Appellate Motions for Rehearing
When Is Enough Really Enough?

by Robert Alfert, Jr.

The Florida Rules of Appellate Procedure provide a vehicle for a party to seek, under narrowly circumscribed bases, reconsideration of an adverse decision on appeal. Rule 9.330(a) sets forth the requisite threshold for a legally sufficient motion: "The motion shall state with particularity the points of law or fact which the court has overlooked or misapprehended." Moreover, "the motion shall not re-argue the merits of the court's order." It is confounding that such a simple rule has been so rife with abuse and has caused such consternation among appellate courts. The misuse of motions for rehearing has caused more than one jurist to lament that "Rule 9.330 continues to occupy a singular status of abuse" in the appellate process.[1] The rule designed for those exceptions when an appellate court clearly erred has in essence mutated into routine motion practice.[2]

As the Fourth DCA has pointed out recently, an inordinately high number of motions for rehearing are being filed—notably in more than half of the cases disposed of by written decision[3]—and the vast majority violate Rule 9.330(a).[4] With very few exceptions, these motions are denied.[5] There exists a legitimate concern that this continued routine motion practice undermines the credibility of the rehearing process and perhaps creates a heavier burden in those rare situations in which a rehearing motion is appropriate. "If this abuse of motion practice perseveres, 'the fear might arise that all motions for rehearing would, at least initially, be viewed with skepticism by a busy court.'"[6]

> The goal of this article is not to discourage the use of rehearing motions, but rather to encourage meaningful, objective analysis prior to their filing.

The purpose of this article is to articulate the limited uses of the rehearing rule principally by pointing out the common mistakes and abuses of the motion practice. The body of cases on this subject fortunately provides an illuminating matrix of what not to do. The goal of this article is to promote a more restricted use of motions for rehearing. The cases clearly posit, after all, that counsel should use these types of motions sparingly, and only after meaningful, objective analysis.[7] The rehearing rule was never designed as a last ditch procedural device for continued argument or to stall the issuance of a mandate.

Standard of Review: Not for Re-argument

Although relatively incongruous with our system of appellate advocacy, a motion for rehearing is not a vehicle for continued argument. The rehearing rule clearly states that "[t]he motion shall not re-argue the merits of the court's order."[8] As Justice Arthur England once opined, "[I]t is not the office of rehearing to invite a complete re-analysis of all that has gone before."[9] Appellate decisions note too frequently that most motions for rehearing are mere condensed versions of points previously argued in the movants' appellate briefs.[10] These types of motions make little sense strategically; they are summarily denied and run the risk of public admonishment and sanctions.[11]

The proscription against continued advocacy logically extends to raising new points on rehearing. As with the preservation at trial of issues for appeal, the failure to raise an issue or argument on appeal is fatal on rehearing. Appellate courts will not consider issues raised for the first time in a motion for rehearing,[12] and certainly will not consider new evidence.[13] Appellate courts also will not entertain authorities cited for the first time in a motion for rehearing when those authorities could have been cited in the appellate briefs.[14]

The Fourth DCA perhaps has articulated with the most clarity the applicable standard of review governing motions for rehearing:

Motions for rehearing are strictly limited to calling to our attention—*with-*

out argument—to something we have obviously overlooked or misapprehended. The motion for rehearing is not a vehicle for counsel or the party to continue its attempt at advocacy. It should be demonstrative only—*i.e.*, merely point to the overlooked or misunderstood fact or circumstance.

Goter v. Brown, 682 So. 2d 155, 158 (Fla. 4th DCA 1996).[15]

The First DCA decision in *State ex rel Jaytex Realty Co. v. Green*, 105 So. 2d 817, 818 (Fla. 1st DCA 1958), which many other appellate decisions have cited with approval,[16] commented that the sole purpose of a motion for rehearing is to point out to the court some fact, precedent, or rule of law overlooked in the decision.[17] For example, the First DCA granted a rehearing motion in *Morgan v. Amerada Hess Corp.*, 357 So. 2d 1040, 1045 (Fla. 1st DCA 1978), in which the movant pointed out that the court had overlooked the fact that certain defendants were joined in the suit after the expiration of the applicable statutes of limitations savings clause, and thus claims against them were time-barred.

In short, an attorney should file a motion for rehearing only after "objectively" and "carefully" analyzing the law and the opinion of the court, if any.[18] "It is only in 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 or fact which, had it been considered, would require a different decision, that a [motion] for rehearing should be filed."[19] After a conscious, well-reasoned decision to proceed with a motion for rehearing, counsel should do so in a demonstrative manner only, without engaging in blatant advocacy or raising new issues or authorities.

Expression of Displeasure

Another common violation of the rehearing rule is the filing of a motion for rehearing that mainly is an expression of displeasure. This approach generally involves expressing displeasure at the opinion, the system, and sometimes the judges themselves. This approach is fraught with peril, especially as most motions of this sort also violate the proscription against re-argument.

Appellate decisions firmly maintain that counsel should not use the motion as a vehicle to express displeasure with a decision.[20] Naturally our system of jurisprudence disappoints, in most cases, half of the participants. A motion for rehearing, however, should not be used as a conduit for criticizing the legal conclusions of the court or the woes which a party or society may suffer from an adverse result. These types of criticisms are best suited to legal reform activities, participation in the legislative process or scholarly publications.

Recently there has been an unfortunate proliferation of motions for rehearing which engage in caustic criticism of the presiding judges. Although an outspoken diatribe against a judge is beyond the comprehension of most practitioners, it is far more common than imagined. Examples include calling the appellate court's review "superficial and shallow";[21] and stating that the court's decision will result in a "social malpractice that brings the bench and bar into disrepute" and is a "token of the triumph of legalese over judicial responsibility."[22] More extreme examples include the extraordinary motion for rehearing filed in *Banderas v. Advance Petroleum, Inc.,* 718 So. 2d 876 (Fla. 3d DCA 1998), in which counsel stated, inter alia, that the appellate court's per curiam affirmance was a "travesty of justice"; a "cop-out"; and bombastically stated, "[B]ut I suppose, when you don't have a good reason for doing something, then you do nothing and don't even have to explain it."[23]

Although the diatribe in *Banderas* is a truly extreme example which may result in harsh sanctions,[24] even the lesser examples are inappropriate and likely to meet with admonishment. As stated by the court whose review was called "shallow and superficial," [t]he instant motion is a personification of the very conduct found by the appellate courts to constitute a flagrant violation of the rule, i.e., it disagrees with the court's conclusion and proceeds to reargue the merits of the case. And, if that were not sufficient, it proceeds to do so in a manner that is disparaging to the lower court, to opposing counsel and to this court. This conduct cannot and will not be countenanced. The time has long since passed for announcements, pronouncements and warnings.[25]

Per Curiam Affirmances

Perhaps no other result on appeal can be more frustrating than a loss by per curiam affirmance (PCA) without written opinion. In addition to affording counsel no underlying explanation for the result, a PCA invariably decimates any ability to

seek higher review.[26] It is not uncommon, therefore, for parties to file motions for rehearing of decisions affirmed per curiam, usually in conjunction with a request for certification of question.

Absent some fortuitous spell of clairvoyance, however, a movant cannot meet the applicable standard of review governing motions for rehearing. Again, the motion must state with particularity the points of law or fact that the court overlooked or misapprehended. "To maintain that the court has overlooked something or misapprehended something when no written opinion is available to support the basis of the motion is less than persuasive, to put it nicely." *Snell v. State,* 522 So. 2d 407 (Fla. 5th DCA 1988).

The Fifth DCA decision in *Snell* was the only decision uncovered by research that clearly suggested motions for rehearing of PCAs were improper. Indeed, the court stated such a motion was "frivolous." The Third DCA opinion in *Banderas* also suggests that such a motion would be inappropriate. The court's first comment was that appellant filed a motion for rehearing "notwithstanding this court's per curiam affirmance without opinion."[27]

In all fairness, it should be pointed out that the Second DCA in *Whipple v. State,* 431 So. 2d 1011 (Fla. 2d DCA 1983), acknowledged that there have been cases before it when the decision was cast without opinion, but upon rehearing it issued a written opinion in order to distinguish cases relied upon by the losing party.[28] The Fourth DCA's written response to the order to show cause in *Elliott v. Elliott,* 648 So. 2d 137 (Fla. 4th DCA 1994), also suggested by implication that a "good-faith" motion for rehearing of a PCA might be tolerated. This suggestion has been reiterated by the Fourth DCA in a recent appellate practice workshop it hosted for practitioners. With all due respect to the Fourth DCA, all motions for rehearing should be filed in "good faith," in addition to stating with particularity points of law or fact overlooked or misapprehended. Given the Fourth DCA's recent stern decisions in *Goter*,[29] *Elliott*,[30] and *Reitzes*,[31] and even the admonishments in the *Whipple* case itself, an attorney would be foolhardy indeed to seek a rehearing of a PCA rendered without written opinion. Moreover, such a motion interposed solely for the purpose of requesting a written opinion similarly would be unwise. *See Horn v. Marine Hospitality Corp.*, No. 96-2810, 1998 WL 39271 (Fla. 4th DCA Feb. 2, 1998).

Motions for Rehearing En Banc

Motions seeking a rehearing en banc have become about as routine as motions for rehearing. Although the appellate rules certainly permit a party to seek en banc reconsideration in connection with a motion for rehearing,[32] the rule and the cases make it explicit that such relief is extraordinary.[33]

Rule 9.331 of the Florida Rules of Appellate Procedure permits a party to seek the extraordinary relief of en banc reconsideration only upon a showing "that the case is of exceptional importance or that such consideration is necessary to maintain uniformity in the court's decisions." A motion predicated on any other ground will be stricken.[34] The ground of "exceptional importance" is a rather nebulous standard. The only recent case where an appellate court granted en banc review solely on this ground looked to federal cases for guidance.[35] *See In the Interest of D.J.S.*, 563 So. 2d 655 (Fla. 1st DCA 1990). The *D.J.S.* court's analysis revealed that federal courts have found two general categories of cases that are of "exceptional importance," thereby potentially meriting en banc review: 1) cases that may affect large numbers of persons; and 2) cases that interpret fundamental legal or constitutional rights.[36] Practitioners also would be well served by following the analogous line of cases dealing with questions certified as ones of "great public importance."[37]

The second ground for en banc reconsideration involves intra-district conflicts only, rather than conflicts with other appellate courts or Florida Supreme Court precedent.[38] Although the Committee Notes to Rule 9.331 and the Florida Supreme Court state that district courts of appeal are free to develop their own concept of decisional uniformity, most follow, again as the Committee Notes suggest, Florida Supreme Court precedent on conflict jurisdiction.[39] The clearest and most quoted articulation of the conflict test was set forth in *Nielson v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960):

> (1) the announcement of a *rule of law* which conflicts with a rule previously announced by this Court; or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court. Under the first situation the facts are immaterial. . . . Under the second situation the controlling facts become vital and our jurisdiction may be asserted only where the [Court] has applied a recognized rule of law to reach a conflicting conclusion in a case involving substantially the same controlling facts as were involved in allegedly conflicting prior decisions of this Court.[40]

An application of this test should take heed of the Fourth DCA's commentary in *Whipple* that "most of the cases cited by zealous advocates as being in direct conflict with our . . . decisions are simply not close enough to write about."[41]

If an attorney files the motion for rehearing en banc, the attorney must certify that he or she "express[es] a belief, based on a reasoned and studied professional judgment," either that the decision is of exceptional importance or that such consideration is necessary to maintain uniformity in the court's decisions.[42] Naturally a legally sufficient motion must underscore the certification itself; form will not prevail over substance. As with motions for rehearing, the motion for rehearing en banc shall not engage in mere re-argument. *See, e.g., Gainesville Coca-Cola v. Young*, 632 So. 2d 83, 84 (Fla. 1st DCA 1994) (threatening sanctions for the filing of deficient motions for rehearing en banc).

Conclusion

The goal of this article is not to discourage the use of rehearing

motions, but rather to encourage meaningful, objective analysis prior to the filing of such motions. Far too many appellate decisions have been handed down recently which caution against the misuse of rehearing motions, principally those which engage in continued advocacy or mere expression of displeasure. These appellate decisions have woven a clear matrix of what will and will not be tolerated. As these recent decisions illustrate, the courts appear to have lost patience with a practice that was intended as an exception but has now become the norm. The arguable skepticism that currently surrounds rehearing motions will erode only through restraint. ❑

[1] *See Lawyers Title Ins. Corp. v. Reitzes,* 631 So. 2d 1100, 1100 (Fla. 4th D.C.A. 1993); *Parker v. Baker,* 499 So. 2d 843, 847 (Fla. 2d D.C.A. 1986).

[2] *See, e.g., Whipple v. State,* 431 So. 2d 1011, 1013 (Fla. 2d D.C.A. 1983).

[3] *See Inside the Fourth District Court of Appeal,* THE RECORD (Sept. 1998) at 6 (quoting 1993 statistics). This number has increased from the 25 percent figure noted by the Second D.C.A. in 1982. *See Whipple,* 431 So. 2d at 1013.

[4] *Reitzes,* 631 So. 2d at 1100–01.

[5] *Whipple,* 431 So. 2d at 1013.

[6] *Reitzes,* 631 So. 2d at 1101 (quoting *Parker v. Baker,* 499 So. 2d 843, 848 (Fla. 2d D.C.A. 1986)).

[7] *See, e.g., Anderson v. State,* 532 So. 2d 4, 6 (Fla. 2d D.C.A. 1988).

[8] FLA. R. APP. P. 9.330(a).

[9] *See United Gas Pipe Line Co. v. Bevis,* 336 So. 2d 560, 565 (Fla. 1976) (England, J., concurring) (citing *State ex rel Jaytex Realty Co. v. Green,* 105 So. 2d 817, 818–19 (Fla. 1st D.C.A. 1958)).

[10] *See Whipple v. State,* 431 So. 2d 1011, 1013 (Fla. 2d D.C.A. 1983).

[11] *See, e.g. Lawyers Title Ins. Corp. v. Reitzes,* 631 So. 2d 1101, 1102 (Fla. 4th D.C.A. 1994) (sanctioning counsel and client $1,250 for filing an argumentative motion for rehearing).

[12] *See, e.g., Anderson v. State,* 532 So. 2d 4, 6 (Fla. 2d D.C.A. 1988); *Price Wise Buying Group v. Nuzum,* 343 So. 2d 115, 117 (Fla. 1st D.C.A. 1977).

[13] *See Goter,* 682 So. 2d at 157–58.

[14] *See, e.g., Raskin v. Community Blood Centers,* 699 So. 2d 1014, 1016–17 (Fla. 4th D.C.A. 1997) (chastising counsel for citing for the first time in a motion for rehearing allegedly controlling authority that could have been cited in the appellate briefs); *Cartee v. Fla. Dep't of Health & Rehab. Serv.,* 354 So. 2d 81, 83 (Fla. 1st D.C.A. 1978).

[15] The Fourth DCA's interpretation of Rule 9.330 is underscored by the Florida Supreme Court's interpretation of the prior rehearing rule—*i.e.*, rehearing motions shall be "without argument." *United Gas Pipe Line Co. v. Bevis,* 336 So. 2d 560, 565 (Fla. 1976) (England, J., concurring).

[16] *See, e.g., Parker,* 499 So. 2d at 847; *Whipple,* 431 So. 2d at 1013.

[17] The *Jaytex* case also acknowledged that motions for rehearing may be appropriate to point out decisions rendered after the close of all briefs or after oral arguments that were not considered by the appellate court. *Jaytex,* 105 So. 2d at 819. Given that the current appellate rules contain a provision for filing with the court newly discovered supplemental authorities—FLA. R. APP. P. 9.225—it is not recommended that counsel wait until rehearing time to point out these new authorities.

[18] *Anderson,* 532 So. 2d at 6; *Jaytex,* 105 So. 2d at 819.

[19] *Id.*

[20] *See, e.g., Whipple,* 431 So. 2d at 1013; *Anderson,* 532 So. 2d at 6.

[21] *Elliott v. Elliott,* 648 So. 2d 135, 135 (Fla. 4th D.C.A. 1994).

[22] *Seminole County v. Sirken,* 686 So. 2d 601 (Fla. 5th D.C.A. 1997).

[23] 23 *Banderas,* 718 So. 2d at 876, 877.

[24] The *Banderas* court published counsel's motion in full, provided a copy to The Florida Bar and ordered counsel to show cause in writing why monetary and other sanctions should not be imposed.

[25] *Elliott,* 648 So. 2d at 136. Although the Fourth D.C.A. ultimately did not sanction counsel, it wrote yet a second opinion which was tantamount to public rebuke. *Elliott v. Elliott,* 648 So. 2d 137 (Fla. 4th D.C.A. 1994).

[26] FLA. CONST. art. V, § 3(b)(3) (1991); FLA. R. APP. P. 9.030(a)(2). *See also Whipple,* 431 So. 2d at 1013–15.

[27] *Banderas,* 716 So. 2d at 876.

[28] *Whipple,* 431 So. 2d at 1015.

[29] *Goter,* 682 So. 2d at 158 (stating that it "will not suffer a flouting" of the prohibition against argument in a motion for rehearing).

[30] *Elliott,* 648 So. 2d at 136 (ordering counsel to show cause in writing why he should not be sanctioned for violating the rehearing rule).

[31] *Reitzes,* 631 So. 2d at 1102 (sanctioning counsel and client $1,250 for violating the rehearing rule).

[32] A party seeking en banc reconsideration under Rule 9.331 must do so in connection with a motion for rehearing under Rule 9.330. FLA. R. CIV. P. 9.331(d)(1). A motion for en banc reconsideration not filed in conjunction with a motion for rehearing is a nullity and will be dismissed or summarily denied. *See, e.g., La Grande v. B & L Services, Inc.,* 436 So. 2d 337, 337 (Fla. 1st D.C.A. 1983).

[33] FLA. R. APP. P. 9.331(d)(2) (providing that a rehearing en banc is an extraordinary proceeding). The Committee Notes to the 1982 Amendment further state that "[c]ounsel are reminded that en banc proceedings are extraordinary. . . ."

[34] FLA. R. APP. P. 9.331(d)(1).

[35] Motions for en banc consideration on this ground alone typically are denied. *See, e.g., 3299 N. Fed. Highway, Inc. v. Bd. of County Comm'rs, Broward County,* 646 So. 2d 215 (Fla. 4th D.C.A. 1994); *Fleischer v. Hi-Rise Homes, Inc.,* 536 So. 2d 1101 (Fla. 4th D.C.A. 1988).

[36] *D.J.S.,* 563 So. 2d at 657 n.2.

[37] *Id.* (noting examples of "questions of great public importance," such as the prebirth conduct of a biological father as related to abandonment and issues involving prospective abuse, neglect, and abandonment). As also noted in Arthur J. England, Jr. and Tobias Simon, 1 FLORIDA APPELLATE MANUAL Ch. 2, at 47, this line of cases has included issues such as: whether stock owned by attorney shareholders in a professional service corporation was exempt from levy; whether admitting evidence of settlement to a defendant on a third-party claim to a wrongful death action constituted prejudicial error; and how to determine who has the right to present opening and closing arguments in condemnation actions.

[38] FLA. R. APP. P. 9.331(a); Committee Notes, FLA. R. APP. P. 9.331(a). *See also Schreiber v. Chase Fed. Sav. & Loan Ass'n,* 422 So. 2d 911 (Fla. 3d D.C.A. 1982) (Nesbitt, J., dissenting) (Judge Nesbitt's dissent was the majority opinion on the standard of review for en banc proceedings).

[39] *See Chase Fed. Sav. & Loan Ass'n v. Schreiber,* 479 So. 2d 90, 94 (Fla. 1985).

[40] *Nielson,* 117 So. 2d at 734 (emphasis in original; citations omitted) (cited with approval in *Schreiber,* 422 So. 2d at 915; *Finney v. State,* 420 So. 2d 639 (Fla. 3d D.C.A. 1982)).

[41] *Whipple,* 431 So. 2d at 1015.

[42] FLA. R. APP. P. 9.331(d)(2).

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