



The Record

JOURNAL • OF • THE • APPELLATE • PRACTICE • SECTION

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Volume XVII, No. 2

THE FLORIDA BAR

Spring 2010

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Coming up:
CLE:
"Government Lawyers - Practicing Before the Florida Supreme Court"

June 10
Florida Supreme Court
Tallahassee, Fla.
See page 22-23.

Motions for Rehearing and Rehearing *En Banc*: Tips for the Trade

By Carlos F. Gonzalez and Gerardo J. Rodriguez-Albizu



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Litigation – whether at the appellate or trial court level – is a zero-sum game. There is always a proverbial “winner” and “loser.” Of course, advocates always desire to be on the winning side of the equation. In a final attempt to persuade the appellate court as to the correctness of an advocate’s position, appellate counsel frequently file a motion for rehearing or rehearing *en banc*.¹ Aside from a bruised ego, there are other reasons for filing a rehearing motion. Chief among them may be client relations. It is certainly easier to tell the client “I did everything possible, it just didn’t work out” after counsel has exhausted all remedies afforded by the Rules of Appellate Procedure. This may be especially true when the client is a fruitful source of work (think trial counsel).

For over half a century, appellate courts have complained that the bar abuses

rehearing motion practice. Beginning in *State ex rel. Jaytex Realty Co. v. Green*,² Judge Wigginton lamented that “[t]he experience of this court indicates that there is prevalent in the bar an opinion that the filing of a petition for rehearing is a routine step in every case decided by an appellate court.”³ Expressing his frustration with this practice, Judge Wigginton further commented that it was “not a compliment to the intelligence, the competency or the industry of the court for it to be told in each case which it decides that it has ‘overlooked and failed to consider’ from three to twenty matters which, had they been given proper weight, would have necessitated a different decision.”⁴ Apparently Judge Wigginton’s plea to the bar has fallen on deaf ears.⁵

Florida Rule of Appellate Procedure 9.330 provides that a party may file a motion for rehearing within fifteen days of the court’s order. Such a motion, however, must “state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues previously raised in the proceeding.”⁶ A cursory review of the law interpreting Rule 9.330 demonstrates that counsel frequently run afoul of the latter requirement.⁷

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Rule 9.331, in turn, governs motions for rehearing *en banc*. Such motions may only be filed when, in counsel's opinion, the case is of "exceptional importance" or reconsideration is "necessary to maintain the uniformity in the court's decisions."⁸ The Rule also requires counsel to certify that the grounds for filing a motion for rehearing *en banc* are present.⁹ Similar to motions for rehearing under Rule 9.330, the District Courts "perceive an undisciplined practice of some appellate counsel to seek *en banc* review of arguments rejected in panel decisions."¹⁰

Perhaps in an attempt to curb rehearing motion practice, the District Courts of Appeal have recently moved towards sanctioning counsel for violating Rule 9.330's strictures.¹¹ Such sanctions include ordering counsel to show cause in writing, awarding attorneys' fees to the opposing party, and even instructing the Clerk of the Court to deliver a copy of the opinion to The Florida Bar.¹²

For example, in *Unifirst Corp. v. City of Jacksonville*, the First District explained that section 57.105, Florida Statutes, could serve as a basis for awarding appellate attorneys' fees

against a party who improvidently moves the court for rehearing.¹³ There, the appellant filed a motion for rehearing pursuant to Rule 9.330 in response to the court's *per curiam* opinion.¹⁴ The appellee responded and also filed a motion for fees pursuant to section 57.105. Importantly, the First District noted the appellee's motion for sanctions was improperly filed because the appellee failed to comply with the 21-day safe harbor provision contained in section 57.105(4).¹⁵ The appellee's failure, however, was due to the operation of Rule 9.330 itself,

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DISCUSSION WITH THE SUPREME COURT

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* **Revised Format:** The Supreme Court will judge the final round of the competition. Following APS Chair Dorothy F. Easley and YLD President RJ Haughey's brief opening remarks, the Justices will discuss cutting-edge topics important to us all: (1) the future of court funding, (2) the status of e-filing for appellate courts and the court system in general, (3) streamlining the process of amending the rules of procedure, (4) recent trends in lawyer discipline and (5) death penalty appeals issues. The APS Chair-Elect, Former Supreme Court Justice Raoul G. Cantero and Vice-Chair Matthew J. Conigliaro will serve as moderators for audience questions. The winners of the competition will be announced and recognized after the Discussion with the Supreme Court.

Advance questions for the Supreme Court are encouraged to be submitted to: info_eap@bellsouth.net.

which requires a response to a motion for rehearing within ten days. The First District nonetheless concluded the court could award attorneys' fees on its own initiative pursuant to section 57.105(1).¹⁶

Consequently, prior to filing a motion for rehearing, clarification, or rehearing *en banc*, counsel should carefully ensure that a good faith basis for filing the motion is present.

The Dreaded PCA Opinion – “Affirmed”

Frequently advocates file rehearing motions in response to a *per curiam* affirmance opinion. Learning that the appellate court simply “affirmed” the trial court without further elaboration becomes a difficult pill to swallow after months of poring over appellate records, researching authorities, drafting and revising briefs, and preparing for oral argument.

By issuing a PCA opinion, counsel frequently argue in their rehearing motion, the appellate court has thwarted the party's right to obtain review from the Florida Supreme Court. In *Whipple v. State*,¹⁷ the court addressed this very issue. There, the court noted that a party does not have a “right” to obtain review by the Supreme Court.¹⁸ The Florida constitution merely guarantees a litigant a right of review.¹⁹ “If every litigant had a right of review in the supreme court,” the Second District explained, “the court would be so overwhelmed that it could not possibly focus on the important cases.”²⁰

In response to the Supreme Court's overwhelming caseload, the District Courts of Appeal were created in 1957 through an amendment to Article V of the Florida constitution. It was originally intended that the District Courts of Appeal would have final appellate jurisdiction in most cases. This finality, however, eroded as the Supreme Court began looking at trial court records in lieu of district

court holdings to determine conflict jurisdiction. As a result, the Supreme Court's caseload once again became unmanageable.²¹ In 1980, the Florida constitution was amended a second time to limit the Supreme Court's jurisdiction to better effectuate the intentions of the original amendment which created the District Courts.²²

Under the present constitutional scheme, the District Courts are tasked with ensuring that every litigant receives a fair trial through its so-called “error-correcting function.”²³ This enables the Supreme Court to focus its attention on its judicial policy-making function by clarifying the law and promulgating new rules of law. To further this purpose, the District Courts of Appeal are empowered with the ability to certify matters “of great public importance” or decisions which are in “direct conflict” with another District Court.²⁴

The District Courts are certainly cognizant of the fact that by issue of a PCA opinion, a party is deprived of further review in the Supreme Court. For this reason the District Courts endeavor to write an opinion whenever there is a colorable argument that review may be obtained before the High Court. Nevertheless, according to the courts, “[t]he fact remains . . . that most of the cases cited by zealous advocates as being in direct conflict with our PCA decisions are simply not close enough to write about.”²⁵

The District Courts of Appeal certainly have good reason for discouraging unnecessary rehearing motion practice. According to the Office of the State Courts Administrator's September 2005 report on Judicial Certification Statistics for Criteria Proposed by the Commission on District Court of Appeal Performance and Accountability,²⁶ in the fiscal year 2004-2005 there were on average of 396.2 cases filed per appellate judge. Florida Rule of Judicial Administration 2.250(a)(2) provides that a decision should be rendered within 180 days of either

oral argument or the submission of the case to the panel without oral argument. Considering the heavy caseload the District Courts of Appeal manage, and the relatively quick turnaround time required by the Rules of Judicial Administration, it is understandable that appellate judges lament the routine practice of counsel filing motions for rehearing.

Tips For The Trade

The District Courts have uniformly cautioned that a rehearing motion should only be filed if a party believes that a reasonable and objective basis exists for filing such a motion. “It is only those instances in which this analysis leads to an honest conviction that the court did in fact fail to consider (as distinguished from agreeing with) a question of law of fact which, had it been considered, would require a different decision, that a petition for rehearing should be filed.”²⁷

An advocate should therefore refrain from filing a rehearing motion that simply asserts the arguments made in a party's merits briefs. In *Unifirst Corp.*, for example, the First District awarded monetary sanctions against the appellant in part for presenting issues initially argued in the appellant's merits brief and at oral argument.²⁸ Asking a friend or colleague to review a proposed rehearing motion may assist counsel in obtaining an objective assessment of the motion's propriety prior to filing. Counsel should also carefully reflect on the arguments made in the merits briefs and gauge the court's temperature during oral argument in assessing whether a rehearing motion is warranted.²⁹

When filing a motion for rehearing *en banc*, the motion should make clear “that the case, rather than an issue in the case, is of exceptional importance.”³⁰ According to Judge Shepherd, *en banc* review is only appropriate when:

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(1) the outcome of the case (or its notoriety) is of greater moment or impact within the community rather than its effect upon the law of the state **and** either (a) the case is important beyond the effect it will have on the litigants or (b) will affect the ability of other potential litigants to seek their own remedies, **or** (2) the outcome of the case may reasonably and negatively influence the public's perception of the judiciary's ability to render meaningful justice.³¹

As with motions for rehearing under Rule 9.330, motions for rehearing *en banc* should similarly be viewed from an objective basis to determine whether a Rule 9.331 motion is warranted.

Concluding Remarks

The District Courts' patience with the bar regarding motions for rehearing and rehearing *en banc* has run thin. Advocates who frequently file such motions as a matter of course do so not only to their detriment, but to the Bar's as well.³² Rehearing motions, however, are the exception to the norm and should only be filed under very limited circumstances. The possibility of sanctions, or worse, potential disciplinary action from the Florida Bar, awaits counsel who improvidently files a rehearing motion.

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* * *

Endnotes:

- 1 See, e.g., *Lawyers Title Ins. Corp. v. Reitzes*, 631 So. 2d 1100, 1101 (Fla. 4th DCA 1993) ("It appears that counsel are utilizing the motion for rehearing and/or clarification as a last resort to persuade this court to change its mind, or to express displeasure with this court's conclusion.")
- 2 105 So. 2d 817 (Fla. 1st DCA 1958).
- 3 *Id.* at 818.
- 4 *Id.*
- 5 See *Amador v. Walker*, 862 So. 2d 729, 733 (Fla. 5th DCA 2003) ("Although much has been written to discourage the use of rehearing motions [to reargue the merits of an unsuccessful appeal], apparently the written word is not penetrating enough to get the point across.") (collecting cases); *Lawyers Title*, 631 So. 2d at 1100 ("Despite all that has been written to discourage the abuse of motion practice, motions for rehearing continue 'to occupy a singular status of abuse' in our court system.") (quoting *Parker v. Baker*, 499 So. 2d 843, 847 (Fla. 2d DCA 1986)).
- 6 Fla. R. App. P. 9.330(a).
- 7 See, e.g., *Unifirst Corp. v. City of Jacksonville, Tax Collector's Office*, No. 1D09-0820, 2010 WL 1076234, at *1 (Fla. 1st DCA March 25, 2010) (noting that appellant's motion for rehearing advance arguments which "were raised in Appellant's Initial Brief and extensively ad-

dressed during oral argument; rearguing these points was improper"); *Amador*, 862 So. 2d at 733 ("As a final point, we wish to address the procedural propriety of the various motions filed by Plaintiff. The Motion for Rehearing simply re-argues the merits of the court's opinion, in violation of Rule 9.330(a), Florida Rules of Appellate Procedure."); *Lawyers Title Ins. Corp.*, 631 So. 2d at 1100 ("We find nothing in the instant motion for rehearing that appellant did not argue in his briefs of in oral argument."); *Whipple v. State*, 431 So. 2d 1011, 1013 (Fla. 2d DCA 1983) ("From our experience, most motions for rehearing or clarification contain a condensed version of all or some of the points previously argued."); *Sherwood v. State*, 111 So. 2d 96, 97 (Fla. 3d DCA 1959) ("A cursory examination of [the petition for rehearing] show that it is an attempted reargument of the case, largely on new theories, taking up certain of the points which were argued in the appellant's brief and rearguing them with citation of authorities.")

- 8 Fla. R. App. P. 9.331(d).
- 9 Fla. R. App. P. 9.331(d)(2).
- 10 *Univ. of Miami v. Wilson*, 948 So. 2d 774, 787 (Fla. 3d DCA 2006).
- 11 See, e.g., *Unifirst Corp.*, 2010 WL 1076234, at *2 (awarding attorneys' fees pursuant to section 57.105(1)(b), Florida Statutes, for violating Rule 9.330); *Banderas v. Advance Petroleum, Inc.*, 716 So. 2d 876, 877-78 (Fla. 3d DCA 1998) (ordering counsel to show cause in writing why sanctions should not be imposed and directing that the Clerk of the Court provide a copy of the court's opinion to the Florida Bar); *Lawyers Title*, 631 So. 2d at 1101 (ordering counsel to show cause why monetary sanctions should not be imposed for violating Rule 9.330).
- 12 See *supra* note 10.
- 13 2010 WL 1076234, at *1.
- 14 *Id.*

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REHEARING

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15 *Id.*

16 *Id.* Section 57.105(1) provides that a court may render an award of reasonable attorneys' fees when "the court finds that the losing party or the losing party's attorney knew or should have known that a claim . . . when initially presented to the court . . . (b) Would not be supported by the application of then-existing law to those material facts." Section 57.105(1), Florida Statutes.

17 431 So. 2d 1011 (Fla. 2d DCA 1983).

18 *Id.* at 1013.

19 *Id.*

20 *Id.*

21 *See id.* at 1014 (noting that the Supreme Court's caseload in 1959 had decreased to 555 cases, and by fiscal year 1978-1979 had increased to a staggering 2,676 cases).

22 *See id.*

23 *Id.*

24 *Id.* at 1014-15.

25 *Id.* at 1015.

26 Office of the State Courts Administrator, Judicial Certification Statistics for Criteria Proposed by the Commission on District Court of Appeal Performance and Accountability, September 2005, available at http://www.flcourts.org/gen_public/programs.shtml (last visited April 27, 2010).

27 *Jaytex Realty Co.*, 105 So. 2d at 819.

28 2010 WL 426380, at *1. According to the court, the appellant "compounded its error by including in its motion new arguments related to an issue already addressed in its briefs and at oral argument" which was, of course, improper. *Id.* at *2.

29 For example in *Amador v. Walker*, 862 So. 2d 729 (Fla. 5th DCA 2003), the court's decision hinged on the interpretation of a recent Supreme Court decision, *White v. Steak & Ale of Florida, Inc.*, 816 So. 2d 546 (Fla. 2002). The court ultimately affirmed the trial court in a PCA opinion citing *White*. Appellant nonethe-

less filed a motion for rehearing, clarification, and for a written opinion. In a scathing opinion denying the rehearing motion, the court noted that "it should have been obvious" that the court agreed with appellee's interpretation of *White* based on the PCA opinion. The court then ordered the appellant's counsel to show cause in writing why monetary or other sanctions should not be imposed for filing the improvident rehearing motion and further directed the clerk of the court to provide a copy of the opinion to The Florida Bar.

30 *Univ. of Miami*, 948 So. 2d at 788.

31 *Id.* at 791.

32 *See, e.g., Lawyers Title Ins. Corp.*, 631 So. 2d at 1101 (noting that if the "abuse of motion practice preservers, 'the fear might arise that all motions for rehearing would, at least initially, be viewed with skepticism by a busy court'" (quoting *Parker v. Baker*, 499 So. 2d 843, 848 (Fla. 2d DCA 1986)).

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