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SUPREME COURT OF FLORIDA

TALLAHASSEE
32304

March 13, 1979

The Honorable Arthur J. England, Jr.
Chief Justice
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

Dear Chief Justice England:

In accordance with your administrative order of August 15, 1978, the Commission on the Florida Appellate Court Structure herewith submits its report of recommendations for changes in the structure and internal procedure of the appellate courts of Florida.

Respectfully yours,

Ben F. Overton, Chairman

Judge Phillip A. Hubbart

Chief Judge Guyte P. McCord, Jr.

Judge Parker Lee McDonald

Chief Judge Stephen M. Grimes

Judge Donald E. Stone

Chief Judge James C. Downey

Judge Morton L. Abram

Commissioner Arthur C. Canaday

Thomas A. Clark

Senator James A. Scott

Charles B. Edwards

Representative Arnett E. Girardeau

Jack Kassewitz

Representative William E. Sadowski

Robert J. Pleus, Jr.

Dean Joseph R. Julin

Tobias Simon

William H. Adams III

COMMISSION

ON THE

FLORIDA APPELLATE COURT STRUCTURE

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Mr. Tobias Simon

INTRODUCTION

Florida should have an appellate court system which dispenses only the highest quality of justice. This fundamental precept guided the work of the Commission on the Florida Appellate Court Structure. Early in the Commission's study, it became apparent that any qualitative analysis of Florida's appellate courts must begin with an understanding of the quantity of work they are called upon to do.

In 1956 when Floridians were asked to relieve the Supreme Court of an unmanageable case load by creating the district courts of appeal, the Supreme Court was confronted with a case load of approximately 1200 annual filings. In 1978, despite the presence of four district courts of appeal, the same seven-member Supreme Court was asked to consider 2740 cases. In a provocative article designed to illustrate the effects of the Court's case load on its ability to deliver quality justice, Chief Justice England estimated:

> [T]he job of dispensing justice requires about fourteen hours of each of the 240 working days of each year. Or, using each of the 365 days in a year to perform the work, it would require more than nine hours of labor each day. Or, at the work rate of eight hours each day, these tasks would require 415 days a year.[1]

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[1] England & McMahon, Quantity Discounts in Appellate Justice, 60 Jud. 442, 450 (1977).

The article concludes that shortcuts are unavoidable. Significantly, the Court now faces 600 more cases a year than it did when Chief Justice England made his projections.

This volume crisis haunts not only the Supreme Court, but the district courts of appeal as well. In 1978 Florida's twenty-eight district court judges were asked to review almost 10,000 cases. California's fifty-six judges serving in its courts of appeal consider 11,000 cases per year. Simple mathematics indicates that Florida's district court judges are required to do nearly twice as much as their counterparts in California, yet a study of the California courts of appeal reflected that its judges were unable to cope effectively with their case load.[2]

Many scholars and judges have attempted to identify the reasons for burgeoning appellate dockets. A few suspected causes are increased urbanization, an expanded litigation consciousness, the enactment of more and complex legislation, and a substantial increase in criminal appeals over the past decade and a half. Internally, Florida's appellate courts have acted to streamline the appellate process in an effort to meet the increased demand for their services. Oral arguments are granted to

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[2] Wold, Going Through the Motions: The Monotony of Appellate Court Decisionmaking, 62 Jud. 58 (1978).

litigants less frequently and, when granted, are shorter in length; the courts have come to rely on larger staffs; the district courts dispose of more cases without written opinions. There are limits, however, to the economies which courts may adopt without a concomitant departure from our common law tradition. As one Commissioner suggested, the job of deciding appeals requires a certain amount of time for quiet reflection, a "time for looking out of windows."[3] Congestion in our courts threatens to deny our appellate judges the time they so vitally need to give each litigant a full and fair review on appeal.

Other systemic evils are promoted by a court which has too little time to do its work. Excessive reliance on staff reduces judicial accountability. Of increased likelihood is the bane known as the "one-judge" opinion which results when a busy court fails to consider each case as a collegial body but rather permits an opinion to reach publication without each member of the panel having reviewed its content and affirmed it intelligently. An overcrowded docket causes inevitable delay, "an unqualified evil."[4] Delay forces courts to

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[3] Remarks of Commissioner Thomas A. Clark.

[4] Carrington, Crowded Dockets and the Courts of Appeal: The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542, 554 (1969).

hasten their decisions to enable them to reach other cases awaiting decision. Delay "increases the pressure for settlement and improves the bargaining position of undeserving litigants who are sheltered by it."[5]

These are the problems presented by sheer volume in Florida's courts today. If we are to realize our initial thesis, the delivery of justice of the highest quality, change is needed. Following are the Commission's recommendations for implementing several measures designed to ease the current pressures on Florida's appellate courts.

Summary of Recommendations:

The Commission was created by Chief Justice England and given the responsibility to recommend "such measures as are deemed advisable to improve appellate justice and promote the efficient disposition of cases in the appellate courts."

Since August, 1978, the members of the Commission have made diligent inquiries into the appellate structure of this state. We all agree that our system of justice must be available, affordable, deliberative, and expeditious. In accomplishing these goals, the system must produce fair and just results and have an image of credibility with the public that justice is being done.

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[5] Id. at 554-55.

RECOMMENDATION NO. 1:

The Commission recommends the establishment of a fifth district court of appeal and the creation of a sufficient number of additional district court of appeal judges to reduce the case load to a number not to exceed 250 cases per judge.

The Commission proposes that the Supreme Court certify a need for and the legislature amend Chapter 35, Florida Statutes, to create a new fifth district by removing Marion County and the Seventh Circuit from the First District Court of Appeal, removing the Fifth and Tenth Circuits from the Second District Court of Appeal, removing the Ninth and Eighteenth Circuits from the Fourth District Court of Appeal, and placing the above circuits in a new district. The newly created district should be designated the Second District; the remainder of the existing Second District should be redesignated the Fifth District. See maps of the existing and proposed district court alignments, Appendix A.

The Commission further recommends that the five Second District judges residing in Hillsborough County should be considered judges of the new Fifth District which encompasses Hillsborough County; the two Second District judges residing in Polk County should be considered judges of the new Second District which encompasses Polk County; the one Fourth District judge residing in Orange County should be considered a judge of the new Second District which encompasses Orange County. The Supreme Court should certify to the legislature a need for additional judges in each of the five districts necessary to reduce the case load per judge as recommended, and the legislature should amend Chapter 35 to effectuate the Court's certification.

RECOMMENDATION NO. 2:

The Commission recommends the adoption of a new appellate rule authorizing the district courts of appeal to sit en banc to resolve intradistrict conflicts of decisions or to consider cases of exceptional importance.

RECOMMENDATION NO. 3:

The Commission recommends the following revision of the existing workmen's compensation system:

(A) All contested or controverted workmen's compensation claims should be adjudicated in the circuit courts rather than by judges of industrial claims (JIC);

(B) The existing judges of industrial claims should be abolished and at least a like number of circuit judge positions should be established to absorb the additional case load;

(C) Special divisions within the circuit courts should be authorized to handle workmen's compensation claims;

(D) The Industrial Relations Commission (IRC) should be abolished, and appeals from workmen's compensation cases should proceed to the district court of appeal in the district where the injury occurred. Additional district court judges should be appointed to absorb the additional appellate case load.

If recommendations 3(A)-(C), abolishing the judges of industrial claims and transferring workmen's compensation cases to the circuit courts are not obtainable, then the Commission urges that recommendation 3(D) be implemented separately.

RECOMMENDATION NO. 4:

The Commission recommends that the Florida Supreme Court exercise greater restraint and be more definitive in the exercise of its jurisdiction and assume greater control of its docket by (a) amending Florida Rule of Appellate Procedure 9.030 to limit the exercise of its direct appellate jurisdiction to cases involving substantial constitutional questions, (b) amending rule 9.030 to limit the exercise of its constitutional certiorari jurisdiction by emphasizing the discretionary nature of the writ and listing several factors which the court will consider in screening petitions for writs of certiorari, and (c) amending rule 9.100 to limit the exercise of "all writs" power to cases in which the Supreme Court has already acquired jurisdiction on an independent basis.

The Commission further recommends that the Supreme Court be given the power to issue writs of common law certiorari, either by constitutional amendment to Article V or by a clarifying construction of the present constitution and amendment to the appellate rules.

RECOMMENDATION NO. 5:

The Commission recommends an amendment to the Rules of Judicial Administration authorizing the chief judge of each judicial circuit to designate either a single circuit judge or a panel of three circuit judges to hear appeals from county courts.

RECOMMENDATION NO. 6:

The Commission recommends expanding county court jurisdiction to encompass cases in which the amount in controversy does not exceed $5,000, including all equitable defenses raised in such cases.

RECOMMENDATION NO. 7:

The Commission recommends transferring jurisdiction to review Public Service Commission orders from the Supreme Court to the district courts of appeal in all cases except those involving companies which dispense electricity, telephone or telegraph services, and natural gas. Venue in the district courts should lie where the regulated company's principal place of business is located, or where the principal place of business of the applicant for commission authority is located.

RECOMMENDATION NO. 8:

The Commission recommends the institution of a pilot program, designed to expedite criminal appeals, in a selected judicial circuit. Intended to ultimately reduce the time of disposition of appeals to 150 days or less from the date of jury verdict, elements of the program include preparation of the record within two weeks, expedited screening and hearing of single issue cases, expanded time for oral argument on appeal, and, whenever possible, rulings from the appellate bench immediately following oral argument and a post-argument conference.

RECOMMENDATION NO. 1:

The Commission recommends the establishment of a fifth district court of appeal and the creation of a sufficient number of additional district court of appeal judges to reduce the case load to a number not to exceed 250 cases per judge.

The Commission proposes that the Supreme Court certify a need for and the legislature amend Chapter 35, Florida Statutes, to create a new fifth district by removing Marion County and the Seventh Circuit from the First District Court of Appeal, removing the Fifth and Tenth Circuits from the Second District Court of Appeal, removing the Ninth and Eighteenth Circuits from the Fourth District Court of Appeal, and placing the above circuits in a new district. The newly created district should be designated the Second District; the remainder of the existing Second District should be redesignated the Fifth District. See maps of the existing and proposed district court alignments, Appendix A.

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be considered a judge of the new Second District which encompasses Orange County. The Supreme Court should certify to the legislature a need for additional judges in each of the five districts necessary to reduce the case load per judge as recommended, and the legislature should amend Chapter 35 to effectuate the Court's certification.

JUSTIFICATION:

The primary function of the district courts of appeal is to provide Florida's litigants with a meaningful appellate day in court as a matter of right. Unlike the jurisdiction of the Supreme Court, which is largely discretionary, the district courts' jurisdiction is largely mandatory. Article V, section 4(b)(1), Florida Constitution, provides: "District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments . . . of trial courts, . . . not directly appealable to the supreme court . . . ." Because the district courts are not free to choose the cases they hear, solutions to an overcrowded docket are limited. The burden of having too much work to do can be alleviated only by adding more judges or creating more courts. The Commission, after months of careful study of case loads, population projections, road networks, and geography, has achieved a careful blend of the two curative measures.

A simple review of the numbers highlights the necessity for additional judicial manpower in the district courts. Our district courts are asked to review nearly twice as many cases as similar courts in Michigan and Illinois handle each year. California, a much larger state, generates only 1,500 more cases for its courts of appeal than Florida does, but California allocates twice as many judges to hear them.

Since 1968 the district courts' case load has increased substantially:

District	Total Filings, 1978	Total Filings, 1968
First	1989	607
Second	2332	651
Third	2422	1130
Fourth	2823	778
Total	9566	3166

In the intervening ten years Florida has added eight district court judges, increasing the size of each court from five to seven members. Yet the actual work load per judge is far greater today than it was ten years ago:

District	Cases Per Judge, 1978	Cases Per Judge, 1968
First	284	121
Second	333	130
Third	346	226
Fourth	403	156

The phrase "cases per judge" means cases in which an individual judge has primary responsibility. Because the district courts decide cases in panels of three, each judge must render a reasoned, studied decision in three times the number of cases for which he has primary responsibility. As an aid to the Commission's understanding of the problems facing appellate courts nationwide, testimony was heard from Professor Maurice Rosenberg of Columbia University. Professor Rosenberg is the co-author with Daniel J. Meador, Deputy Attorney General of the United States, and Paul D. Carrington, Dean of Duke University College of Law, of a leading study on appellate systems.[1] These authors suggest that a district court of appeal judge have primary responsibility for no more than one hundred full appeals per year. Although the case load per judge of our district courts was not far removed from that goal ten years ago, that figure under present circumstances seems unattainable.

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[1] P. Carrington, D. Meador, and M. Rosenberg, Justice on Appeal (1976).

Aside from sheer numbers, other problems face litigants pursuing appeals to the various district courts. As presently aligned, two rapidly growing areas are far removed from district headquarters. Appeals originating in the Fort Myers area are heard in Lakeland; those originating in the Orlando area are heard in West Palm Beach; both are significant trips for the litigants involved. Poor roads prevent the transfer of the Fort Myers area to the Fourth District, while a case load imbalance blocks the transfer of the Orlando area to the Second District which also serves the Tampa Bay area.

The Third District poses a unique problem in itself. Comprised solely of Dade and Monroe Counties, the Third District cannot be helped by realignments of district boundaries as a quick perusal of a map of Florida reveals. Splitting of circuits between districts has proven inadvisable in the Fifth Circuit which is presently divided between the First and Second Districts. In a more urban area such as the Eleventh Circuit, such a move seems even less desirable.

In his charge, the Chief Justice asked the Commission to look forward to the Florida that will exist in several years. A glimpse of Florida's future mandates prompt action to revamp our districts:

POPULATION PROJECTIONS

District	1978	2000	Percentage Increase
First[2]	2,194,700	3,227,600	47
Second[3]	2,358,800	4,707,800	57
Third[4]	1,530,600	2,138,600	39
Fourth[5]	2,544,000	4,105,900	61
TOTAL	8,628,100	13,179,900	52

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[2] The First District serves the 1st, 2nd, 3rd, 4th, 5th (Marion County only), 7th, 8th, and 14th circuits, including the counties of Escambia, Okaloosa, Santa Rosa, Walton, Franklin, Gadsden, Jefferson, Leon, Liberty, Wakulla, Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee, Taylor, Clay, Duval, Nassau, Marion, Flagler, Putnam, St. Johns, Volusia, Alachua, Baker, Bradford, Gilchrist, Levy, Union, Bay, Calhoun, Gulf, Holmes, Jackson, and Washington.

[3] The Second District serves the 5th (except for Marion County), 6th, 10th, 12th, 13th, and 20th circuits, including the counties of Citrus, Hernando, Lake, Sumter, Pasco, Pinellas, Hardee, Highlands, Polk, DeSoto, Manatee, Sarasota, Hillsborough, Charlotte, Collier, Glades, Hendry, and Lee.

[4] The Third District serves Dade and Monroe Counties in the 11th and 16th circuits.

[5] The Fourth District serves the 9th, 15th, 17th, 18th, and 19th circuits, including the counties of Orange, Osceola, Palm Beach, Broward, Brevard, Seminole, Indian River, Martin, Okeechobee, and St. Lucie.

Although the entire state is destined for increased growth, the areas now encompassed in the Second and Fourth Districts will expand more quickly and dramatically.

The Commission's solution should resolve the problems outlined above for the present and provide sufficient flexibility to meet population or case load shifts which may arise in the future. See Appendix A.

By creating a sufficient number of additional judgeships, complementing the existing twenty-eight district court judges, to achieve a case load not to exceed 250 cases per judge, the legislature can ensure that litigants will argue appeals to judges who have time to fully consider them. Case loads should be monitored periodically to avoid the crisis currently facing our courts. The figure of 250 reflects the practical reality that many cases may be disposed of routinely, yet strives to reduce the number of substantial appeals to levels which a single judge can be expected to effectively handle. Experience may reveal that the case load per judge should be reduced even further, but a maximum of 250 cases will significantly improve existing conditions.

The creation of the recommended fifth district will ease the travel problems for the areas which are now troubled without creating

new ones. For example, the Orlando and Volusia County area practitioners will have easy access to Lakeland via Interstate Route 4.

The combination of adding judges and redistricting should produce the following results:

Appellate Structure Commission Proposal

Total Cases

District	Without Workmen's Compensation Appeals	With Workmen's Compensation Appeals
First	1735	1890
Second	1492	1694
Third	2422	2723
Fourth	1970	2271
Fifth	1947	2142

Cases Per Judge

District	Proposed Number of Judges	Without Workmen's Compensation Appeals	With Workmen's Compensation Appeals
First	7	247	270
Second	6	248	282
Third	10	242	272
Fourth	8	246	283
Fifth	8	243	267

These tables are prepared with the anticipation that Recommendation No. 3 will become a reality. Thus, the effect of incorporation

of workmen's compensation appeals into the district courts is projected. It must be emphasized, however, that the need for new judges and a fifth district is wholly independent of Recommendation No. 3. The chart entitled Cases Per Judge indicates that if workmen's compensation appeals are transferred from the Industrial Relations Commission to the district courts, additional judges in excess of the proposed number of judges will be needed to meet the 250 cases-per-judge level. Finally, as these charts reveal, the only relief which can be provided for the Third District is the creation of extra judgeships.

The Commission proposal is also sound from a population standpoint, achieving a fair balance among the districts:

POPULATION PROJECTIONS

District	1978	2000	Percentage Increase
First	1,774,300	2,581,300	45
Second	1,548,700	2,401,800	55
Third	1,530,600	2,138,600	39
Fourth	1,665,500	2,768,200	66
Fifth	2,109,000	3,290,000	52
TOTAL	8,628,100	13,559,000	52

The Commission considered the possibility of further redefinition of district boundaries or creation of additional courts and concluded that five district courts of appeal should be the limit. In the future as courts expand, Florida should consider moving to divisions within the districts similar to the system presently in operation in California.

IMPLEMENTATION:

To implement this recommendation, the Supreme Court, under Article V, Section 9, Florida Constitution, must certify to the legislature the need for additional judges and the creation of the Fifth District Court of Appeal in accordance with the specific proposal set forth on page 1-1. Upon certification of such a need, the legislature may implement the Supreme Court's findings by appropriate legislation.

RECOMMENDATION NO. 2:

The Commission recommends the adoption of a new appellate rule authorizing the district courts of appeal to sit en banc to resolve intradistrict conflicts of decisions or to consider cases of exceptional importance.

JUSTIFICATION:

The purpose of the proposed recommendation is to provide a formal procedural mechanism to permit the district courts to settle conflicts of decisions arising within the same district and to speak with one voice as a court on matters of exceptional importance.

Presently, the district courts hold ad hoc conferences to discuss problems of conflicts between panels and to determine whether a panel should recede from a prior written opinion of the court. This proposal will formalize that process and provide a method for securing the input of counsel to resolve cases worthy of en banc determination. Although conflicts of decisions in cases decided by the same district court do not often arise, this recommendation will serve the dual purpose of reducing the Supreme Court's work load and furthering the goal of making the district courts the courts of last resort in most instances.

The Commission has carefully studied a possible constitutional infirmity in the en banc rule. Article V, section 4(a), Florida Constitution, provides: "Three judges shall be necessary to a decision." This provision might be construed to mean that district courts cannot constitutionally sit in panels larger than three judges. The Commission's studied opinion, however, is that

such a rigid construction of Article V, section 4(a) is neither required, nor is it the most reasonable. A memorandum of law prepared in 1961 by Charles A. Carroll, former judge of the Third District Court of Appeal, addressed this very issue. Judge Carroll concluded that this constitutional provision sets only a minimum standard and does not prohibit en banc review by district courts of appeal. Notably, a similar construction of a federal statute was necessary to permit federal circuit courts to hear cases en banc. The Commission adopts Judge Carroll's well-reasoned memorandum and incorporates it as part of this recommendation. See Appendix B.

IMPLEMENTATION:

The Commission recommends adoption of the following appellate rule:

Rule 9.331

DETERMINATION OF CAUSES BY A DISTRICT COURT OF APPEAL EN BANC

(a) EN BANC MATTERS: GENERALLY. A majority of a district court of appeal may order that an appeal or other proceeding pending before the court be heard or reheard en banc. A district court of appeal en banc shall consist of the judges in regular active service on such court. En banc hearings and rehearings are not favored and ordinarily will not be ordered except (1) when such consideration is necessary to maintain uniformity in the court's decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) HEARINGS EN BANC. A hearing en banc may be ordered only by a district court of appeal on its own motion. A party may not request an en banc hearing, and a motion seeking such a hearing will be stricken.

(c) REHEARINGS EN BANC. A rehearing en banc may be ordered by a district court of appeal on its own motion or on motion of a party. Within the time prescribed by Rule 9.330 for filing a motion for rehearing, a party may move for an en banc rehearing solely on the ground that such consideration is necessary to maintain uniformity in the court's decisions; a motion based on any other ground will be stricken. A vote will not be taken on such motion unless requested by a judge on the panel which heard the cause, or by any judge in regular active service on the court; provided, that nonpanel judges are under no obligation to consider such motion unless a vote is requested.

(1) REQUIRED STATEMENT FOR REHEARING EN BANC. A rehearing en banc is an extraordinary proceeding. In every case the duty of counsel is fully discharged without filing a motion for rehearing en banc unless the criterion set forth above is clearly met. In such instance, the above motion when filed by counsel shall contain the following statement:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court: (citing specifically the case or cases).
>
> /s/_____

(2) FORMAL ORDER ON REHEARING EN BANC. An order on a motion for rehearing en banc will not be entered unless a rehearing en banc is granted. Such order may limit the issues to be reheard, require the filing of additional briefs, or set the cause down for additional argument.

COMMENTARY:

This rule is patterned after the en banc rule of the federal Fifth Circuit Court of Appeals, and should be sparingly used.

Subsection (a) provides that a majority vote of a district court is necessary to set a case for hearing or rehearing en banc. All judges in regular active service, not excluded for cause, will constitute the en banc panel. Counsel are reminded that en banc proceedings are extraordinary and will be ordered only in the two narrow enumerated circumstances. The first ground, maintenance of uniformity in the court's decision, is the equivalent of decisional conflict as developed by Supreme Court precedent in the exercise of its conflict certiorari jurisdiction. The district courts are free, however, to develop their own concept of decisional uniformity. The second ground, questions of exceptional importance, may on occasion overlap with "questions of great public interest"--the basis for certifying questions to the Florida Supreme Court. The two concepts, however, are not necessarily coextensive. In determining whether a question is of exceptional importance, the district courts should consider whether the issue: (1) affects a significant number of persons other than the parties to the litigation; (2) creates uncertainty regarding the duties and

responsibilities of public officers; (3) creates doubt concerning interests acquired in reliance on prior decisions; (4) is significant to the administration of law; (5) is likely to be recurring; and (6) is inconsistent with established principles of settled law.

Subsection (b) provides that hearings en banc may not be sought by the litigants; such hearings may be ordered only by the district court sua sponte.

Subsection (c) governs rehearings en banc. A litigant may apply for an en banc rehearing only on the ground that an intradistrict conflict of decisions exists. Once a timely motion for rehearing en banc is filed, the three judges on the initial panel must consider the motion. A vote of the entire court may be initiated by any single judge on the panel. Any other judge on the court may also trigger a vote by the entire court, but nonpanel judges are not required to review petitions for rehearing en banc until a vote is requested by another judge. The court may on its own motion order a rehearing en banc on either of the enumerated grounds in subsection (a).

Subsection (c)(1) requires a signed statement of counsel certifying a bona fide belief that an en banc hearing is necessary to ensure decisional harmony within the district.

Subsection (c)(2) is intended to prevent baseless motions for en banc rehearings from absorbing excessive judicial time and labor. The district courts will not enter orders denying motions for en banc rehearings. If a rehearing en banc is granted, the court may order briefs from the parties and set the case for oral argument.

RECOMMENDATION NO. 3:

The Commission recommends the following revision of the existing workmen's compensation system:

(A) All contested or controverted workmen's compensation claims should be adjudicated in the circuit courts rather than by judges of industrial claims (JIC);

(B) The existing judges of industrial claims should be abolished and at least a like number of circuit judge positions should be established to absorb the additional case load;

(C) Special divisions within the circuit courts should be authorized to handle workmen's compensation claims;

(D) The Industrial Relations Commission (IRC) should be abolished, and appeals from workmen's compensation cases should proceed to the district court of appeal in the district where the injury occurred. Additional district court judges should be appointed to absorb the additional appellate case load.

If recommendations 3(A)-(C), abolishing the judges of industrial claims and transferring workmen's compensation cases to the circuit courts are not obtainable, then the Commission urges that recommendation 3(D) be implemented separately.

* * *

> "Great public interest." The Supreme Court is authorized to grant the common law certiorari (sic) decisions involving questions of "great public interest." The term "great public interest" doubtless means "Great public importance," and might better have been so worded. Review in this instance is dependent upon the Court of Appeals certifying the question to be of 'great public interest' or importance. Whether the certificate must affirmatively show the question to be of great public importance, or whether mere statement to that effect would be sufficient is problematical.
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> * * *
>
> Provisions for review by appeal and by certiorari in the Supreme Court are limited and it appears that no interlocutory review by certiorari by that court was intended to be permitted unless the specified constitutional questions were raised and adjudged [by the trial court]; . . . . (Emphasis added.)

The foregoing statements make it clear that:

1. Article V was intended by the Council to "clearly define and restrict" the jurisdiction of the Supreme Court. This intention grew out of an overriding concern by the draftsmen that litigants would be unnecessarily forced to the expense of defending a second appellate review.

2. Common law certiorari was considered by the Council, but the Supreme Court's jurisdiction to issue the writ was limited to cases provided for in the language of present Section 3(b)(3) which allows the Supreme Court to issue writs of certiorari to review "any interlocutory order passing upon a matter which, upon final judgment, would be directly appealable to the Supreme Court."

3. In order to restrict the Supreme Court's discretionary jurisdiction, the Court was deprived of the power to make subjective decisions concerning whether or not it had jurisdiction to review cases on grounds that they involved matters of great public interest.

DATED: January 16, 1979.

William H. Adams III

LIT29/P

JUSTIFICATION:

This recommendation has several beneficial objectives. First, by clothing judges, who preside over workmen's compensation cases, with constitutional status under Article V, Florida Constitution, judicial independence will be fostered. Second, by recognizing these cases as judicial, rather than administrative in nature, claimants will be guaranteed a meaningful "day in court." Third, creating specialized divisions within the circuits will encourage speedy and efficient disposition of these cases, and the development of expertise within the circuit courts to maintain the quality of review which claimants now receive from judges of industrial claims (JICs). Fourth, placing appellate jurisdiction over appeals in these cases within the district where the injury occurred will reduce the cost of travel, and avoid the problems which specialized appellate courts encourage. Fifth, the Supreme Court's docket will be reduced by removing an entire class of cases which the court is now required to review.

Subsection (A) of this proposal was prompted by a review of the actual work performed by JICs. Amounts in controversy in workmen's compensation cases are frequently substantial. Although the "comp" system is in substance judicial in nature, rather than administrative, the judges who preside in this area of the law are not governed by Article V of the Florida Constitution. To best ensure judicial independence and freedom from political pressures, to the true benefit of workers, employers and insurance carriers alike, compensation claims should be incorporated into the circuit courts. Although the Workmen's Compensation Section of the

Florida Bar recently passed a resolution opposing absorption of the entire "comp" system into the circuit courts, it supports granting JICs judicial status. The Conference of JICs unqualifiedly recommends that JICs become circuit judges, and the Board of Governors of the Florida Bar favors granting JICs Article V status and integrating the system into the circuit courts. JICs are presently appointed by the Governor and are reviewed at the end of each term of office by a judicial nominating commission. Thus, although JICs perform substantially the same tasks as circuit judges, the people of the state do not elect their JICs. Absorption of the JICs into Article V and the circuit courts would eliminate this method of selection and tenure which is far removed from public scrutiny.

Subsection (B) of this recommendation is not intended as a Commission finding concerning the quality of work which the existing JICs perform. Rather, since JICs are not under the judicial article but are administrative officers of the executive branch, they cannot be "grandfathered" and transferred directly into the circuit courts as many judges of civil and criminal courts of record were following the amalgamation of those courts into the circuit courts in 1972. The Commission thus recommends abolition of the JICs and suggests that the Governor carefully consider appointing existing JICs to the newly created circuit judgeships to best utilize their expertise in this area of the law that has developed over the years. Existing JICs will have the option of seeking appointment to the circuit bench through the present judicial nominating system.

Subsection (C), suggesting the creation of workmen's compensation divisions within the circuits, recognizes that during a transition period a new body of law must be mastered by the circuit judges. Divisions should assist in maintaining an efficient and speedy system of serving workers having compensation claims.

By recommendations 3(A)-C), the Commission in no way suggests a departure from the traditional foundation of workmen's compensation laws. As Mr. Justice Thornal, writing for the Florida Supreme Court in Fireman's Fund Insurance Co. v. Rich,[1] stated:

> The policy of workmen's compensation laws is to provide a prompt and expeditious forum to adjudicate the claims of workmen injured in the course of their employment. Within the memory of many of us, the industrially injured worker was formerly required to travel the laborious path of recovery in the common law courts. He was compelled to prove negligence. He faced the fellow servant rule, the foreseeability test and the doctrine of assumption of risks. The employer had the burdensome responsibility of defending against a multitude of claims, employing counsel and protecting himself against each separate industrial claim as it arose. Finally, employer and employee saw the wisdom of a system that would eliminate the technicalities of both claims and defenses. Fault as an element was removed. A ceiling was put on recovery, measured by earnings and extent of injury. A liberal, remedial approach replaced the stringency of the common law as a solution to a social and economic problem aggravated by the industrial age. . . .[2]

The Commission studied several alternatives before concluding that the Industrial Relations Commission (IRC) should be abolished, and appeals in workmen's compensation cases should be apportioned among the district courts, as recommended by subsection (D).

The Commission's initial concern was to determine a method for removing review of IRC orders from the Supreme Court's docket. In 1978,

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1. 220 So. 2d 369 (Fla. 1969).
2. Id. at 371.

the number of petitions for certiorari filed in the Supreme Court seeking review of IRC orders doubled the previous year's total. Forecasted increases in population and statewide industrialization suggest that this class of cases will continue to expand. The issues presented in most IRC cases, however, are rarely of statewide import or otherwise deserving of the attention of the state's highest court.

The Commission considered creating a specialized statewide court of appeals to hear appeals from judges of industrial claims. This approach would in actuality transform the Industrial Relations Commission into a court. This option, however, was rejected because of a desire to avoid the specialized court syndrome. Although the workmen's compensation field has been traditionally segregated from the mainstream of Florida's judicial system, perpetuation of that tradition is no longer justified. Equally valid arguments for separate courts could be made by practitioners who specialize in juvenile, criminal, general civil, and probate and guardianship cases. All are governed by separate statutes and rules. Such a fragmented approach, if applied to each of these areas, would complicate the law and confuse the public. Significantly, the people of this state rejected the philosophy of specialized courts when they voted to consolidate our trial court system in 1972. Having considered the merits of both sides of this question, the Commission strongly urges complete integration of workmen's compensation appeals into the district courts of appeal.

The specialized courts issue is discussed further in the conclusion to the report. For a projection of the effect the transfer of workmen's compensation appeals will have on the district courts' work, see Appendix A.

This proposal will require the creation of additional district court judgeships to handle the transferred cases. In filling these vacancies, the Governor should consider appointing existing IRC commissioners to the appellate bench to provide the district courts with experience in this field of law.

IMPLEMENTATION:

Implementation of this recommendation will not require a constitutional amendment but will necessitate a coordinated effort both by the legislature and the Supreme Court. Legislation transferring workmen's compensation jurisdiction to the circuit courts and abolishing the JICs and the IRC will be necessary. The Supreme Court must certify to the legislature the need for additional judicial manpower in the circuit courts and district courts. The Court's certification must then be approved and adopted by the legislature.

RECOMMENDATION NO. 4

The Commission recommends that the Florida Supreme Court exercise greater restraint and be more definitive in the exercise of its jurisdiction, and assume greater control of its docket by (a) amending Florida Rule of Appellate Procedure 9.030 to limit the exercise of its direct appellate jurisdiction to cases involving substantial constitutional questions; (b) amending rule 9.030 to limit the exercise of its constitutional certiorari jurisdiction by emphasizing the discretionary nature of the writ and listing several factors which the court will consider in screening petitions for writs of certiorari, (c) amending rule 9.100 to limit the exercise of "all writs" power to cases in which the Supreme Court has already acquired jurisdiction on an independent basis.

The Commission further recommends that the Supreme Court be given the power to issue writs of common law certiorari, either by constitutional amendment to Article V or by a clarifying construction of the present constitution and amendment to the appellate rules.

JUSTIFICATION:

A review of the quantity of the Court's work during the past year leads to the inescapable conclusion that it has too much to do. At year's end, the Court's docket had swelled by 244 cases over the final tally at the end of 1977, meaning that the Court was unable to keep pace with the demands placed on it. To remedy this situation, Chief Justice England urged that the Commission carefully consider recommending a wholesale revision of Article V,

Florida Constitution, to vest the Supreme Court with wholly discretionary jurisdiction except for death penalty appeals. The Commission has concluded that such a departure from our existing constitutional framework is unnecessary. For the Chief Justice's proposal to achieve the desired result of reducing the Court's work load significantly, the Court must exercise a degree of self-restraint which it has not done in the past. This same requisite measure of self-discipline, if applied to the existing jurisdictional scheme, should achieve the same desired end without the attendant instability in the appellate court system which would follow such a dramatic revision.

The Commission urges, in the strongest possible terms, that the Court reconsider its role within Florida's appellate system. To effectively serve the state as its highest judicial tribunal, the Supreme Court must consider only cases which substantially affect the law of the state. The present justices of the Florida Supreme Court should weigh carefully the words of former United States Supreme Court Justice Harlan Stone:

> The Supeme Court ought to devote itself to the consideration of cases involving important public questions, that its time and energy ought not to be absorbed in hearing and deciding cases merely to provide an unsuccessful litigant with further opportunity for delay, or to give him another chance, or where the issue is not doubtful or has plainly been considered and adequately dealt with by a competent appellate tribunal.[1]

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[1] A. Mason, Harlan Fiske Stone: Pillar of the Law 448 (1956) reprinted in The Wisdom of the Supreme Court 428 (P. Jackson ed. 1962).

These words reflect the role which the Commission envisions for the Florida Supreme Court. To fulfill this function, the district courts must be recognized as the court of last resort for the vast majority of litigants in this state. The concept of finality attaching to decisions of the district courts of appeal has been a difficult notion to accept for the court that sits at the apex of our system. It must be fully embraced by the Court, however, if it is to assume the role of a true policymaking court.

To assist the Court in shifting its focus from the problems of individual litigants and from the practice of granting "second appeals," the Commission has suggested several amendments to the appellate rules which are intended to guide the Court and inform the bar and the public of the proper role of the Supreme Court.

IMPLEMENTATION:

The Commission urges the adoption of the proposed amendments to court rules to define and limit the Court's power to hear appeals in cases passing on the validity of statutes or construing a constitutional provision; to restrict the use of its power to issue writs of certiorari pursuant to Article V, Section 3(b)(3), Florida Constitution; and to restrict the exercise of the "all writs" power.

Concerning the power to issue the writ of common law certiorari, the Commission was split on the method for best implementing its

recommendation. On one hand, a strong plurality of the Commission opined that in view of the Court's clear statements in several cases that it is powerless to issue "so-called common law writs of certiorari," the constitution must be amended to create the power. See Commissioner Adams' memorandum at Appendix C. On the other hand, a small minority of the Commission suggests that the power to issue these writs has always been vested in the Court, that in practice the Court issues the writ without expressly naming it as such, and in the absence of an express constitutional denial of this power the Supreme Court has inherent supervisory powers of which the common law writ is a part. This faction maintains that the existence of this power may be clarified for the practicing bar through an appellate rule. Finally, a third group of Commissioners contends that the ultimate decision regarding implementation of this suggestion rests with the Supreme Court and favors recommending only the policy determination that the Court should ideally have the power to issue the writ of common law certiorari.

The proposed appellate rules follow:

RULE 9.030. Jurisdiction of Courts

(a) Jurisdiction of supreme court.

(1) Appeal Jurisdiction.

(A) The supreme court shall review, by appeal:

(i) final orders of courts imposing sentences of death;[1]

(ii) final orders of trial courts and decisions of district courts of appeal initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution,[2] provided that the supreme court will not review such orders by appeal unless the constituional issue involved is substantial.

While the considerations mentioned in this rule are neither controlling nor exclusive, the court will, in determining whether a constitutional issue is substantial, consider:

(1) Whether the lower tribunal has declared invalid a statute of statewide application;

(2) Whether there exist nonconstitutional issues which might serve a more adequate ground for resolving the dispute;

(3) Whether the issue is involved in other cases pending in the lower tribunal;

(4) Whether the issue is of continuing importance;

(5) Whether the precise constitutional issue has been previously decided by the court.

(B) When provided by general law, the supreme court shall review, by appeal:

(i) final orders of courts imposing sentences of life imprisonment;

(ii) final orders entered in proceedings for the validation of bonds or certificates of indebtedness.[3]

The recommended amendment to Florida Rule of Appellate Procedure 9.030 (a)(1)(A) does not affect the Court's duty to hear direct appeals from trial court orders imposing the death penalty or from bond validation proceedings. Nor does it address the possibility of expanded appellate jurisdiction by general law to include appeals from orders imposing life imprisonment. The Commission suggests no change in these classes of cases.

This amendment is intended to codify existing case law interpreting the Court's duty to hear appeals from cases passing on the validityof state statutes, federal statutes and treaties, and from cases construing the state or federal constitution. When appeals are filed in the Supreme Court on either of these jurisdictional bases in cases involving colorable, insubstantial or frivolous constitutional claims, the Court will transfer these cases to the district courts

for disposition. Recently, in Coffin v. State,[2] the Court cautioned practitioners against filing frivolous appeals in the Supreme Court because insubstantial constitutional issues often obscure other more significant trial errors. The Court encouraged appellees to file motions to dismiss or transfer these types of appeals.

The proposed rule lists five non-exclusive factors which the Court will consider in reaching a determination of substantiality of an issue. These guidelines should assist the bench and the bar in best utilizing this jurisdictional path to the Supreme Court.

RULE 9.030 (a)(2)(A)

(2) Certiorari Jurisdiction. The certiorari jurisdiction of the supreme court may be sought to review:

(a) decisions of district courts of appeal that:[4]

(i) affect a class of constitutional or state officers;

(ii) pass upon a question certified to be of great public interest;

(iii) are in direct conflict with a decision of any district court of appeal or of the supreme court on the same point of law;

Review by writ of certiorari is not a matter of right. The supreme court will determine as a matter of sound judicial discretion whether to exercise its constitutional certiorari jurisdiction to review a decision of a district court of appeal. While the considerations mentioned in this rule are neither controlling nor exclusive, the court will, in determining whether a decision is sufficiently important to warrant review by certiorari, consider:

(1) whether or not the decision has been embodied in a written opinion;

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2. No. 52,018 (Fla. Sept. 14, 1978).

(2) the extent to which the rule of law announced in the decision will defeat or render doubtful rights acquired in reliance on previously rendered decisions;

(3) the extent to which the decision will create uncertainty with respect to the applicable rule of law and the extent to which the uncertainty will impair the ability of persons to plan future courses of action, to enter into contractual and other relationships, to settle disputes or to conduct judicial proceedings;

(4) the extent to which the decision will create uncertainty with respect to obligations of public officials;

(5) the number of persons affected by the decision or likely to be affected in the future by the rule of law announced in the decision;

(6) the frequency with which events raising the question of law answered in the decision are likely to occur;

(7) the degree to which the decision is incorrect or inconsistent with established principles of law.

In any event, where a petition for certiorari is predicated upon a conflict of decisions, the supreme court will not exercise its constitutional certiorari jurisdiction to review a decision of a district court of appeal:

(1) in which the alleged conflict exists only because of statements expressed in dicta, dissent, or other parts of the opinion which are not controlling; or

(2) in which a settled rule of law has been applied to facts which are not substantially the same as those in a prior decision; or

(3) in which the alleged conflict of decisions is based upon the comparison of the weight of the evidence and the credibility of the witnesses.

(B) any interlocutory order passing upon a matter which, upon final judgment, would be directly reviewable by the supreme court;[5]

(C) administrative action, including final orders of commissions established by general law having statewide jurisdiction.[6]

The Court's current practice of accepting jurisdiction over any case in which a conflict is found has all but written the word "may" out of Article V, Section 3(b)(3), Florida Constitution.

The proposed amendment to rule 9.030(a)(2)(A) announces that this form of review is discretionary. The amendment lists seven considerations, which if present, suggest that acceptance of jurisdiction is more likely; it also lists three factors, which if present, indicate that the Court will be less likely to issue the writ. The Court is urged by this proposed rule to accept only cases of importance to the jurisprudence of the state.

RULE 9.030(a)(3)

(3) Original Jurisdiction.

(A) The supreme court may issue writs of prohibition to lower tribunals in causes within the jurisdiction of the court to review; writs of mandamus and quo warranto to state officers and agencies; all writs necessary to the complete exercise of the court's jurisdiction.

(B) The supreme court may issue writs of common law certiorari to review decisions of district courts of appeal that pass upon matters of great public interest where there is a substantial departure from the essential requirements of law. While the considerations mentioned in this rule are neither controlling nor exclusive, the Court will, in determining whether to grant a writ, consider:

(1) Whether it affects a significant number of persons in addition to the particular parties to the litigation;

(2) Whether it creates uncertainty with regard to the duties and responsibilities of public officials;

(3) Whether it renders doubtful interests acquired in reliance on prior decisions;

(4) Whether it is significant to the administration of law;

(5) Whether it is likely to be recurring.

Controversy over the appropriate means of implementation aside, the majority of the Commission favors the Court's having power to review cases in which a substantial departure from the essential requirements of law has occurred through the common law writ of certiorari. If the Court determines that a constitutional amendment is necessary and is accomplished, the Commission's proposed rule should then be adopted. Proposed rule 9.030(3)(B) will permit the court to hear only cases of great public importance through this writ, thus limiting the common law writ even further than its already narrow scope. The rule lists five considerations which indicate when a case might be sufficiently important to prompt the Supreme Court to exercise this jurisdictional power.

An important aim of this suggestion by the Commission regarding the Supreme Court's jurisdiction, is that no longer will the Court be forced to stretch its other jurisdictional powers to fulfill its role as the overseer of Florida jurisprudence.

The following comment to proposed rule 9.030 was prepared by Commissioner Simon.

COMMENT - 9.030

The amendments to this rule allow the Florida Supreme Court to emulate the model upon which the United States Supreme Court is structured. The two principles underlying the effectiveness of the federal system are that the supreme court (1) maintains complete control over the volume and nature of its docket, and (2) recognizes the courts of appeals as courts of final determination, thus permitting the supreme court to devote its total energy to the formulation of policy.

The United States Supreme Court has interpreted its mandatory appellate jurisdiction to be limited by the requirement of substantiality in the question presented. See Zucht v. King, 260 U.S. 174 (1922). If the appellant cannot show "reasons why the questions presented are so substantial as to require plenary consideration,"[1] the court will affirm or even reverse summarily without argument. The considerations used by the court to determine the substantiality for question on appeal are similar to those governing certiorari jurisdiction. And while technically the "substantiality" of a question has no relationship to the court's work load, in practice the subjective criterion of substantiality may be influenced by the pressures of the docket.

The United States Supreme Court may not exercise its discretionary jurisdiction to review seemingly important questions merely because lower courts have reached conflicting resolutions unless other convincing factors can be shown. Compare Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073 (9th Cir. 1970), cert. denied, 402 U.S. 923 (1971), with Fields Productions, Inc. v. United Artists Corp., 432 F.2d 1010 (2d Cir. 1970), cert. denied, 401 U.S. 949 (1971). The United States Supreme Court is not influenced by the needs of the particular litigants, but rather concerned with whether the question significantly affects a great number of persons. Dupuy v. Dupuy, 434 U.S. 911 (1977). The important and recurring nature of the question in conflict influences the grant or denial of certiorari. The issue must also be ripe for determination and in conflict with a decision which has not been discredited or lost all weight as authority by intervening precedents.

As the United States Supreme Court has done, the Florida Supreme Court should reaffirm its position as a policymaking body as opposed to the arbiter of individual disputes. The district courts of appeal are courts of final arbitration. In order to facilitate this shift towards exercising stricter control over the nature of cases before the Florida Supreme Court, the following changes are suggested.

In regard to its obligatory appeal jurisdiction, the court should hear only "substantial" constitutional issues. The purpose of rule 9.030(a)(1)(A)(ii) is to set our guidelines which are neither exclusive nor controlling to aid the practitioner in determining

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1. Sup. Ct. R. 15(1)(e), (f).

whether a "substantial consitutional issue exists to warrant involking the supreme court's jurisdiction.[2] Subsections (1) and (2) are objective standards, which will be clear on the face of the order, creating and negating, respectively, the substantiality of the constitutional issue. Considerations (1) and (2) are determined by the substance of the final order of the lower tribunal. On the other hand, subsections (3) and (4) are somewhat subjective criteria determined by the effect of a lower tribunal's declaration of the validity of the constitutional issue.

These considerations do not relieve the attorney from the burden of researching case law for more complete definitions of what comprises a "substantial constitutional issue." The considerations, however, do provide a set of guidelines in order to avoid the type of misunderstanding which occurred in Coffin v. State, No. 52,018 (Fla. September 14, 1978). In Coffin the supreme court accepted jurisdiction and heard argument based on the appellant's constitutional challenges to the validity of certain provisions of a statute. The court then concluded that the constitutional issues raised were "frivolous with regard to the crimes under which appellant was charged and convicted." The court considered the other issues raised by appellant in order to avoid further unnecessary expenditure of judicial labor by lower appellate courts but warned appellate lawyers to use restraint in raising constitutional challenges to state statutes unless they were of a substantial nature.

Concerning the court's discretionary jurisdiction, subsections (a)(2)(A)(iii) set forth guidelines for the granting of the writ of certiorari. The amendments allow the court to recede from its prior practice of finding conflict in dicta, dissents, and unwritten opinions. See Lake v. Lake, 103 So. 2d 639 (Fla. 1958); Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958); Foley v. Weaver Drugs, Inc., 177 So. 2d 221 (Fla. 1965). The considerations recommend that the court exercise its discretion sparingly.

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2. This rule does not enumerate all of the doctrines affecting supreme court review of constitutional issues which have been well established by case law. In Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So. 2d 439 (Fla. 1959), the court outlined the "inherency doctrine" whereby the jurisdiction of the supreme court to directly review "final judgments or decrees directly passing upon the validity of a state statute" would not be diminished where the order of the lower tribunal did not explicitly rule or refer to the vaildity of an act, if the effect of the decree necessarily implies that such a determination was inherent in the ruling. Evans v. Carroll, 104 So. 2d 375 (Fla. 1958). In addition, it is irrelevant whether a statute is declared invalid on its face

Likewise, regarding the court's original jurisdiction, the rule suggests that the court recede from its abdication of its right to issue writs of common law certiorari. See Dresner v. City of Tallahassee, 164 So. 2d 208 (Fla. 1964). The amendment provided guidelines for the issuance of the writ of the court to follow its reassertion of its right to issue writs of common law certiorari.

RULE 9.100(j)

Considerations and Procedures Governing Petitions Invoking a Court's "all writs" Jurisdiction.

Where a petition seeks an order to show cause from a court pursuant to its authority to issue all writs necessary to the complete exercise of its jurisdiction, the petition shall also demonstrate that the court has already acquired jurisdiction of a cause on an independent basis and that complete exercise of that jurisdiction might be defeated if an order to show cause did not issue.

This proposed addition to rule 9.100 restricts the Court's use of the "all writs" power, prescribed by Article V, Section 3(b)(4), Florida Constitution, to cases in which the Court has

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2 (cont'd) or as applied to specific facts, as in Snedeker v. Vernmar, Ltd., 151 So. 2d 439 (Fla. 1963). When the supreme court's jurisdiction is sought because a case "construes the constitution," the inherency doctrine is inapplicable. Ogle v. Pepin, 273 So. 2d 391 (Fla. 1973). The court, in Armstrong v. City of Tampa, 106 So. 2d 407, 409 (Fla. 1958), explained that an order does not construe a provision of the constitution unless it undertakes "to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision." See also Schermerhorn v. Local 1625 of Retail Clerks Int. Ass'n., 141 So. 2d 269 (Fla. 1962). These and other case law principles are omitted from this rule because their subject matter is better suited to development on a case-by-case basis.

already acquired jurisdiction on some independent basis. Prior to Couse v. Canal Authority,[3] this was precisely the interpretation given to "all writs" jurisdiction. In Couse the Court overruled an earlier leading case and held that the all writs power "extends to support an ultimate power of review though it not be immediately and directly involved." Since Couse recent Supreme Court decisions have signaled a retreat from a liberal use of the "all writs" power.[4] This proposed rule, then, is intended to clarify existing uncertainty and return the power to its formerly limited scope.

This recommendation is closely related to the suggestion concerning the power to issue common law writs of certiorari. If that power is reposed in the Court, permitting it to decide cases of exceptional importance which otherwise do not fit neatly into a jurisdictional niche, an expanded all writs power will no longer be necessary to reach cases such as Couse.

RULE 9.110(j)

(j) //Exception/Appeal/Proceedings/from/District/Court/of Appeal///Where/the/appeal/is/from/an/order/of/a/district/court/of appeal,//the/clerk/shall/transmit/the/record/to/the/court/within 60/days/of/filing/the/notice.///Appellant's/initial/brief/shall be/served/within/20/days/of/filing/the/notice.///Additional/briefs shall/be/served/as/prescribed/by/Rule/9.210/

(j) Exception: Appeal of Constitutional Issues Pursuant to Rule 9.030(a)(1)(A)(ii)

(1) Review Proceedings in District Courts of Appeal and Circuit Courts.

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3. 209 So. 2d 865 (Fla. 1968).

4. Besoner v. Crawford, 357 So. 2d 414 (Fla. 1978); Shevin ex rel. State v. PSC, 333 So. 2d 9 (Fla. 1976).

(i) Appeals of cases which contain constitutional issues not in conformance with the criteria of Rule 9.030 (a)(1)(A)(ii) and applicable case law may not be filed in the supreme court. Rather, they should be filed in the appropriate court which will proceed to determine all issues in the cause. A ruling on the constitutional issue may not be the basis for a further appeal to the supreme court, since there will necessarily not be an "initial" ruling as defined in Article V, §3(b)(1) of the Florida Constitution.

(ii) The court in which the appeal is filed, upon motion of a party or on its own motion, may transfer the cause to the supreme court if it certifies that the nature of the issue is such as to be more appropriately decided by the supreme court.

(2) Review Proceedings in Supreme Court.

(i) Brief on Jurisdiction. Unless the appeal is filed in the supreme court accompanied by a certificate above described in sub-paragraph (j)(1)(ii), the appellant shall within ten days of filing the notice serve a brief limited solely to the issue of the supreme court's jurisdiction. Appellee's brief on jurisdiction shall be served within ten days after service of the appellant's brief. A reply brief may be served within ten days thereafter.

(ii) Accepting or Postponing Decision on Jurisdiction; Record.

If the supreme court accepts or postpones decision on jurisdiction, the court shall so order and advise the parties and the clerk of the lower tribunal.

(iii) Appeals from the District Court of Appeal.

If the appeal is from a district court of appeal, the clerk thereof shall transmit the record within sixty (60) days or such other time as set by the court. The initial brief on the merits shall be filed within twenty (20) days of the order accepting or postponing jurisdiction on the merits. Additional briefs shall be served as prescribed by Rule 9.210(f).

(iv) Appeals from Circuit and County Courts.

> If the appeal is from a circuit or county court the clerk thereof shall transmit the record within eighty (80) days or such other time as set by the court. The initial brief on the merits shall be filed within forty (40) days of the order accepting or postponing jurisdiction on the merits. Additional briefs shall be served as prescribed by Rule 9.210(f).

The proposed amendment to rule 9.110(j), a procedural recommendation necessary to implementation of the entire jurisdictional package, provides that if an appeal is filed in district involving substantial constitutional issues, it may be certified to the Supreme Court for disposition by the high court. Jurisdictional briefs will now be required in cases appealed directly to the Supreme Court, facilitating the screening of these appeals.

RECOMMENDATION NO. 5:

The Commission recommends an amendment to the Rules of Judicial Administration authorizing the chief judge of each judicial circuit to designate either a single circuit judge or a panel of three circuit judges to hear appeals from county courts.

JUSTIFICATION:

This proposal is designed to clarify existing doubts concerning the status of circuit courts serving in an appellate capacity. Permissive in application, this recommendation will allow circuit courts to designate three-judge panels to hear appeals from county courts. When a three-judge panel is convened, the concurrence of two judges shall be necessary to a decision.

Article V, section 5(b), Florida Constitution, provides: "The circuit courts shall have . . . jurisdiction of appeals when provided by general law." The legislature has activated this provision of the constitution in section 26.012(1), Florida Statutes (1977), providing that circuit courts shall hear appeals from county courts in all cases except those directly appealable to the Supreme Court. The statute and the rules promulgated by the Supreme Court are silent, however, concerning the manner in which the circuits may conduct appeals. Presently, at least two circuits entertain appeals in three-judge panels. The Twentieth Circuit established a procedure for hearing appeals in this manner by local rule, approved by the Supreme Court in December, 1972. The Eleventh Circuit has

provided for a similar system of conducting appeals in three-judge panels through an administrative order of that circuit's chief judge in July, 1977. These two circuits have found that the three-judge panels are favored by the litigants and attorneys. In the Eleventh Circuit, encompassing Dade County, 431 appeals were filed in 1978 and 396 were disposed of in an expeditious and efficient manner.

This proposed rule change will make the three-judge procedure available statewide but provides flexibility, recognizing that in some of Florida's rural judicial circuits, single circuit judge appeals are more feasible.

Because the constitution is silent concerning the method of conducting appeals, this rule is an appropriate subject for the Supreme Court's rulemaking power. The proposed rule also provides that when the circuit courts hear appeals in panels of three, the concurrence of two judges shall be necessary to support a decision. Although this approach is not required by the constitution, it adopts the method the district courts of appeal follow in resolving appeals.

IMPLEMENTATION:

Florida Rule of Judicial Administration 2.050(b) should be amended to include:

> The chief judge of each judicial circuit shall designate a single judge, or may designate a panel of three judges, to hear appeals and other proceedings from orders of lower tribunals. When a panel is designated, three judges shall consider each case and the concurrence of two judges shall be necessary to a decision.

RECOMMENDATION NO. 6:

The Commission recommends expanding county court jurisdiction to encompass cases in which the amount in controversy does not exceed $5,000, including all equitable defenses raised in such cases.

JUSTIFICATION:

Florida's judicial system, like its coordinate branches of government, has not escaped the ravages of inflation since 1972. In that year the legislature established the county courts' jurisdiction by adopting section 34.01(1), Florida Statutes (1977), which provides: "County courts shall have original jurisdiction . . . of all actions at law in which the matter in controversy does not exceed the sum of $2,500, exclusive of interest, costs, and attorney's fees . . . ." This monetary limit of $2,500 is simply no longer realistic. The proposed increase is not expected to create judicial manpower problems in our county and circuit courts by shifting case loads. The increase will, however, make best use of our present system by enlarging the responsibility of the county courts and concomitantly removing appeals involving lesser dollar amounts from the district courts of appeal. The circuit courts may anticipate some increase in appellate responsibilities to partially fill the gap created by the decrease in original jurisdiction.

The inclusion of the power to settle all equitable defenses raised in matters otherwise properly before county courts is designed to abolish an existing procedural anomaly. Although the common law distinction between law and equity was purportedly abolished years ago, vestiges remain. Section 34.01(1) limits county courts' jurisdiction to actions at law. Thus, when equitable defenses are raised in a case otherwise properly before a county court, the entire case must be transferred to a circuit court for disposition. This proposed change will permit settlement of the entire dispute within the county court, prevent "forum shopping," and eliminate the cost, delay, and waste of judicial labor which result from the need to transfer cases between courts.

IMPLEMENTATION:

This proposal may be easily implemented by a legislative amendment to section 34.01, Florida Statutes (1977).

RECOMMENDATION NO. 7:

The Commission recommends transferring jurisdiction to review Public Service Commission orders from the Supreme Court to the district courts of appeal in all cases except those involving companies which dispense electricity, telephone or telegraph services, and natural gas. Venue in the district courts should lie where the regulated company's principal place of business is located, or where the principal place of business of the applicant for commission authority is located.

JUSTIFICATION:

To enable the Supreme Court to truly function as the highest court of the state serving a policy-making role, mandatory review of cases of less than statewide or exceptional importance should be avoided. Many PSC orders which are now reviewed by the Supreme Court involve matters of local importance only. For example, the Court might be asked to review the propriety of a PSC order granting a certificate of public convenience to a local airport limousine service. Cases like this simply do not require plenary consideration by the state's supreme court. On the other hand, PSC orders in most cases involving telephone, natural gas, or electric power companies have substantial impact on the citizens of the State of Florida. Thus, the Commission suggests that these cases remain subject to review by the Supreme Court.

Cases transferred to the district courts of appeal will remain subject to the Supreme Court's general supervisory power such as the power to review conflicting decisions. The venue clause of this recommendation is designed to allocate the transferred PSC cases among the districts.

IMPLEMENTATION:

The Supreme Court reviews PSC orders under Article V, Section 3(b)(7), Florida Constitution, providing for review of administrative action prescribed by general law. The district courts have a similar jurisdictional power under Article 4, Section 4(b)(2). Thus existing statutes placing review in the Supreme Court must be amended to direct the district courts to review these cases. See § 323.09, Fla. Stat. (1977) (motor carriers); id. § 330.52 (air carriers); id. § 350.641 (all commission orders); id. § 365.12 (private wire services); id. § 366.041 (public utilities); id. § 366.10 (orders regulating utilities); id. § 367.131 (water and sewer utilities). Because many of the listed statutes overlap, implementation of this proposal might be best achieved by the repeal of all the above sections and the enactment of a single comprehensive statute prescribing the avenue of review for PSC orders, in Chapter 350, Florida Statutes (1977), which generally describes PSC powers and duties.

RECOMMENDATION NO. 8:

The Commission recommends the institution of a pilot program, designed to expedite criminal appeals, in a selected judicial circuit. Intended to ultimately reduce the time of disposition of appeals to 150 days or less from the date of jury verdict, elements of the program include preparation of the record within two weeks, expedited screening and hearing of single issue cases, expanded time for oral argument on appeal, and, whenever possible, rulings from the appellate bench immediately following oral argument and a post-argument conference.

JUSTIFICATION:

A significant element of delay in the appellate process is the preparation of the record on appeal. During this time period little can be done by litigants or appellate courts to advance a case toward disposition. This project will reduce the transcription time substantially through the use of computerized stenotype machines and modern word-processing equipment.

At the other end of the appellate process is the delay caused by time spent deliberating and drafting opinions. In certain cases involving recurring, straightforward issues, this delay can be removed by permitting the appellate court to issue its decisions from the bench following argument and a collegial conference. This project is based in part on an experiment conducted in Arizona.[1]

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[1] Jacobson & Schroeder, Arizona's Experiment with Appellate Reform, 63 A.B.A.J. 1226 (1977).

IMPLEMENTATION:

This project is still in the planning stages. Once the equipment necessary to implement the program has been determined and internal operating procedures in the pilot circuit or circuits have been formalized, sufficient funds must be obtained from the legislature. An appropriate court order or rule will be necessary to activate the program.

CONCLUSION

The order of the Chief Justice establishing the Commission directed it to inquire into several topics which are not embodied in the eight recommendations. Following is a brief synopsis of the Commission's conclusions in each area.

Circuit and County Courts

The Commission voted not to recommend consolidation of the trial courts at this time. Professor Rosenberg, during his presentation to the Commission, suggested that such a move might be desirable because one court is always better than two. The real benefits to the system, however, may not justify the expense.

Commissioner Abram has expressed an intention, which the Commission supports, to obtain the aid of the Conference of County Court Judges to study case loads, costs, and a viable method of consolidation. When the hard data is in, consolidation should be revisited.

Recommendations 3, 5, and 6 affect the jurisdiction of circuit courts in workmen's compensation cases, the general jurisdiction of county courts, and the circuit courts' appellate function.

District Courts of Appeal and Specialized Courts

Recommendations 1, 3, and 7 concern the creation of a new district, creation of additional judgeships, and the transfer of IRC and PSC cases to the district courts of appeal.

The Commission also considered the advisability of establishing a statewide special court of appeals and concluded that such a court should not be recommended. The latest body to study the specialized court issue was the Commission on Revision of the Federal Court Appellate System. It reported:

> More recently there have also been proposals for a court of administrative appeals, a court of environmental appeals and what would basically be a court of criminal appeals. The debate over the desirability of such courts has spawned a rich literature, focusing on the special needs of the respective specialties on the one hand, and, on the other, on broader concerns with the factors which make for the highest quality of appellate adjudication.
>
> After extensive discussion the Commission has concluded that, on balance, specialized courts would not be a desirable solution either to the problems of the national law or, as noted elsewhere, to the problems of regional court caseloads.

The federal commission concluded there were disadvantages inherent in specialized courts, expressing the view that "[T]he quality of decision-making would suffer as the specialized judges become subject to 'tunnel vision,' seeing the cases in a narrow perspective without the insights stemming from broad exposure to legal problems in a variety of fields." The report also quoted the Chairman of the Section of Taxation of the American Bar Association, who testified in opposition to a specialized tax court of appeals and said:

> Tax cases are difficult and time consuming for generalist judges; yet those judges do bring a judgment and experience which produce decisions that integrate the development of tax law with contemporaneous legal developments. Without this leavening, tax law might become even more esoteric and arbitrary than it sometimes appears to many to be.

In a classic article, debating the proposed specialized patent court of appeals in 1951, Simon Rifkind wrote:

> [A] body of law, secluded from the rest, develops a jargon of its own, thought-patterns that are unique, internal policies which it subserves and which are different from and sometimes at odds with the policies pursued by the general law.
>
> . . . .
>
> Once you complete the circle of specialization by having a specialized court as well as a specialized Bar, then you have set aside a body of wisdom that is the exclusive possession of a very small group of men who take their purposes for granted. Very soon their internal language becomes so highly stylized as to be unintelligible to the uninitiated. That in turn intensifies the seclusiveness of that branch of the law and that further immunizes it against the refreshment of new ideas, suggestions, adjustments and compromises which constitute the very tissue of any living system of law. In time, like a primitive priestcraft, content with its vested privileges, it ceases to proselytize, to win converts to its cause, to persuade laymen of the social values that it defends. Such a development is invariably a cause of decadence and decay.[1]

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[1] Rifkind, A Special Court for Patent Litigation? The Danger of a Specialized Judiciary, 37 A.B.A.J. 425, 426 (1951).

Based on these reasons, the Commission suggests that specialized courts are not the best solution to our appellate courts' maladies.[2]

Supreme Court

The Commission has stated its view that the Supreme Court should become a strictly law and policy making court, except in those cases in which the Court has original or direct appellate jurisdiction. Correction of trial errors should be left in most instances to the district courts of appeal.

Other than the changes suggested in Recommendations 3, 4, and 7, the Court's jurisdiction should remain unchanged.

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[2] Specialization is now permissible to a limited extent within the district courts of appeal, circuit courts, and county courts. Divisions may be established by local rules, approved by the Supreme Court. § 43.40, Fla. Stat. (1977).

APPENDIX

A. Maps of existing and proposed district courts of appeal A-1-2

B. Memorandum of Judge Charles A. Carroll, Validity of Proposed En Banc Rule B-1-10

C. Memorandum of Commissioner William H. Adams III, Supreme Court Power to Issue Writs of Common Law Certiorari C-1-11

APPENDIX A

EXISTING DISTRICT COURTS OF APPEAL

TOTAL CASES

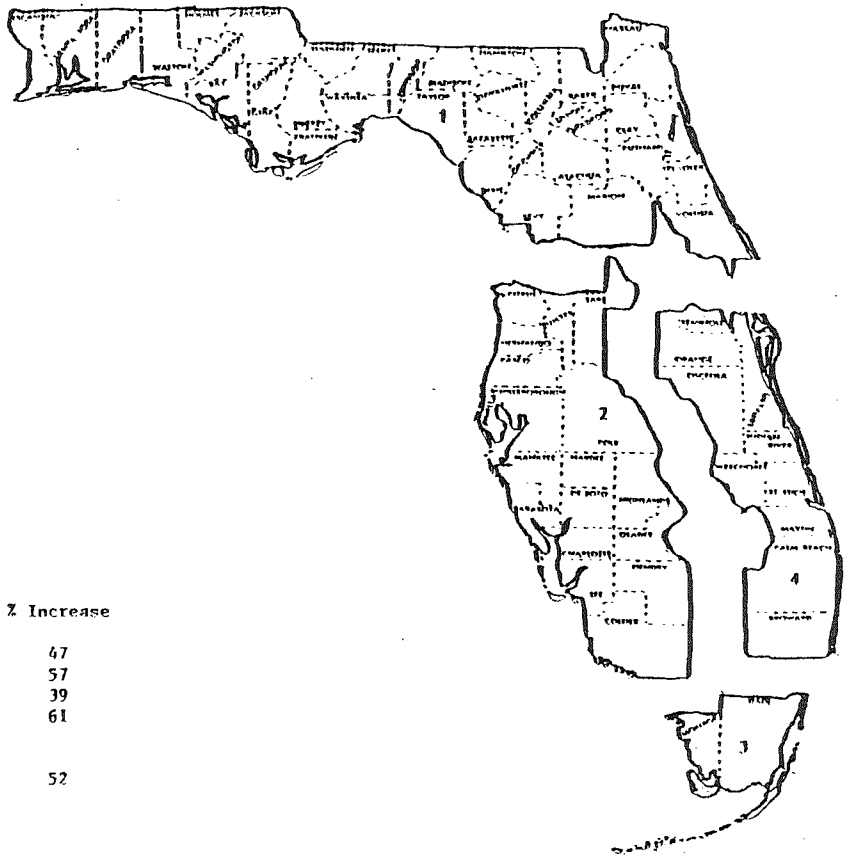
	Total Filings 1978	Estimated Workmen's Comp. Appeals	Total
1st	1989	189	2178
2nd	2332	248	2580
3rd	2422	301	2723
4th	2823	350	3173

CASES PER JUDGE

	Without Workmen's Comp. Appeals	With Workmen's Comp. Appeals
1st	284	311
2nd	333	369
3rd	346	389
4th	403	453

POPULATION PROJECTIONS

	1978	2000	% Increase
1st	2,194,700	3,227,600	47
2nd	2,358,800	3,707,800	57
3rd	1,530,600	2,138,600	39
4th	2,544,000	4,105,900	61
TOTAL	8,628,100	13,179,900	52



APPELLATE STRUCTURE COMMISSION PROPOSAL

TOTAL CASES

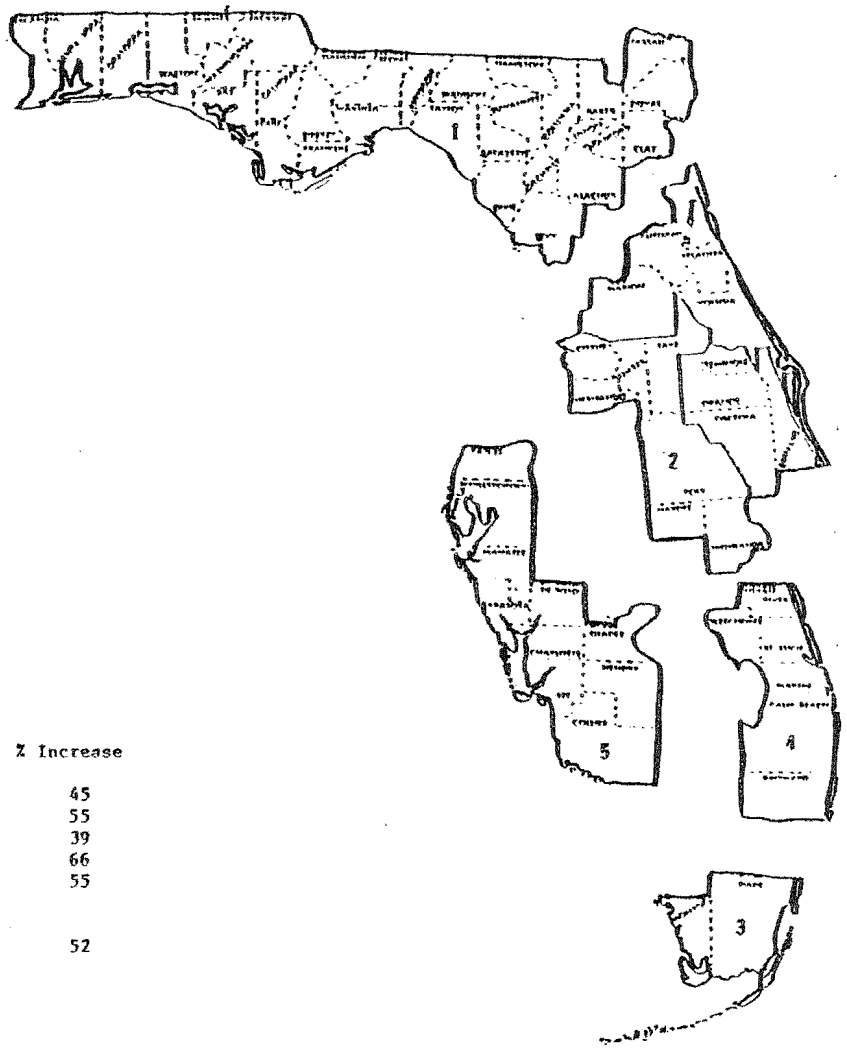
	Without Workmen's Comp. Appeals	With Workmen's Comp. Appeals
1st	1735	1890
2nd	1492	1694
3rd	2422	2723
4th	1970	2271
5th	1947	2142

CASES PER JUDGE

	Proposed Number of Judges	Without Workmen's Comp. Appeals	With Workmen's Comp. Appeals
1st	7	247	270
2nd	6	248	282
3rd	10	242	272
4th	8	246	283
5th	8	243	267

POPULATION PROJECTIONS

	1978	2000	% Increase
1st	1,774,300	2,581,300	45
2nd	1,548,700	2,401,800	55
3rd	1,530,600	2,138,600	39
4th	1,665,500	2,768,200	66
5th	2,109,000	3,290,000	55
TOTAL	8,628,100	13,179,900	52



Appendix B

June 2, 1961

MEMORANDUM: To Judges of District Courts of Appeal

From Judge Charles A. Carroll

SUBJECT: Policies and Rules for Operation of Enlarged District Courts of Appeal

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A primary consideration is the wording of the Constitution as it relates to the functioning of the court. House Joint Resolution No.1601, of 1959, the basis for the 1960 constitutional amendment, was entitled "A Resolution /to amend, etc./ relative to the number and organization of district courts of appeal and the number of judges for each district court of appeal and the composition of the district courts of appeal for the consideration of cases." The applicable language of the Constitution, as changed by the amendment, Article V, § 5(2), is as follows:

> "(2) ORGANIZATION; NUMBER AND SELECTION OF JUDGES. There shall initially be three judges of each district court of appeal. The Legislature may provide not more than two additional judges for any district court of appeal and may reduce the number for any district to not less than three. Three judges shall constitute a panel for and shall consider each case, and the concurrence of a majority of the panel shall be necessary to a decision. The court shall hold at least one session every year in each judicial circuit within the district wherein there is ready business to transact." /Underscoring added./

The underscored sentence in the above quotation is all that is said as to "the composition of the district courts of appeal for the consideration of cases." Thus, no problem is presented as to how the court shall sit. It is clear that cases are to be heard and considered by a panel of three judges. Since there are not enough

judges for two separate panels of three, it seems obvious that some system of rotation of the judges making up the hearing panel should be used to distribute and even the work load for all judges. Further, in this memorandum I will make certain comments concerning the matter of assignment of judges, and hearings by a panel of three.

Undoubtedly, we will be confronted with problems relating to whether the court can sit en banc, and if so, when and how en banc hearings shall be provided for.

In view of the wording of our Constitution, providing for cases to be considered and decided by a three-judge panel, with no provision for sitting en banc, but containing no express provision prohibiting it, the court appears to be in substantially the same situation as that in which the federal circuit courts of appeals found themselves in 1941 when the Supreme Court decided that those courts could sit en banc, in Textile Mills Sec. Corp. v. Comr. of Int. Rev., 314 U.S. 326, 62 S.Ct. 872, 86 L.Ed. 249. Up to that time, by § 117 of the Judicial Code, it was provided that "there shall be in each circuit a circuit court of appeals, which shall consist of three judges of whom two shall constitute a quorum * * *." Section 118 of the Code reflected another statute which had increased the number of judges in certain circuits, and a conflict arose between the circuits as to whether they could hear cases en banc. That conflict was resolved by the Supreme Court in the

Textile Mills case by holding that they could. Later, any uncertainty was removed by an amendment /1/ which, while preserving the character of the courts as three-judge courts, made provision for en banc hearings and rehearings when the court so decides.

In considering the question of whether any enlarged federal appellate court could sit en banc, in view of the apparent inflexible wording of § 117 to the effect that a circuit court of appeals "shall consist of three judges, of whom two shall constitute a quorum," the Supreme Court reasoned that the power for the enlarged court to sit en banc followed as a matter of necessity and practicality. First, the Supreme Court pointed to functions in which the full court would act, other than in hearing cases, such as in prescribing the forms of writs, etc., the making of rules and regulations, appointment of a clerk and employees or their removal, and the fixing of calendars and other administrative matters. Then the court referred to and placed reliance on a matter which is applicable to the wording of our own constitution, and that is that the federal statute in question did not expressly rule out or prohibit

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/1/ 28 U.S.C.A. § 46(c), in its present amended form is as follows:
"Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

en banc hearings. In so concluding, the Supreme Court in the Textile Mills case (86 L.Ed. at 258) said:

> "* * * Certainly the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases. Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting en banc. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation."

Later the United States Supreme Court was concerned with the problem of how the en banc power was to be invoked. See Western P. R. Corp. v. Western P. R. Co., 345 U. S. 247, 73 S. Ct. 656, 97 L.Ed. 986. In that case, it was held that the Textile Mills decision went no further than to declare the power. The conclusion was reached that while counsel or the parties had no right to demand it, or even to demand that a motion for en banc hearing or rehearing must be considered by all of the judges, each court had wide discretion to decide just how the power would be exercised; that the matter of granting or denying en banc hearings could be handled by the full court or left up to the hearing panel. This was put into practice in a case in the Ninth Circuit (Bradley Mining Co. v. Boice, 9 Cir.1953, 205 F.2d 937) where a petition for rehearing en banc was disposed of by a panel, for the entire court. The three-judge panel which heard the case denied the petition for rehearing as well as counsel's application for the rehearing to be en banc. As revealed in the opinion in that case, the Ninth Circuit

has a rule covering this subject as it relates to rehearings. Rule 23 of that court provides:

> "All petitions for rehearing shall be addressed to and be determined by the court as constituted in the original hearing.
>
> "Should a majority of the court as so constituted grant a rehearing and either from a suggestion of a party or upon its own motion be of the opinion that the case should be reheard en banc, they shall so inform the Chief Judge. The Chief Judge shall thereupon convene the active judges of the court and the court shall thereupon determine whether the case shall be reheard en banc." /2/

In conferring with the Clerk and with Judge Warren Jones of the Fifth Circuit Court of Appeals on May 25, I learned that the court was in the process of formulating a rule relating to en banc hearings and rehearings, modeled on the rule of the Ninth Circuit. Today, I received from the Clerk a copy of the new rule, adopted by that court on May 31. It is their Rule 25(a), and reads as follows:

> "A hearing or rehearing before the Court en banc as permitted by Section 46(c) of Title 28, United States Code, may be ordered by a majority of the Circuit Judges in active service for any reason which appears to them sufficient in

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/2/ In conversation I had on May 25 with the Clerk of the Court of Appeals for the Fifth Circuit (which has seven active Judges), I learned certain things of interest in this connection. Without a separate rule, the Fifth Circuit has been following the practice set out in the above quoted rule of the Ninth Circuit. A question of whether a case should be heard or reheard en banc is not presented to and passed upon by the full court unless a majority of the panel of three before which the case is to be heard or has been heard, together with the Chief Judge, shall so conclude, and then the full court votes on whether to hear or rehear the case en banc. In the Fifth Circuit, the use of en banc courts has not been more than three or four times in a year. Most of those have occurred where the court has granted rehearing en banc, by full court consideration of the case without further oral argument. There is no exact guide to the type of cases heard en banc. In the Fifth, it has been allowed in an extremely voluminous and complicated case, in areas where judges of the court held differing or conflicting views, and cases involving important procedural questions.

the particular case. Ordinarily, a hearing or rehearing en banc is not ordered except: (1) when necessary to secure or maintain uniformity or continuity in the decisions of the Court, or (2) when unusually important or novel questions are to be decided.

"Consideration by each of the Circuit Judges in active service of whether to order a hearing or rehearing en banc may be initiated by any Circuit Judge at any time. A motion or suggestion of counsel for hearing or rehearing en banc is considered by the members of the court or division to which the case is assigned. A formal order as to en banc hearing or rehearing is not entered unless a hearing or rehearing en banc is ordered. An order for rehearing en banc may direct whether the case or any feature thereof is to be reargued orally, and whether the filing of additional briefs is requested."

Referring to hearings and rehearings en banc, the United States Supreme Court, in the Western Pacific Railroad case (97 L.Ed. at 1001) said:

"Rehearings en banc by these courts, which sit in panels, are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern. Moreover, the most constructive way of resolving conflicts is to avoid them. Hence, insofar as possible, determinations en banc are indicated whenever it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear a case or which has heard it. Hearings en banc may be a resort also in cases extraordinary in scale--either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit. Any procedure devised by a court of appeals which is sensibly calculated to achieve these dominant ends of avoiding or resolving intra-circuit conflicts may be adopted agreeably with § 46(c). A rule providing that petitions for rehearing en banc may be made to, and will be considered by, the court en banc would, of course, be so calculated. And, to repeat, that being so, it is not for us to pass on the advantages or disadvantages of such a rule, though one may think, as I do, that it is likely to impose an undue burden by unwittingly encouraging the lax inclination of counsel

to file pro forma petitions automatically in every case." /3/

A very instructive article on this subject, written by Judge Maris of the Third Circuit, entitled: "Hearing and Rehearing Cases In Banc," was published in 1954 in 14 F.R.D. 91. That article alone could serve as sufficient guide in dealing with the problem it discusses.

For purposes of comparison, inquiry was made as to the experience and practice of the Louisiana Courts of Appeal, which formerly were three-judge courts. Since July of 1960, three of the courts of appeal have operated with five judges. The Louisiana Constitution (Article VII, § 23), in the form in which it was amended to provide for additional judges, follows the federal statute. In addition to specifying that cases be heard by panels of three judges, it expressly makes provision for hearing en banc in exceptional cases or when deemed necessary or expedient, viz:

> "§23. Presiding judge; panels; sessions en banc; vacancy in office
>
> "Section 23. In each court of appeal, the senior judge in point of service on the courts of appeal shall be the presiding judge; if two or more judges in the same court have served the same length of time, the eldest shall preside.

/3/ In a footnote in Western (97 L.Ed. at 993) the Reviser's Note with reference to 28 U.S.C.A. § 46(c) was quoted at some length and included the following which is pertinent here:

" ' This section preserves the interpretation established by the Textile Mills case, but provides in subsection (c) that cases shall be heard by a court of not more than three judges unless the Court has provided for hearing en banc. This provision continues the tradition of a three-judge appellate court and makes the decision of a division, the decision of the court, unless rehearing en banc is ordered. It makes judges available for other assignments, and permits a rotation of judges in such manner as to give to each a maximum of time for the preparation of opinions.' "

"Courts of appeal having more than three judges shall sit in rotating panels composed of three judges selected in conformity with the rules adopted by the court, two of whom constitute a quorum. However, in exceptional cases or when deemed necessary or expedient by the judges thereof, a court of appeal may sit en banc. (Underscoring supplied.)

"If a vacancy occurs * * *."

Upon inquiry of the Clerk of the Louisiana Court of Appeal in New Orleans, he did not have available a record of the number of times the court had sat en banc, but his recollection was that it has not exceeded two or three occasions, in this first year in which the court has had five judges.

* * *

The Fifth Circuit is the second busiest of the federal circuit courts of appeals. They have approximately 600 cases a year. Only two or three are heard en banc per year, and as explained above, while a few more are considered en banc on rehearing, most of those are considered by the full court without being reargued orally. Motions of the parties for en banc hearings present no particular problem. Formerly, and prior to the court's new Rule 25(a) of May 31, 1961, no consideration by the full court was given to ordering an en banc hearing or rehearing unless a majority of the panel involved, plus the Chief Judge, chose to have the full court pass thereon. The court's new Rule 25(a) will change that feature, as it provides that the full court will consider whether to order a hearing or rehearing en banc upon request of any one of the judges. If the panel of three judges denies a rehearing, or a suggestion or motion for en banc hearing or rehearing, the matter stops there, and does not go before the full court for consideration.

* * *

In summary, my conclusions and recommendations are as follows:

The Constitution primarily provides for a panel of three judges to hear and decide the cases.

It may be advisable to have hearings or rehearings en banc in exceptional cases, and in the absence of an express provision to the contrary, the court would have power to sit en banc in such instances, under the authority of Textile Mills Sec. Corp. v. Comr. of Int. Rev., supra. And see Western P. R. Corp. v. Western P. R. Co., supra.

The Court should make its own rules or regulations as to how the question of the granting of en banc hearings or rehearings should be initiated and considered.

Temporarily, and in the interest of uniformity, I would recommend, as to petitions for en banc hearing, the use of the present Rule 23 of the Ninth Circuit, which is quoted above, and shown at 28 U.S.C.A., United States Courts of Appeals Rules, p. 492, or the use of new Rule 25(a) of the Fifth Circuit which also is quoted hereinabove.

I would recommend a further rule, relating to assignments of judges, to read substantially as follows:

> "Assignment of Judges; quorum.
> "The judges of this court shall, as provided in Article V, § 5(2), Fla.Const., 26 F.S.A., be assigned to sit upon the court and its divisions or panels in such order, at such times, and for the hearing of such cases, as the court directs.(4)

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(4) In practice, no doubt this will be delegated to and handled by the Chief Judge.

"Cases and controversies shall be heard and determined by a division or panel of not more than three judges unless a hearing or rehearing before the court en banc is ordered by the majority of the judges of this court who are in active service.

"A majority of the number of judges authorized to constitute the court or a division or panel thereof shall constitute a quorum."(5)

This memorandum is made primarily for the information of the judges and clerks of the District Courts of Appeal. * * *

Charles A. Carroll

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(5) The wording of this rule was suggested by Rule 3 of the U.S. Court of Appeals in the Sixth Circuit, shown at 28 U.S.C.A., United States Courts of Appeals, Rules, p. 33

APPENDIX C

THE SUPREME COURT DOES NOT HAVE ANY JURISDICTION TO ISSUE WRITS OF CERTIORARI EXCEPT THAT EXPLICITLY CONFERRED BY ARTICLE V, SECTION 3(b)(3) OF THE FLORIDA CONSTITUTION

The Previous Constitutional Provision

The power to issue writs of common law certiorari is not an inherent power of the Supreme Court. Before Article V was amended in 1956, Section 5 explicitly gave the Supreme Court power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus. It expressly gave the court power to issue all writs necessary or proper to the complete exercise of its jurisdiction.

The Evolution of the 1956 Amendment

The 1956 amendment to the Constitution was proposed by the Florida Judicial Council. Some of its reports are printed in The Florida Bar Journal. They show the legislative history of the amendment and how its proposals evolved. The evolution of the provisions relating to certiorari described on the attached statement shows rather clearly that the draftsmen of the amendment intended to limit the Supreme Court's jurisdiction and to make sure that decisions of the district courts of appeal would be final in all but a limited class of cases. They did not intend the Supreme Court to have any certiorari jurisdiction other than that provided by Article V, Section 3(b)(3).

Intrinsic Evidence in Article V as amended

The amendment to Article V as it was finally adopted contains detailed provisions on the power of various courts to issue writs. The jurisdiction of the Supreme Court to issue writs of certiorari is specified in Article V, Section 3(b)(3). The explicit detail with which Article V deals with writs, not only in Section 3 but in Section 4 (on the jurisdiction of the DCAs) and Section 5 (on the jurisdiction of the Circuit Courts) makes it clear that the draftsmen did not act inadvertently when they omitted giving the Supreme Court certiorari jurisdiction other than in the cases specified in Article V, Section 3(b)(3).

Later Decisions and Commentary

In every relevant utterance of the Supreme Court since the 1956 revision, it has denied that it has common law certiorari jurisdiction. In Karlin v. City of Miami Beach, 113 So. 2d 551 (Fla. 1959), the court noted that it had no certiorari jurisdiction other than that outlined in Section 3(b)(3). In Robinson v. State, 132 So. 2d 3 (Fla. 1961), and Ramagli Realty Co. v. Craber, 121 So. 2d 648 (Fla. 1960), the Supreme Court rejected any notion that it might still have common law certiorari. Although these statements are dicta, they are clearly expressed.

No published commentators have taken issue with this construction of the 1956 amendment. A recent article

states unequivocally the author's view that the Supreme Court does not have jurisdiction to issue writs of common law certiorari. Haddad, The Common Law Writ of Certiorari in Florida, 29 U. of Fla. L. Rev. 207 (1977).

Conclusion

The argument that the Supreme Court does have general jurisdiction to issue writs of common law certiorari is based entirely on the questionable inference that the omission to provide common law certiorari jurisdiction was inadvertent. This argument does not take into account the legislative history of the amendment. Nor does it consider either Article V as it existed before the amendment or the explicit detail with which writs are treated in the amendment. Taking all the relevant factors into account, it seems clear that the amendment was intended to take away the Supreme Court's pre-existing power to issue common law writs of certiorari.

William H. Adams III

January 16, 1979

THE EVOLUTION OF THE SUPREME COURT'S POWER TO ISSUE WRITS OF CERTIORARI UNDER ARTICLE V OF THE FLORIDA CONSTITUTION

The 1956 amendment to Article V of the Florida Constitution grew out of proposals drafted by the Judicial Council which was created by Chapter 28062, Laws of Florida (1953). The intentions of the draftsmen with respect to the Supreme Court's certiorari jurisdiction are apparent from the evolution of the provisions of Article V dealing with the Supreme Court's power to issue writs of certiorari.

Although I have been unable to find any reports of the Council, articles in several issues of The Florida Bar Journal from 1954 to 1956 reveal (a) the problem that the Council was created to solve and (b) the evolution of the Council's ideas on how it should be dealt with. It is clear from these articles that the problem in 1956 was virtually the same as the problem we now face. The Supreme Court was overburdened with cases; the quality of its work was suffering; and delays were forcing litigants to accept what many considered to be unfair settlements. The solution chosen by the Council and embodied in its proposal was to limit the jurisdiction of the Supreme Court to particular classes of cases and to make sure that the newly created district courts of appeal would have final appellate authority with respect to all other cases. One of the main subjects of discussion by the

Council was how to eliminate in all but specified cases any possibility that litigants would be forced to the expense of a second appellate review.

The first tentative draft of the new Article V was printed in the January, 1955, issue of The Florida Bar Journal. Section 5 of this draft dealt with the Supreme Court's jurisdiction. The first paragraph described the Supreme Court's jurisdiction to review decisions of trial courts. The Court was given power to "review by certiorari interlocutory orders or decrees passing upon chancery matters upon which a final" decree would be directly appealable to the Supreme Court. (The paragraph had previously provided for appeal to the Supreme Court "as a matter of right" only from judgments imposing the death penalty; directly passing upon the validity of a state statute, other than a special or local law or a federal statute, or treaty; or construing a provision of the Florida or federal constitution.) As noted below, this power to issue writs of certiorari in cases that could be appealed directly to the court was characterized in a later article in the Journal as the power to issue the "common law discretionary writ of certiorari."

The second paragraph of Section 5 described appeals which could be taken to the Supreme Court as a matter of right from the district courts of appeal. It also provided that the Supreme Court could review by certiorari "decisions

of district courts of appeal that affect a class of constitutional or state officers or that pass upon questions of great public and general interest, or that are in conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law." Under this draft of Article V, the Supreme Court was given power to determine whether a question was one of great public and general interest. Its jurisdiction was not conditioned on a certificate of importance issued by a district court of appeal.

A later version of Article V was printed in the May, 1955, issue of The Florida Bar Journal. In this version the Supreme Court's jurisdiction to review decisions of the trial courts was not changed. However, substantial changes were made in its power to issue writs of certiorari. In this version, the Supreme Court was denied the power to determine for itself whether a question was one of great public interest. Thus the Council's original recommendation was changed to deny the Supreme Court power to issue writs of certiorari to review decisions on this ground unless a district court of appeal certified the question as one of great public interest.

The March, 1956, issue of The Florida Bar Journal was devoted to a series of articles by prominent individuals concerning the amendment of Article V proposed by the Council. These articles contain several statements which illuminate the intentions of the Council. The first article by John D.

Pennekamp, 30 Fla. Bar. J. 136, discussed the issue of whether setting up District Courts of Appeal would "further delay final decisions in Florida litigation." Pennekamp wrote:

> It is inconceivable that further delays can be injected into our court processes without causing nearly all controversy to be transferred to non-legal areas of compromise and agreement. Much of it already has taken that course. (Emphasis in original.)
>
> In self protection, lawyer's can't afford to let that trend continue.
>
> If the judges of the Appellate Courts are men of stature--and the responsibility of seeing that they are rests squarely with the Bar--their decision should have a convincing finality. That is not now possible with an overloaded Supreme Court calendar and overworked justices.
>
> I know of no practical and possible alternative to insure relief. Certainly enlarging the Supreme Court isn't the answer, and the people have shown a pronounced indisposition toward that remedy, anyway.
>
> The District Courts of Appeal could, with the cooperation of litigant--conscious lawyers, acquire an acceptance in most matters that would about equal that of the Supreme Court. They could provide an early "end of the road" for much litigation. Such has been the experience elsewhere.
>
> If, however, with this remedy at hand, the Supreme Court permits itself to continue to be involved in the wallow of too-much-to-do, it will endanger that prospect. The onus will be on it, and again the Bar must accept public criticism. (Emphasis added.)
>
> My principal fear is that wealthy litigants will use the intermediate court for delaying tactics designed to enforce compromises. This could be especially true in personal injury cases.

> The Supreme Court must establish itself, by stern conduct in receiving appeals, as the steadfast opponent of such practices.

An article by Marion T. Gaines, 30 Fla. Bar J. 142 contains the following statements:

> These district courts are not intermediary courts. They have final appellate jurisdiction in most cases. Cases of major importance would go directly to the Supreme Court. Thus, the new courts do not present a means for a second appeal, but can help keep dockets current. (Emphasis added.)

In another article, 30 Fla. Bar J. 155, E. Dixie Beggs wrote:

> Many lawyers in the past have opposed the creation of any appellate courts in addition to the Supreme Court on the assumption that the new courts would be "intermediate" only, thereby requiring the labor and expense of two appeals instead of just one. The proposed revision guards against this result by giving the district courts of appeal final appellate jurisdiction. Only in a very limited area is there the possibility of a further appeal. Moreover, cases involving constitutional questions, or death sentences in criminal cases, are subject only to direct appeals from the trial courts to the Supreme Court.
>
> It is not too much of a stretch of the realities to view the proposal as creating one appellate court of four branches or divisions. The coordinating division will be the Supreme Court itself which will reconcile any conflicts that may develop in the decisions of the other three branches, generally supervise the work of all of the branches of the appellate court, and will itself serve as the division to review constitutional questions and death sentences. The other three divisions (the district courts of appeal) will have the final appellate jurisdiction of substantially all other cases arising within their respective districts. (Emphasis in original.)

The most extensive article was by Retired Supreme Court Justice Paul D. Barnes, 30 Fla. Bar J. 162. It contained the following statement:

> As stated by the second annual Report of the Judicial Council, "the Council thought it wise to have the jurisdiction of the Supreme Court clearly defined and restricted." To be consistent, the Council did not intend to open up new constitutional floodgates whereby the burden on the Supreme Court would be replaced with cases from other sources after having relieved it of cases from the present sources. (Emphasis added.)

With reference to the Supreme Court's power to issue writs of certiorari, Judge Barnes wrote:

> Certiorari: Supreme Court. The proposal would permit the review in the Supreme Court by certiorari of some interlocutory orders and decrees in equity of the trial courts and some decisions of the courts of appeals and would also permit review by certiorari of the decisions of commissions.
>
> Relative to review by the Supreme Court, the common law discretionary writ of certiorari Section 4(b) of the proposed amendment provides:
>
> Interlocutory certiorari in equity--when
>
> "(b) . . . the Supreme Court may review by certiorari interlocutory orders or decrees passing upon chancery matters upon which a final decree would be directly appealable to the Supreme Court."
>
> It would seem that the Supreme Court would be authorized by this provision to grant the discretionary common law writ of certiorari in equity cases for the review of interlocutory orders and decrees which would be reviewable by the Supreme Court on appeal from final judgments and decrees . . . .