

APPENDIX I
FLORIDA BAR MEMBER COMMENTS

Florida Bar Member Comments

The PCA Committee received **34** responses from Florida Bar members throughout the state. The responses are grouped by issue type and are summarized and edited to minimize redundancy.

Jurisdiction

- One problem perceived by some is the limited nature of Supreme Court jurisdiction and its inability to review PCAs, a circumstance which effectively gives the district courts absolute power to control the extent of their supervision by that court. Since potential for abuse exists the current system is structurally flawed.
- The present situation in regards to PCA decisions is deplorable and a miscarriage of justice. It effectively allows the DCAs to preclude and prevent further review by the Supreme Court. This allows them to exert extra-judicial control over cases and effectively determine important public issues that should be reviewed by the Supreme Court. This occurs in cases of first impression and in other cases where there is a conflict decision of another appellate court with which the court disagrees or chooses simply to ignore.
- A PCA decision prevents any further review by the issuing court by Motion for Rehearing or Clarification. Often there are substituted opinions following rehearing and clarification requests of full opinions because the court may have overlooked or misapprehended an issue of law or fact. A PCA decision tells the litigant that the appellate court believes that it is perfect, should not be reviewed, and could not possibly have erred. Such is not the case in all instances.

Role of the District Courts of Appeal

- The role of the appellate courts in Florida, as courts of last resort, should be to provide to litigants and the public a fair, well-reasoned decision which applies existing precedent or interprets the law. Courts have an obligation to identify and refine issues which require review by the Supreme Court. All appellate court decisions should be clear, with written opinions addressing the dispositive issues of the case.

Precedent

- Courts are reluctant to upset the applecart of precedent largely for the following reason. Faced with the choice of jettisoning important precedent (or carving out major exceptions) on the one hand and applying the law and letting the chips fall where they may on the other hand, more courts would just bite the bullet and follow the law. PCAs allow a convenient evasion of that choice. With a PCA, the precedent remains intact for the next exponent of wealth and power who appears before the court, but the court still escapes the fallout that would attend equal justice under law for the powerless against the powerful. The net result is that PCA opinions undermine confidence in the integrity of the judicial system. The point is not that the public perceives PCA opinions as a way to hide injustice. The point is that they are right in thinking so. The remedy is to change the practice, not the perception.
- Problems arise when the only law on the subject from one DCA is not followed by a sister court when the identical issue is presented. The court has an obligation to either follow the law or explain why they may have reached a different conclusion. It is improper for a court to hide behind a PCA to avoid following the law and avoid taking a stand if it disagrees. The results of such actions are compounding and confounding. The lawyer benefitting from the PCA uses it as the “law” in the district, and the PCA is used as having given credence and validity to the trial court’s order, which is in fact, contrary to the only law on the subject. The lawyer then obtains other judgments based upon the appellate court’s refusal to follow the law and the non-existent authority of the PCA. Those judgments are also appealed and decided by another PCA.
- PCAs should be used to avoid restating precedent, not avoid making it. To allow PCAs to be used otherwise undermines the predictable and precedential value of cases, which is a detriment to everyone. Courts cannot, and should not, be required to issue lengthy and clearly articulated opinions in all cases. This is not practical, necessary, or valuable. They should, however, be required to provide minimal justification or explanation for the affirmance. This could be through a mere citation to existing authority, or simply by espousing a new rule where such is appropriate. Difficult, close, threshold issues deserve opinions even if they cloud the law. Only then can better law have an opportunity to emerge, and the law ultimately become more predictable and uniform.

- Florida’s appellate courts have long used PCAs to avoid writing on important issues that have not been decided under Florida law. There exists a dearth of Florida case law on important issues, which often requires lawyers and litigants to roam far afield for well-reasoned authority. Important issues of Florida law would be much easier for lawyers and litigants to predict if the words “Affirmed Per Curiam” did not form the substance of two-thirds of all DCA opinions.

Education

- Attorneys should always be learning by reading the law and decisions. When they lose at trial, appeal, and receive a PCA (i.e., no explanation) how can they learn?

PCA Appropriateness

- As stated in *3 Fla. Jur.2d, Appellate Review 416*, a PCA decision is appropriate (only) in the following instances: (1) where points of law raised are so well settled that a further writing would serve no useful purpose; (2) where an opinion will not add to the law of the subject or otherwise serve some useful purpose; and (3) where the matter is totally without merit. The main problem with PCA decisions is that many are entered without falling within the ambit of the above.
- PCA decisions must be considered in the context of the multiple functions served by the DCAs. On the one hand, the DCAs serve to review trial court errors and abuses. Most criminal appeals fall into this category, as do many civil appeals, presenting questions of the correctness of a procedural or substantive ruling by the court. In these types of cases, PCA decisions are an appropriate and necessary vehicle in order for the courts to adjudicate the vast number of appeals they are faced with and to prevent the *Southern Reporter* from becoming cluttered with redundant statements of well-established principles of law.

PCA Inappropriateness

- The DCAs serve an important function as courts of policy and interpretation. The DCAs are frequently called upon to resolve questions of statutory interpretation and to develop common law questions regarding various rights and remedies. This function is especially important in light of the limited jurisdiction of the Supreme Court and its death penalty caseload. In such cases as this, the use of a PCA is particularly inappropriate, as it frustrates the parties and leaves important questions of law unresolved and, therefore, unclear.

- Overuse of the PCA practice masks laziness by appellate court judges, uncritical judicial analysis, and questionable justice in the administration of the court system. PCAs are antithetical to developing a body of case law, thereby undermining the concept of *stare decisis*. Moreover, when litigants commit themselves to the time and expense to take an appeal, win or lose, they expect greater consideration by the appellate courts than a one sentence decision or a citation to one or two cases that often appear inapplicable or distinguishable. Usually the losing party in the appeal feels cheated, not only by the loss but also by how the appellate court treated the appeal in a dismissive, perfunctory way. That undermines the justice system or at least the perception of the justice system.
- Inherent in the PCA process is the opportunity for PCA decisions to be a tool for district courts to avoid difficult issues in “gray,” changing, or unsettled areas of the law where affirmance is likely proper but difficult to articulate or justify without creating jurisprudential conflict and uncertainty.
- A PCA should include, at a minimum, sufficient citations to indicate the basis for affirmance. If appellate courts are not sufficiently staffed, service should be curtailed until the legislature meets this responsibility.
- PCAs lead to more work and uncertainty in the criminal field, especially in more serious cases. A PCA compounds questions about issues in post-conviction proceedings. PCAs often cause doctrinal and precedential confusion between cases involving similar facts. A simple citation in an opinion (citing controlling precedent) is better than a PCA opinion.
- PCAs result in many motions for rehearing. Litigants want to know why the court reached a certain decision or if the court understood the issues or the facts of a case. PCAs on pretrial writs (like a petition for a writ of certiorari on a discovery or jurisdictional issue) cause much confusion and often unnecessary litigation by the parties. Courts must remember that appellate decisions instruct the parties and the courts on how to act in a particular case and do not just advance the “law” or legal precedent.

PCA Checklist

- A sensible compromise between the needs of the litigants to be informed of the ground or grounds for decision and the efficiency needs of the court can be effectuated by the use of a form attached to a PCA that lists and checks off the applicable basis for decision. The content of such a form is suggested by the Eleventh Circuit Court of Appeals Rule 36-1. The form, though imperfect, would represent a substantial improvement over the present thunderous silence embodied by a PCA.

Public Trust

- Nothing undermines public trust or professionalism more than the inability of the attorney for the appellant to explain to his or her client a PCA opinion.
- PCAs contribute to a lack of respect for, and acceptance of, appellate decisions. PCAs seem arbitrary and contain an element of decisions made behind closed doors. Part of the effectiveness of any court, including an appellate court, is the perception and reality of fairness. A court should explain its decision even if the explanation will not necessarily advance legal precedent.
- The hollowness of PCA decisions undermines the integrity of our judicial system. In addition to fostering litigation and alienating litigants and practitioners, PCA decisions also create the impression that the DCAs are intentionally avoiding review by the Supreme Court. PCA decisions should be the extremely rare exception, rather than the common tool they have become. The judicial system in Florida would be far better served by the appellate courts issuing actual decisions rather than cursory stamps of approval without explanation.
- The use of PCAs has become a case management tool, with courts opting to overcome caseload backlog by declining to write opinions, even memorandum ones, whenever possible. This is unacceptable and breeds public mistrust about the role, responsibility, and operation of the appellate justice system. When coupled with the increasing tendency of appellate courts to decline to grant oral arguments, the public perception is that access to courts is limited. Couple this fact with the belief that litigants with money or influence are able to obtain justice in our courts, and without such resources a litigant will obtain only superficial attention. The scenario is ripe for legislative intervention into the judicial process.
- Respect for the rule of law in general, and the appellate courts of this state in particular, is diminished through the use of PCAs. No matter what rationalization is offered based on efficiency, perceived lack of precedential value, and docket management, a PCA can leave the obvious impression that the appeal was viewed by the district court as unworthy of serious attention. That logically engenders doubt on the part of the litigants and their counsel regarding the quality of the process by which an affirmance was determined to be the most appropriate outcome. A PCA thus corrodes the perception that the underlying appellate decision was reached through the type of impartiality, consideration, and reasoning that is able to withstand outside scrutiny. This problem is particularly disturbing in the case of appeals which are provided to the people of this state as a matter of right and not discretion. There is little practical difference to the layperson between denial of discretionary review and an unexplained affirmance in a plenary appeal.

- The use of PCAs in approximately 65 percent of DCA decisions harms the public’s faith in the fairness of the legal system that it helps to fund through payment of taxes. Litigants who have endured the struggle inherent in asserting their legal rights and have paid for attorney’s fees at both the trial and appellate level, and lost at both levels, have a right to be told by the appellate court why they lost. To write a short opinion with one or two sentences and one or two citations to cases, statutes or rules, would not unduly burden an appellate court appreciably more than does a PCA. Deciding cases is what courts are for and what judges are paid to do. The professed justification for the use of PCAs does not outweigh the public’s right to written opinions in appeals.
- Florida has been a leader in promoting Government in the Sunshine which helps to promote the public’s confidence in the integrity of our state government. The courts are a part of that government, and stopping the practice of PCAs by appellate courts will greatly add to the public’s trust of our legal system.

Citation PCAs

- If courts wish to PCA a case because the law is well-settled against reversal, a simple “PCA” with a case cite would suffice, as it would adequately explain the basis for the court’s decision. If there are multiple points on appeal, one simple case cite for each would suffice. Since the court has the cases before it when considering an appeal, no extra effort would be required beyond typing a few lines of text. In giving such summary explanation, the losing appellant is afforded the possibility of further review, and citizens of the state, the lawyers, and the courts have some firm basis to point to so as to justify the holding, thereby furthering continuity and predictability in the law.

Written Opinions

- PCAs are frustrating to trial and appellate attorneys because they offer no explanation as to the court’s reasoning. A one or two paragraph explanation of the basis for the court’s ruling and any particular case law upon which the appellate court relied would be helpful. Short opinions are recommended with each PCA ruling.
- The use of PCAs is one of the greatest travesties of justice in Florida. Anyone spending thousands of dollars on litigation in Florida’s courts deserves the comfort of closure that comes from knowing the basis for an appellate court’s ruling in his/her case. This is especially true of unsuccessful litigants. Even reasons given in a single sentence without citation to authority would be preferable to a PCA decision. Any concern that such abbreviated opinions would generate more appeals to the Supreme Court could be addressed by conferring upon that body whatever additional legal authority is necessary to exercise complete discretion in accepting or rejecting such appeals. The judiciary

could seek enactment of a “cert pool” system similar to that used by the United States Supreme Court.

- After spending hours reviewing a case, the idea is ludicrous that, between three judges and their numerous clerks, they cannot take 30 seconds or two to five minutes to even bother to write, type, or dictate either: (a) a one sentence opinion; (b) a brief opinion adopting the holding of the court below; or (c) an opinion merely containing a citation or two.
- In many instances, an opinion of two or three sentences with a couple of citations would inform the parties as to why their appeal was disposed of in the manner it was. A written opinion enables the practitioner to decide for him or herself whether a motion for rehearing, certification, or petition for certiorari might be justified and well-advised, but it may have consequences for the litigation in the trial court. If it is emphatically the province and the duty of the judiciary to say what the law is, then it should do so.
- PCA decisions deny clients their constitutional right to a direct appeal, in that PCA decisions do not provide meaningful appellate review. Clients and their attorneys are left to ponder the appellate issues left unanswered by PCA decisions for the rest of their lives. Written appellate opinions would answer many, if not all, of these unanswered issues. A prohibition on the use of PCA decisions would mean that the appellate courts of Florida would provide meaningful review through written opinions. A rule prohibiting PCA decisions would not increase the number of appeals accepted for discretionary review by the Supreme Court. Conflict would still have to exist between two DCAs, or between a DCA and the Supreme Court for the latter to accept jurisdiction.
- Courts can take more time to issue more opinions. It is better to exchange time and the expediting of the process for more written opinions. A little delay in a written opinion is far better than a PCA issued within an earlier time period.
- Every contested appeal should be entitled to at least a brief opinion that cites the primary arguments and the legal authority that resolves those points. If there is truly time enough to review the record and the briefs, then there is time to write a paragraph or two that resolves the case. Most cases on appeal involve issues complex enough to be of interest to the parties and instructive to the trial court. For the appellate court to issue no guidance in those matters is, in my opinion, a dereliction of duty. The habitual use of the PCA by Florida’s DCAs has been a disastrous practice that has fostered widespread disrespect and frustration with the law.

- Written opinions accomplish two goals: (1) the parties and their counsel understand that the judges have read their arguments; and (2) it gives the losing counsel something to explain to their clients as to the reasoning of the court on why they were unsuccessful. PCAs threaten to destroy the integrity of the appellate process and are indicative of nothing more than laziness on the court's part. They should not be utilized. There is no excuse for the court not penning a few words on why they are affirming.
- If an appellant's brief is so meritless that no preliminary basis for reversal has been demonstrated, Florida has a procedural rule that permits summary affirmance. See rule 9.315(a), Florida Rules of Appellate Procedure. The use of this rule is to avoid patently frivolous appeals. It has the salutary effect of saving the appellee the cost of having to pay an attorney to write the answer brief and prepare for and attend oral argument and saving the court from having to prepare for oral argument as well. But, if an appellate court chooses not to invoke the rule, thereby requiring expenditures of additional resources by both parties and the court through the oral argument stage, then the court should write at least a short opinion which explains the basis of the decision.

PCA with Dissent

- In cases sufficiently close to warrant a dissent by a member of the panel, the mere exercise of articulating the basis for decision and refuting the dissent arguments will, in a significant number of cases, cause the majority to sufficiently re-examine the underlying premises of their decision so that a different result might obtain. A written decision by the majority also may provide at least the possibility of further review in the Supreme Court, a possibility which should not be unnecessarily foreclosed in a close call. The Supreme Court should adopt a rule of judicial administration which requires the district courts to write an opinion explaining the rationale for the decision in any case where a member of the panel has dissented.

Selective Publication

- Many United States circuit courts of appeals have adopted a practice of either recommending only certain opinions be published and relied on as precedent, or entering written opinions expressly stating that they are not for publication and therefore do not constitute binding precedent. Many states have adopted this position as well. The rationale is clear and simple; it gives the litigants assurances that the merits were reviewed and denied or granted, without having any further precedential effects on others.

Appellate Secrecy

- It is important for everyone to remind themselves that the system functions fairly when it does not operate under a shroud of secrecy. Moreover, when decisions are handed down, there is no mystery as to why the panel reached its conclusion. Being open is equated with being fair. Shrouding the process and results in Masonic-like mystery can only breed suspicion. If a panel has decided a case and entered a PCA, it will have already reviewed the merits of the case, and therefore concluded with a reason to rule the way it has. Accordingly, inserting a paragraph or two explaining the reasons why review is granted or denied is not harmful, but in fact helpful in assuring the litigants that the merits were reviewed and either granted or denied without extensive opinion. Those opinions could be denoted as not for publication, and that would simply resolve the matter on its own.

Abuse of Power

- There have been many instances where the power of the DCAs to PCA decisions has been abused with no avenue of redress available to the litigant who receives the unfavorable PCA decision. In several instances, the PCA decision was contrary to existing law. DCA judges should be required to cite the appropriate authority when issuing a PCA.
- Some cases receive PCAs because the three-judge panel determines that they are “too tough to tackle.” These cases are usually long in trial, complex in character, difficult in analysis, and frequently multi-faceted. These are the appellate headaches, usually with jury verdict complications and respected trial judges. Lawyers and their clients deserve to be heard, understood, and responded to. Without that, a decision of law is a farce.

Other Suggestions

- Often practitioners’ unhappiness with a PCA decision stems from an inability to properly characterize the nature of the issue in a given appeal. One way to resolve this problem might be to label appeals as involving questions of ‘error’ or questions of ‘law.’ This could be done through a question on a docketing statement regarding the nature of the issues involved.
- There is some justification for per curiam opinions but they should be few and far between and should follow criteria promulgated by the courts. Each judge should be mandated to assert separately, and independently, his or her reasons for expressing no opinion.

- There should be some type of opinion in every case (even if only in case citation or memorandum form) if this is possible. The Eleventh Circuit Court of Appeals often issues unpublished memorandum opinions. It is better to have opinions for the parties only, without precedential value, than more PCAs. Such opinions would at least give guidance to the litigants. It is time to worry less about caseloads and expediting decisions, and worry more about the quality of justice dispensed.

- Create secondary review panels as a system of checks and balances.