, but sought further study on the issue.

B. Letter to Chief Justice Wells re: *Jackson*

In light of a pending motion for rehearing in *Jackson v. Department of Corrections*—in which the Supreme Court held unconstitutional the requirement that inmates seeking indigency status provide copies of prior proceedings—the chair had asked Chief Justice Wells that the Committee be given 20 days from the date of the June 2001 meeting to respond to the Court's decision. The chair's request was granted, and the *Jackson* motion for rehearing was decided January 18, 2001.

C. Letter to Hon. Oscar Eaton Jr., Chair, Criminal Procedure Rules

The chair's letter to Judge Eaton urged the Criminal Procedure Rules Committee to consider adopting a withdrawal-of-counsel rule similar to new Rule 9.140, in order to

close a gap that has resulted in criminal defendants not having representation when the State of Florida appealed.

D. Letter to Paul Regensdorf re: Prioritizing Appeals

The chair's letter to Paul Regensdorf addressed the Rules of Judicial Administration Committee's consideration of rule amendments to implement statutory and other case priorities. The chair stated the Appellate Court Rules Committee's position that prioritizing was being done adequately on a case-by-case basis. The chair also noted, however, that preparation of the record is a primary impediment to handling expedited appeals.

IV. OLD BUSINESS

A. Chart of Amendments for 2002 Rules Cycle

The chair reminded the Committee that the September 2001 meeting will be the deadline for the 2002 rules cycle.

B. Input on the Final Report and Recommendations of the Committee on Per Curiam Affirmed Decisions, report by Steve Krosschell, Chair of the PCA Subcommittee

The Supreme Court of Florida asked the Committee to study whether there should be rules changes implemented regarding per curiam affirmance (PCA) decisions. PCA Subcommittee chair Steve Krosschell reported that the subcommittee was making four alternative proposals and moved that the proposals be presented to the court for its consideration. Judge Webster stated that, with a limited exception, the proposals were beyond the ambit of the Appellate Court Rules Committee and that the only committee that arguably had jurisdiction to make such proposals was the Rules of Judicial Administration Committee.

Judge Webster then moved to reject the entire proposal of the PCA Subcommittee, other than the following language in the last paragraph of the subcommittee's proposal: "If we do not adopt either of these alternatives, the Appellate Rules PCA Subcommittee recommends that we adopt the rule [i.e., Rule 9.330(a)] proposed by the Judicial Management Council's PCA Committee, which is attached hereto and which Chief Justice Wells in the attached letter asked us to review." The proposed rule provided:

Rule 9.330. Rehearing; Clarification; Certification

(a) Time for Filing; Contents; Reply. A motion for rehearing, clarification, or certification may be filed within 15 days of an order or within such other time set by the court. A motion for rehearing or clarification shall state with particularity the points of law or fact that the court overlooked or misapprehended. The motion shall not re-argue the merits of the court's order. A reply may be served within 10 days of service of the motion. When the order is a per curiam affirmance without opinion, and a party believes that a written opinion

would provide a legitimate basis for Supreme Court review, the party may request that the court issue a written opinion. Such a request shall include the following statement:

> I express a belief, based upon a reasoned and studied professional judgment that a written opinion will provide a legitimate basis for Supreme Court review because (state with specificity the reasons why the Supreme Court would be likely to grant review if an opinion were written).
>
> /s/ _____
> Attorney for (name of party)
> (address and telephone number)
> Florida Bar No.. _____

The motion passed 30-9. It was then pointed out that the JMC's proposal predated the recent changes to Rule 9.330(a). An amended motion was then made to alter the JMC proposal so that the following language "When the order is a per curiam affirmance without opinion, and a party believes that a written opinion would provide a legitimate basis for Supreme Court review, the party may request that the court issue a written opinion" was changed to "When the order is a per curiam affirmance without opinion, and a party believes that a written opinion would provide a legitimate basis for Supreme Court review, the motion may include a request that the court issue a written opinion." The motion passed 32-8.

V. NEW BUSINESS

A. Letter from Judge Michael E. Allen

The chair was copied on a letter from Judge Allen to Judge Altenbernd, chair of the Criminal Appeal Reform Act Committee, regarding possible rule amendments to facilitate preservation of sentencing issues in juvenile cases. Judge Altenbernd will consult with Chief Justice Wells to determine whether the Criminal Appeal Reform Act Committee, the Juvenile Rules Committee, or the Appellate Court Rules Committee should address the possible amendments.

B. *Coblentz v. State*

The chair reported that the she had referred the issues raised by *Coblentz v. State*, regarding the labeling of sexual predators, to the Civil Rules Subcommittee and the Criminal Rules Subcommittee. The chair also indicated that there should be a joint subcommittee to study the issues, which are neither truly criminal nor truly civil.

C. *United States Services Automobile Assoc. v. Phillips*

The chair reported that she had referred the issues raised by *USAA v. Phillips*, regarding how a party must seek attorney's fees on appeal, to the Civil Rules Subcommittee.

D. **Letter from Bruce Berman re: 3-Judge Circuit Court Appellate Panels**

The chair received a letter from Bruce Berman, chair of the Rules of Judicial Administration Committee's subcommittee considering how many judges should be empanelled to hear appeals and writ proceedings in circuit courts. The subject was referred to the General Subcommittee, which proposed the following rule:

Rule 2.050. Trial Court Administration
(i) In all proceedings to review an order of a lower tribunal, three judges shall consider each case and the concurrence of a majority of the judges shall be necessary to a decision.

Notes
The terms "lower tribunal" and "order" shall be defined as set forth in the Rules of Appellate Procedure.

Judge Webster reported that on January 18, 2001, the day before the Appellate Court Rules Committee met, the Rules of Judicial Administration Committee met and voted not to require 3-judge panels for appellate review, but—alternatively—proposed the following rules and revisions:

Rule 2.045. Circuit Court Review Of County Court Orders
Three judges shall constitute a panel for review of each county court order within the circuit court's appellate and certiorari jurisdiction under rule 9.030 (c) (1) and (2), Fla. R. App. P. [The requirements of this rule may be excused by local court rule, in accordance with the procedures set forth in rule 2.050 (e), in any circuit in which compliance with this rule is not feasible or would create a hardship or otherwise interfere with the judicial function in the circuit.]

Rule 2.050. Trial Court Administration
(i) **Circuit Court Appeals.** Every final appeal to the circuit court appellate division shall be assigned to a panel of three circuit court judges. If the chief judge of the circuit believes that it would be unfeasible for such appeals to be assigned to three judges, the chief judge may file a petition for waiver in the Supreme Court. The petition must be filed by July 1 of each year. If the petition is granted, the circuit shall for the following calendar year be excused from the requirement that circuit court final appeals be assigned to a panel of three judges. Petitions for waiver will be looked upon with disfavor, and will be granted only upon proof that it would not be feasible for the circuit to assign three judges to a final appeal.

Rule 9.030. Jurisdiction of Courts

* * *

(c) Jurisdiction of Circuit Courts.

(1) *Appeal Jurisdiction.* The circuit courts shall review, by appeal before a panel of three circuit judges

(A) final orders of lower tribunals as provided by general law;

(B) non-final orders of lower tribunals as prescribed by rule 9.130;

(C) administrative action if provided by general law.

(2) *Certiorari Jurisdiction.* The certiorari jurisdiction of circuit courts may be sought to review non-final orders of lower tribunals other than as prescribed by rule 9.130.

(3) *Original Jurisdiction.* Circuit courts may issue writs of mandamus, prohibition, quo warranto, common law certiorari, and habeas corpus, and all writs necessary to the complete exercise of the court's jurisdiction.

The Committee discussion that followed focused upon which proceedings in circuit courts should have three-judge panels. Jay Levy also raised the issue of whether the Supreme Court of Florida had the constitutional power to determine the number of judges hearing circuit court proceedings, since the state constitution spelled out the number of judges for proceedings in the district courts of appeal. General Subcommittee chair, John Crabtree, reported the subcommittee analysis and determination that the issue of the number of judges on a panel was a procedural matter left to the court. Discussion then focused on whether a three-judge panel rule should include an opt-out provision, as the Rules of Judicial Administration Committee proposed.

Tony Musto moved to have the rule "apply to all review proceedings pending before the circuit courts, if the Supreme Court of Florida required three judge appellate panels." The motion passed 29-13.

Judge Laban moved to have the Committee take the position that it favored three-judge panels in circuit court review proceedings. John Crabtree reported that the Executive Council of Appellate Practice Section had voted unanimously the previous day to support three-judge panels in all circuit court review proceedings and to inform the Committee of its vote. Judge Laban's motion passed 22-20.

John Crabtree moved to endorse the Rules of Judicial Administration Committee's bracketed language (above) in that committee's proposed Rule 2.045, *i.e.*, "The requirements of this rule may be excused by local court rule, in accordance with the procedures set forth in rule 2.050 (e), in any circuit in which compliance with this rule is

not feasible or would create a hardship or otherwise interfere with the judicial function in the circuit." The motion passed 36-5.

VI. Subcommittee Reports

A. General Rules Subcommittee – Chair, John Crabtree

In addition to the three-judge panel issue, the General Subcommittee considered and rejected as moot a request to propose a rule limiting the reply portion of reply/answer briefs to 15 pages. The Committee had proposed such a rule in the last 4-year cycle, and the Supreme Court of Florida had accepted the proposal.

B. Rule 9.800 and ALWD Citation Manual Subcommittees – Chair, Nancy Gregoire

The Rule 9.800 and ALWD subcommittees requested and obtained extensions of time to make recommendations regarding pinpoint citations and the ALWD Citation Manual's provision that the Southern Second reporter be referred to as "S.2d" rather than "So. 2d."

C. Criminal Rules Subcommittee Report – Chair, Allyn Giambalvo

Since the *Jackson* case is now final (as of January 18, 2001, see above), the Criminal Rules Subcommittee will attempt to have a recommendation for the Committee within 20 days of the Committee's June 2001 meeting in Orlando.

VII. Announcement: ABA's Council of Appellate Lawyers

Cindy Hofmann announced the formation of the ABA's Council of Appellate Lawyers, and urged all Committee members to join. Annual due are $35. The Council's next conference will be in New York on October 4-7, and held in conjunction with the Council of State Appellate Judges.

VIII. Adjournment

There being no further business, the meeting was adjourned at 3:30 p.m. The next meeting is scheduled for June 20-23, 2001 at the Orlando World Center Marriott.

Respectfully submitted,

John G. Crabtree, Acting Secretary

DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
TALLAHASSEE
32399-1850

January 29, 2001

Chief Justice Charles Wells
The Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1925

Re: Review in the Circuit Courts of County Court Orders

Dear Chief Justice Wells:

This letter is in response to your letter of October 20, 2000. In that letter, you advised me that the Court has concluded that three-judge panels should be further considered for review of county court orders by circuit courts. Pursuant to your instructions, the Rules of Judicial Administration Committee took this matter up on January 18, 2001.

By a vote of 15 to 8, the Rules of Judicial Administration Committee readopted its previous position that no action be taken at this time, but in the alternative, voted to propose a rule that would provide three-judge panels in circuit court to hear all appeals, both civil and criminal, from county court. In furtherance of the will of the Committee, I am providing to the court a proposed rule. I am also providing a copy of my letter of September 20, 2000, concerning the original investigation performed by a subcommittee of the Rules of Judicial Administration Committee.

The Rules of Judicial Administration Committee directed me to advise the court that the Committee, after full reconsideration, is not persuaded that the rationale set out in my letter of September 20, 2000, is incorrect. Moreover, by a vote of 17-3, the Committee directed me to advise the Court of four additional reasons why the Committee is not completely in favor of a rule requiring three-judge panels. These reasons are:

a. such a requirement could well result in a misuse or even waste of scarce judicial resources;

II A

b. such a rule could result in delay of routine appellate matters that could be swiftly handled by a single judge;

c. such a rule could result in awkwardness in those circuits where three-judge panels have not been utilized before; and

d. the sense of the Committee was that it somehow seems incongruous to require three circuit judges to decide cases such as routine zoning matters when a single circuit judge may sentence a person to death.

Set out below is the Rules of Judicial Administration Committee's suggested rule, should this court determine to proceed further with the question of three-judge panels at the circuit court level:

Rule 2.045. Circuit Court Review of County Court Orders

Three judges shall constitute a panel for review of each county court order within the circuit court's appellate and certiorari jurisdiction under Rule 9.030(c)(1) and (2), Florida Rules of Appellate Procedures. The requirements of this rule may be excused by local court rule, in accordance with the procedures set forth in rule 2.050(e), in any circuit in which compliance with this rule is not feasible or would create a hardship or otherwise interfere with the judicial function in the circuit.

At the direction of the Court, I am providing a copy of this letter to the Appellate Rules Committee and to the Circuit and County Judges' Conferences for comments.

Sincerely,

Charles J. Kahn, Jr., Chairman
Rules of Judicial Administration Committee

cc: Craig Shaw, Esquire
Bruce Berman, Esquire
Debra Brueckheimer,
Chairman, Appellate Rules Committee
Judge Donald Moran,
Chairman, Circuit Judges Conference
Judge C. Jeffrey Arnold,
Chairman, County Judges Conference