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The Florida En Banc Rule

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THE FLORIDA EN BANC RULE

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I. INTRODUCTION

Effective January 1, 1980, the Florida Supreme Court adopted the en banc rule, rule 9.331 of the Florida Rules of Appellate Procedure, requiring Florida's five district courts of appeal to resolve intra-district conflicts and maintain uniformity of decision through formalized en banc proceedings.[1] The Rule imposes on each district court a function which was within the conflict jurisdiction of the Florida Supreme Court prior to an amendment to the state constitution in 1980.[2] On September 13, 1984, the supreme court released the most recent amendment to rule 9.331, authorizing district courts of appeal to sit en banc to consider cases of exceptional importance.[3]

The term "en banc," from the French meaning "full bench," refers to a session of the court where the entire court membership par-

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The authors wish to express their appreciation to the judges of the district courts of appeal who have graciously responded to questionnaires, correspondence and inquiries and assisted in locating en banc opinions.

1. *In re* Rule 9.331, 374 So. 2d 992, 993, (Fla. 1979). *See generally* Overton, *District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities—An Expanded Power to Certify Questions and Authority to Sit En Banc*, 35 U. FLA. L. REV. § 80, 89-93 (1983).

2. FLA. CONST. art. V, § 3(b)(3) (1980). After 1980, the supreme court may only review "a decision of a district court of appeal . . . that expressly and directly conflicts . . . with a decision of another district court of appeal or of the supreme court on the same question of law. . . ." *Id.*

3. Re Rules of Appellate Procedure, ___ So. 2d ___, Case No. 65,082, opinion filed September 13, 1984.

ticipates in the decision rather than the regular quorum. Generally, the term "panel" refers to the group of judges, less than the entire court membership, which considers and determines a case. As used in the article, a "panel decision" is a case decided by three judges, whereas an "en banc decision" is a case decided by the whole membership of the particular court.

The District Courts of Appeal of Florida normally sit and decide cases in three judge panels, as prescribed by the Constitution of the State of Florida.[4] En banc proceedings under rule 9.331 require the participation of all active judges on the court who are not disqualified from considering the particular case. Thus, in the case of the First District Court of Appeal, the en banc proceeding usually involves twelve judges, and the concurrence of seven is necessary for a decision. The number of judges composing the en banc court and necessary for a decision varies according to the particular district court involved.[5]

Currently, the forty-six judges of the District Courts of Appeal of Florida handle a caseload second only to that of the California intermediate appellate courts.[6] As case filings in each district increase without a commensurate increase in the court's staffing and equipment, intra-district conflicts can be expected to increase. At the same time, the courts will be hard-pressed to deal with a multitude of en banc motions and determine expeditiously those cases deserving en banc consideration. Statistics on the federal courts' experience show that the number of "judge-hours" required for an en banc decision increases dramatically as both the work load and the number of judges on a particular court increase.[7] An appellate court of twelve judges, which normally operates in three-judge panels, requires the same number of judge-hours to render one en banc decision as to render four panel decisions.[8]

This article will review various en banc procedures followed in Florida's district courts of appeal and the experience of those courts since the adoption of the rule. The information and opinions offered are based upon the reported decisions involving en banc proceedings

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4. FLA. CONST. art. V, 4(a) (1980): "Three judges shall consider each case and the concurrence of two shall be necessary to a decision."

5. *See infra* note 77.

6. Report, Article V Review Commission at C-7 & C-8 (Feb. 1, 1984) (available through the Florida Supreme Court). California (population 23.7 million) has 14,699 cases filed in its intermediate appellate courts. Florida (population 9.7 million) has 13,924 cases filed in its intermediate appellate courts. *Id.*

7. Note, *En Banc Hearings in Federal Courts of Appeal: Accommodating Institutional Responsibilities (pt. 1)*, 40 N.Y.U. L. REV. 563, 576-77 (1965).

8. *Id.*

listed in appendix I,[9] as well as results of questionnaires submitted to the district courts regarding their intramural procedures.[10] The records of the First District Court of Appeal were also examined to determine the number of motions and requests for en banc hearings and rehearings.[11]

II. Background of Florida's En Banc Rule

Prior to adoption of the en banc rule, Florida district courts of appeal resolved conflicts between the decisions of various panels on an informal basis. A judge, or a panel of judges, who believed that an opinion in a pending case overlooked or misconstrued another decision could informally discuss their concerns with the author of the opinion and the panel on the case. At the request of either panel or nonpanel judges, a conference of the entire court could be called to discuss the possible conflict. The panel was not required to comply with the recommendations of the majority of the court. Generally, however, the judge authoring the opinion would be willing to try to satisfy the concerns of the court majority by making changes in the opinion, provided the majority of the panel approved.[12]

Florida's en banc rule was designed to provide a formal procedural mechanism for resolving conflicts;[13] to allow the court to speak "with one voice" on matters of exceptional importance;[14] to reduce the supreme court's workload; and to make district courts the courts

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9. Locating en banc opinions can be difficult, using either conventional or computer research aids, because a good number of en banc opinions have been written without any indication by title, cite to rule, or use of term "en banc." The reader may only learn that the case is not a panel decision because of the number of judges who are shown as participating in the opinion.

10. *See* Questionnaires to Chief Judges of District Courts, (May/June, 1983) (on file in the University of Florida Law Review office).

11. Motions for rehearing en banc are docketed and filed with the particular case and have not been the subject of specific statistical research. An informal count in the First District for the one-year period Jan. 1, 1983 through Feb. 29, 1984, shows some 127 party motions were filed. This figure does not include party motions dismissed for failure to comply with the rules. *See, e.g.*, La Grande v. B & L Services, Inc., 436 So. 2d 337 (Fla. 1st D.C.A. 1983). For the same one-year period, there were 20 judge and panel requests in the First District. No figures are available from the other four district courts at this time.

12. A question may be raised as to whether informal proceedings for resolution of conflict between panels are appropriate since the adoption of the en banc rule. However, the chief judges of the district courts of appeal, in response to the authors' questionnaire indicated that informal procedures are still successfully used, particularly in the Second and Fifth District Courts.

13. *In re* Rule 9.331, 374 So. 2d 992, 993 (Fla. 1979).

14. This purpose, stated by the Appellate Structure Commission, was apparently eliminated with the supreme court's deletion of the "exceptional importance" ground for the proceedings in 1979, but is now a viable purpose under the recent rule amendment, see *infra* note 21.

of last resort in most instances.[15] The stated purpose of the rule is to ensure uniformity of decision.[16] An equally important function of the rule was to lighten the supreme court's caseload.[17] This function was the principal factor prompting the 1980 amendment of article V of the Florida Constitution which eliminated intra-district conflict as a jurisdictional basis for supreme court review.[18] As stated in the supreme court's 1982 reported rules decision: "The En Banc Rule is an essential part of the philosophy of the constitutional scheme embodied in the new amendment."[19]

The Appellate Structure Commission proposed that Florida adopt a rule similar to that of the United States Fifth Circuit Court of Appeals, providing for en banc proceedings to resolve intra-district conflict and to decide cases of exceptional importance. The "exceptional importance" ground was eliminated from the original rule as adopted by the Florida Supreme Court in 1979;[20] but, by opinion of the supreme court dated September 13, 1984, the rule was amended to add "exceptional importance" as a second ground for en banc consideration.[21]

The rule was clarified prior to its effective date, most notably through a committee note providing that "all petitions [sic] for rehearing en banc should be circulated to non-panel judges."[22] Although modifications were urged by the judges of the district courts of appeal, the supreme court in its 1980 reported rule proceeding declined to make modifications until there had been time for testing the rule in operation.[23]

In 1982, the Conference of District Court of Appeal Judges petitioned the supreme court for an emergency rule change to address practical problems which had arisen under the rule. Specifically, the Conference raised questions concerning the number of judges necessary to constitute a majority of the court and the authority of one

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15. *See* Overton, *supra* note 1, at 82.

16. *See, e.g., id.* at 90.

17. As pointed out by Justice Overton: "The Florida Supreme Court initially adopted the en banc rule in 1979, *prior* to the adoption of the 1980 Amendment. . . .

The 1980 Amendment was drafted and submitted to the legislature *with the clear understanding* that the district courts *could* sit en banc to resolve intra-district conflict. . . ." *Id.* (emphasis added).

18. FLA. CONST. art. V, § 3(b)(3) (1980).

19. *In re* Rule 9.331, 416 So. 2d 1127, 1127-28 (Fla. 1982).

20. *In re* Rule 9.331, 374 So. 2d 992 (Fla. 1979).

21. Re: Rules of Appellate Procedure, ___ So. 2d ___, Case No. 65,082, opinion filed Sept. 13, 1984: "En banc hearings and rehearings shall not be ordered unless the case is of exceptional importance or unless necessary to maintain uniformity in the court's decisions."

22. *In re* Rule 9.331, 377 So. 2d 700, 701 (Fla. 1979). Although the commentary refers to "petitions," request for rehearing en banc is by *motion*.

23. *In re* Rule 9.331, 388 So. 2d 1235, 1236 (Fla. 1980).

three-judge panel to expressly overrule or recede from the prior opinion of another panel of the same court without an en banc vote of the entire court.[24]

Responding to the questions of the conference, the supreme court ruled that the term "majority of the district court" meant a simple majority of all active judges actually participating and voting on a case, without regard to illness or recusal.[25] If the en banc proceeding results in a tie vote on the merits of a case, the existing panel decision remains standing. In the event there was no panel decision, a tie vote of an en banc panel would affirm the decision of the trial court. The supreme court modified the rule accordingly.[26]

Concerning the authority of one panel to overrule another panel's decision, the supreme court cautioned that a three-judge panel *should not* overrule or recede from a prior panel's ruling on an identical point of law. The supreme court refused to prohibit such action by rule but concluded: "In most instances, a three-judge panel confronted with precedent with which it disagrees will suggest an en banc hearing. As an alternative the district court panel could, of course, certify the issue to this court for resolution."[27]

III. Grounds for En Banc Consideration

One of the areas of greatest difficulty in applying the rule has been determining whether sufficient grounds exist for en banc consideration. This determination by a majority vote of the court is crucial since it removes the case from the three-judge panel and places it within the jurisdiction of the en banc court, frequently resulting in an entirely different decision than would have been reached by the regular panel.

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24. *In re* Rule 9.331, 416 So. 2d 1127 (Fla. 1982).

25. *Id.* at 1129. In Royer v. State, 389 So. 2d 1007, 1015 n.1 (Fla. 3d D.C.A. 1980), the application of the "regular active service" requirement resulted in the disqualification of two judges who had formed the majority in the panel decision. The en banc court subsequently adopted the view of the dissenting judge in the original panel decision.

26. *In re* Rule 9.331, 416 So. 2d at 1129, *amending* Rule 9.331(a). Fla. R. App. P. 9.331(a) provides in pertinent part:

> A majority of the judges of a district court of appeal *participating* may order a proceeding pending before the court be determined en banc. A district court of appeal en banc shall consist of the judges in regular active service on the court. . . . *The en banc decision shall be by a majority of the active judges actually participating and voting on the case. In the event of a tie vote, the panel decision of the district court shall stand as the decision of the court. If there is no panel decision, a tie vote will affirm the trial court decision.*

Id. (emphasis in original).

27. 416 So. 2d at 1128.

The rule, as recently amended, provides that "[e]n banc hearings and rehearings shall not be ordered unless the case is of exceptional importance or unless necessary to maintain uniformity in the court's decisions."[28] In addition, the rule provides that "[a] party may move for an en banc rehearing solely on the grounds that the case is of exceptional importance or that such consideration is necessary to maintain uniformity in the court's decisions."[29] Counsel filing a motion for rehearing en banc shall include one or both prescribed statements, to wit: counsel believes, based on 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. . . ."[30]

In determining whether there is a basis for en banc review under the "maintenance of uniformity" ground, the committee note on the rule offers the following:[31]

> The ground, maintenance of uniformity in the court's decisions, 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 rule itself states the ground for en banc consideration as "necessary to maintain uniformity in the court's decisions."[32] The committee note uses the following term to define that ground: "decisional conflict," "decisional harmony," "intra-district conflict of decisions," and "decisional uniformity."[33]

The different terminology found in the rule and in the committee note has generated several theories regarding the proper test for en banc jurisdiction on the "lack of uniformity" ground. If the terms "conflict" and "uniformity" are viewed as antipodes, then uniformity may be equated with a *lack* of decisional conflict.[34] Alternatively, the "lack of uniformity" language could be interpreted as broadening the traditional concept of decisional conflict.[35] The majority view in the

28. FLA. R. APP. P. 9.331(a).
29. *Id.* 9.331(c).
30. *Id.*
31. FLA. R. APP. P. 9.331 committee note.
32. *Id.*
33. *Id.*
34. Schreiber v. Chase Fed. Sav. & Loan Ass'n, 422 So. 2d 911, 915 n.9 (Fla. 3d D.C.A. 1982) (dissenting opinion of Nesbitt, J., stating the majority view on interpretation of Rule 9.331).
35. *Id.* at 912 n.1 (majority opinion of Schwartz, J., stating the minority view on interpre-

district court's opinion in *Schreiber v. Chase Federal Savings & Loan Association*[36] suggested that the rule's drafters intended to give discretion to each district court to decide whether a conflict of decision could be created by an unpublished order, an opinion that has not been released, a per curiam affirmance without opinion (PCA), or by dicta in a written opinion and that the discretion was not as to the scope of review.[37]

The rule contemplates that determination of grounds for en banc review and of the merits of the en banc decision be treated, and voted on, separately. It is often difficult to consider the ground for en banc consideration apart from the merits of the case, but this must be done. Most judges would probably agree that disagreement on the merits should not be the basis for an affirmative vote for en banc consideration. Beyond this area of agreement, however, a wide diversity of opinions exist among judges as to what constitutes conflict.[38] A similar diversity will no doubt exist as Florida courts begin to interpret the most recent rule amendment and to determine what is meant by a case of "exceptional importance" qualifying for en banc consideration.

In *Schreiber*, a majority of the Third District Court of Appeal agreed that maintenance of uniformity in court decisions is the equivalent of decisional conflict as developed by the supreme court in *Neilson v. City of Sarasota*[39] and *Kyle v. Kyle*.[40] The *Neilson* case defined the two principal situations justifying the supreme court's assumption of jurisdiction based on conflict as:

> (1) the announcement of a *rule of law* which conflicts with a rule previously announced by this Court, or (2) the applica-

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tation of Rule 9.331).

36. *Id.* at 915 n.10 (Nesbitt, J., dissenting). The dissenting opinion of Judge Nesbitt expresses the majority view on grounds for en banc:

> The Committee Note to Rule 9.331 indicates that the district courts of appeal are free to develop their own concepts of decisional uniformity. This, in my view, has reference to divergent practices about the use and employment of the rule rather than the scope of review. Such practices include: (1) the form which a nonuniform decision may take (per curiam affirmance without an opinion, an order dismissing an appeal or denying an extra-ordinary writ without an opinion); (2) whether rehearing could be granted before receding from an earlier decision rendered by that court; or (3) whether there may be a conflict with an opinion which has not yet been released. It is in this sense, as the majority recognizes in footnote 1, that the district courts may develop their own definitions different from the Supreme Court.

37. That view has apparently been disapproved by the Florida Supreme Court in its *Schreiber* decision. 9 Fla. L.W. 313 (opinion filed July 26, 1984, not final pending rehearing).

38. 422 So. 2d 911 (Fla. 3d D.C.A. 1982) (illustrates the diversity of these opinions).

39. 117 So. 2d 731, 733 (Fla. 1960).

40. 139 So. 2d 885 (Fla. 1962).

> tion of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court.[41]

The *Kyle* case held that a decisional conflict exists where an earlier and later decision are rendered by the same court and the later decision has the effect of overruling the earlier one.[42]

The *Schreiber* majority held that the maintenance of uniformity in court decisions is only necessary in the event of an intra-district conflict of decisions. The minority view, however, stated that grounds for en banc consideration exist whenever decisions lack uniformity, and that there is lack of uniformity if decisions are "so inconsistent . . . that they would not have been rendered by the same panel of the court."[43]

The Florida Supreme Court, in an opinion released July 26, 1984, responded to the following question certified by the Third District Court of Appeal in the *Schreiber* case: "What is the proper scope of review for district courts of appeal in granting rehearings en banc?" In its consideration of this question,[44] the supreme court expressly

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41. 117 So. 2d at 734 (emphasis in original).
42. 139 So. 2d at 887.
43. 422 So. 2d at 912 n.1.
44. 9 Fla. L.W. 313, 314-15 (opinion filed July 26, 1984, not final pending rehearing):

> We respectfully reject the interpretation that the district courts, in exercising their en banc powers, are limited by the case-law standards adopted by the Supreme Court of Florida in the exercise of its discretionary conflict jurisdiction. We have held the en banc process to be constitutional and have stated "[t]he district courts are free . . . to develop their own concept of decisional uniformity. . . ."
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> The en banc process now authorized for the district courts is designed to help the district courts avoid conflict, assure harmonious decisions within the courts' geographic boundaries, and develop predictability of the law within their jurisdictions. Consistency of decisions within each district is essential to the credibility of the district courts. There has been criticism of intermediate appellate courts for their failure to speak with "a single voice of the law." Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U. MICH. J.L. REF. 471, 474 (1983). As judges are added to Florida's district courts to meet expanding caseloads, the resulting increased number of three-judge panels cannot help but increase the number of inconsistent and conflicting decisions. When there is a general rotation of Florida's district court judges among three-judge panels, the increased number of panel combinations compounds the problem. With a five-member court, the number of different panel combinations is ten. With a twelve-member court, however, the number of panel combinations is 220. The en banc process provides a means for Florida's district courts to avoid the perception that each court consists of independent panels speaking with multiple voices with no apparent responsibility to the court as a whole. The process provides an important forum for each court to work as a unified collegial body to achieve the objectives of both finality and uniformity of the law within each court's jurisdiction. We have previously said that
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> > [u]nder our appellate structural scheme, each three-judge panel of a district court of appeal should not consider itself an independent court unto itself, with no responsi-

rejected the view that the district courts, in exercising their en banc powers, are limited to the case law standard applicable to the supreme court's conflict jurisdiction. The court stated that the en banc process was "designed to help the district courts avoid conflict, assure harmonious decisions within the courts' geographic boundaries, and develop the predictability of the law within their jurisdictions," and concluded: "Accordingly, we hold that the district court of appeal, in implementing the provision of the en banc rule, has the authority to adopt the standard for conflict it believes necessary to harmonize the decisions of its court and avoid costly relitigation of similar issues in its jurisdiction."

It is important to note that, although the supreme court rejects the view that the en banc rule requires decisional conflict of the type defined in the *Neilson* and *Kyle* cases, the court does not prohibit the use of that standard. The court emphasizes that each district court is free to adopt its own concept of decisional uniformity, and that freedom includes the right to adopt any standard of conflict which will serve the purposes of the en banc rule, including the conflict jurisdiction standard used by the supreme court.

The supreme court in *Schreiber*, as quoted above, uses the term "adopt" in reference to the district courts' selection of the standard to be applied, but stops short of expressly requiring each district court to adopt an internal rule identifying the standard which will be used in that court. This should probably be done, however, in order to avoid variation in the standard to be applied on a case-by-case basis and to stabilize the proceedings despite changing memberships of each court. In the absence of a rule or published decision stating the standard adopted, the Bar will be uncertain as to when party motions should be filed and, in an abundance of caution, will file more frequently.

Once a district court of appeal has voted to rehear a case en banc, the question arises whether the en banc court will rehear the entire case or limit its consideration to the issue or part of the case giving rise to the en banc proceeding. Generally, once the court has determined that any portion of the case qualifies for en banc consideration, it is probably better practice to have the court resolve the entire

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bility to the district court as a whole. . . .

We would expect that, in most instances, a three-judge panel confronted with precedent with which it disagrees will suggest an en banc hearing. . . . Consistency of law within a district is essential to avoid unnecessary and costly litigation.

416 So. 2d at 1128. We expressly granted the district courts broad discretionary authority "to develop their own concept of decisional uniformity" to be able to fully carry out these expressed purposes. 374 So. 2d at 994.

case.[45] On the other hand, the en banc court could expressly limit its consideration to that portion of the case which is the basis of en banc consideration. The rule seems to provide for this latter result: "If rehearing en banc is granted, the court may limit the issues to be reheard."[46] As in other areas of en banc review, this question has not been handled uniformly among the district courts.[47] In *Tribune Co. v. Cannella*,[48] the Second District Court limited reargument before the en banc court to one issue, and counsel for the parties were directed to submit additional briefs and address oral arguments solely to that issue. The en banc decision, however, resolved all issues in the case. While the First District Court has not yet adopted a firm policy regarding the proper scope of consideration, it has occasionally limited en banc review to the point of conflict and allowed the panel to act on remaining issues.[49] It should be noted, however, that if the court en banc *adopts* the panel decision on some issues, those issues are considered as being decided en banc.

An analysis of decisions involving en banc proceedings under the "lack of uniformity" ground reveals three types of circumstances which courts have viewed as sufficient for en banc consideration.[50] First, there is the classic case of conflict where the court, through oversight, unintentionally creates conflict with that court's own precedents by reaching opposite results in factually indistinguishable cases which involve the same legal issue. Such intra-district conflict can arise through oversight as by counsel's failing to cite the court a controlling case or because different panels of the court working simultaneously, but independently, have released divergent opinions.[51]

A second situation which may trigger en banc review is one involving a basic philosophical difference between judges. Such differences between judges on a court may or may not be manifested in

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45. *See, e.g.*, Jenkins v. State, 422 So. 2d 1007 (Fla. 1st D.C.A. 1982).

46. FLA. R. APP. P. 9.331(c)(3).

47. *See infra* notes 48-49 and accompanying text.

48. 438 So. 2d 516 (Fla. 2d D.C.A. 1983).

49. Questionnaire response by former Judge Robert P. Smith, Jr., First District Court of Appeal. *See* Questionnaires, *supra* note 10. "Though there is difference of opinion within the court, the point has not formally been addressed. We have in fact released an en banc decision on only the point of disharmony, with panel acting on balance of case. Entire court addresses only point of disharmony if panel decision was previously released."

50. *See* appendix I (charts of "Cases Involving En Banc Proceedings"). All cases arose under "lack of uniformity" ground, as there have been no decisions as yet under the rule amendment adding the "exceptional importance" ground.

51. This latter circumstance is an embarrassment to the court, but will no doubt continue so long as multi-panel courts are required to manage large case loads without computer equipment and expertise needed to organize the assignment, disposition, and tracking of closely related cases. With some 14,000 new cases filed each year in the district courts of Florida, the scope of the problem is apparent.

written opinions of the court. It is difficult, however, in this second situation to find a clear conflict between decisions even though there may be much disagreement within the court on the general subject of a proposed opinion. The standard for decisional conflict stated by the minority view in *Schreiber* is broad enough to cover cases involving philosophical disputes,[52] but would also greatly increase the number of cases eligible for en banc proceedings. The better view would require philosophical differences to be expressed in opinion form, creating conflict with specific prior cases in order to invoke en banc proceedings.[53]

The third type of situation is one that all the district courts agree requires en banc consideration: receding from a prior decision of the court. Although the Florida Supreme Court declined to amend the rule to require en banc consideration under such circumstances, the district courts presently recognize overruling of a prior decision as grounds for en banc review.[54]

The courts usually view the first and the third circumstances stated above as sufficient grounds for en banc review. Questions remain, however, as to other situations which may provide a basis for

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52. *Schreiber*, 422 So. 2d at 912 n.1. The court stated:

> We do note, however, that a primary function of the en banc rule is . . . to minimize the importance of the "luck of the [appellate] draw" . . . in presenting cases before our increasingly multi-member courts. Considered in that light, we believe that an appropriate standard . . . is the rather practical one that decisions lack uniformity whenever it appears that they are so inconsistent and disharmonious that they would not have been rendered by the same panel of the court.

53. *In re* Interest of K.A.F., 442 So. 2d 365, 369-70 (Fla. 5th D.C.A. 1983) (Cowart, J., dissenting):

> Section 4(a), Art. V, of the Constitution of the State of Florida provides that in district courts of appeal "three judges shall consider each case and the concurrence of two shall be necessary to a decision." That constitutional provision has absolutely no meaning if a majority of the judges on a district court of appeal, disagreeing with the view of some proposed panel majority decision, can, by merely claiming an en banc hearing is necessary to maintain uniformity in the court's decisions, act under Florida Appellate Rule 9.331 to wrestle jurisdiction of a particular case away from the panel to which it was assigned and decide it according to a different view of the law or facts and do this without the proposed panel majority opinion ever being published or the claimed conflict issue ever being briefed, argued or conferenced. This occurred the first time on this court in *Torrence v. State*, 440 So. 2d 392 (Fla. 5th D.C.A. 1983), and each instance needs to be noted for whatever value it may have and for consideration by anyone concerned with the constitutional problem involved in the present en banc rule as it is being used. As here and in *Torrence* en banc jurisdiction can be decisive in a particular case. En banc jurisdiction is important beyond the resolution of the particular case and its effect on the body of law. Its employment can constitute an end run around the constitution which is so effective as to be subject to no defense or review. I dissent from its use in this case.

54. *See* Questionnaires, *supra* note 10.

en banc consideration. Yet to be resolved is whether a PCA or an opinion which does not expressly address the point of conflict can form the basis of en banc consideration. A related question is whether the court should search its records for prior cases disposed of by PCA or without a written opinion addressing the point for conflict, in order to determine whether there was in fact a ruling on that point which can form the basis for conflict.[55] It is also unclear whether dicta in an opinion can provide grounds for en banc review. Due to the difficulty of distinguishing dicta from the holding of the case, it is probable that dicta can, and frequently will, create a conflict supporting an en banc consideration.

Another problem in determining whether grounds for en banc consideration exist is presented when different panels of the court reach contrary results in separate appeals by co-defendants who raised substantially identical issues on appeal. In *Cruz v. State*,[56] the First District Court of Appeal reversed the conviction of defendant Cruz because the trial court erred in limiting his right to cross-examine a witness. In an earlier appeal to the First District Court, the co-defendant of Cruz raised the same issue.[57] His conviction, however, was affirmed. The court determined that because the harmless error rule may have been applicable in the co-defendant's appeal and because the issue was not discussed in the per curiam affirmance of the co-defendant's conviction, there was no conflict and thus no basis for en banc consideration.[58]

In *Joseph v. State*[59] a panel of the Third District Court of Appeal determined that Joseph's conviction should be reversed because the trial court improperly admitted evidence of a crime collateral to the offense charged. Earlier, a different panel of the court affirmed the conviction of Joseph's co-defendant who sought relief on the same ground.[60] On its own motion, the court considered the case en banc and reversed Joseph's conviction.[61]

These cases illustrate the continuing perplexing problem faced by the multi-panel appellate court in determining when the decision of one panel is to be considered binding on the rest of the court, regard-

55. *See, e.g.*, Cruz v. State, 437 So. 2d 692 (Fla. 1st D.C.A. 1983).

56. *Id.*

57. Gilley v. State, 422 So. 2d 358 (Fla. 1st D.C.A. 1982).

58. 437 So. 2d at 698.

59. 447 So. 2d 243, 244 (Fla. 3d D.C.A. 1983) (en banc).

60. Neal v. State, 414 So. 2d 1146 (Fla. 3d D.C.A. 1982).

61. 447 So. 2d at 246. Due to the expiration of the term, the court was unable to withdraw its mandate in Neal's earlier appeal. The court suggested FLA. R. CRIM. P. § 3.850 could be used to grant relief in cases such as Neal's, where fundamental defects resulted in a miscarriage of justice. *Id.* at 247.

less of disagreement with that panel's decision. Thus, once it has been determined that a particular piece of evidence was properly admitted into a criminal trial and, on that basis, the court affirms the conviction of one co-defendant, can another panel of the same court reach a contrary result as to the second co-defendant? Judge Hubbart, dissenting in *Joseph v. State*,[62] makes a persuasive statement that the general rules allowing receding from prior decision and use of the en banc rule do not apply under these circumstances.

The responses of Chief Judges to the authors' questionnaire reflected a concurrence among the districts that en banc proceedings can be dissolved and the case returned to the panel if the court finds that grounds for en banc consideration do not exist. One apparent exception to this practice is the case of *Gomez v. Neckwear*,[63] where a panel of the First District requested an en banc hearing in order to recede from two prior opinions of the court. After the en banc conference was convened, however, the court determined that the point for conflict was not an issue in the case because it had not been raised by the parties below. Nevertheless, the en banc proceedings continued and an en banc opinion was issued which did not cite the legal issue or opinions forming the basis of the panel's original en banc request. This would appear to be an erroneous interpretation of the Rule because the convening of an en banc court should not be viewed as "locking" the court into an en banc proceeding regardless of matters which come to light during the en banc conference.

IV. Motion by a Party

In conjunction with filing a motion for rehearing of a panel decision, a party may move for an en banc rehearing on the grounds that

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62. *Id.* at 248, 251 (Hubbart, J., dissenting):

> Moreover, it should be clear that FLA. R. APP. P. 9.331 is not in itself an exception to the doctrine of stare decisis. The rule does not entitle this court to order an en banc hearing whenever, as here, a majority of the assigned panel does not wish to follow a prior controlling decision of this court; such an en banc hearing is appropriate only when the doctrine of stare decisis otherwise admits an established exception permitting this court to overrule the prior precedent. Any other result would mean that this court en banc sits as a mini-supreme court over the panel decisions of this court, and is in no way bound by any panel decision rendered in the 26-year history of this court. If that is the law, the doctrine of stare decisis has been considerably undermined in this jurisdiction and an unconstitutional second court has, in effect, been created to review the panel decisions of this court. I emphatically disagree with such a result.
>
> It is axiomatic that a judge is not a knight errant roaming at will in pursuit of the judge's personal concepts of law and justice.

Id. at 251.

63. 424 So. 2d 106 (Fla. 1st D.C.A. 1983).

the case is of exceptional importance or that such consideration is necessary to maintain uniformity in the court's decisions. To discourage the filing of frivolous requests, the rule requires that each motion for rehearing en banc contain the attorney's statement that "based on a reasoned and studied judgment," one or both of the following grounds exists: "that the panel decision is of exceptional importance" or 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. . . ."[64]

The attorney must comply with procedural, as well as substantive, requirements of the rule. The motion for an en banc rehearing must be filed within fifteen days after the court's decision unless otherwise stipulated by the court. A motion filed after the fifteen days will be stricken as untimely. A separately filed motion for en banc review, unaccompanied by a motion for rehearing, is a nullity.[65] The Florida Supreme Court explained the reason for requiring both motions was to ensure "that each en banc rehearing request will simultaneously be disposed of by the district court's disposition of the traditional rehearing motion and . . . to eliminate separate motions for rehearing en banc."[66]

Satisfying the substantive and procedural requirements does not guarantee that the party's request will be considered by nonpanel judges. Although the commentary to the Rule states that all petitions for rehearing en banc should be circulated to nonpanel judges, the Fifth District Court of Appeal circulates such motions only to panel members unless a panel member requests a vote of the court.[67] The commentary further provides that judges who are not panel members are under no obligation to consider motions unless a vote is requested by a panel judge, or by any judge in "regular active service" on the court.

V. Judge or Panel Request

Filing a motion for rehearing en banc does not automatically bring the case before the whole court for consideration. A judge, either a panel or nonpanel member, must request a vote of the court

64. To ensure that the panel decision will be readily available to each judge who reviews the motion, the movant should append a copy of the panel decision to the motion. This procedure may be crucial. For example, the First District Court of Appeal does not circulate a copy of the panel decision to each judge unless it is attached to the motion. However, copies of all panel decisions are distributed to each judge on the court prior to release.

65. La Grande v. B & L Serv., Inc., 436 So. 2d 337 (Fla. 1st D.C.A. 1983).

66. State v. Kilpatrick, 420 So. 2d 868, 869 (Fla. 1982).

67. If all three panel members agree to deny the motion, it is not circulated further within that court.

that the case be considered en banc in order for such vote to be taken.[68] The judge may simply request the court to vote on the party's motion, or the judge may submit his own memorandum stating the grounds for en banc review. The judge's memorandum may either supplement the party's motion or raise issues not asserted by the party's motion.

Rule 9.331(b)(c) provides that hearings and rehearings en banc may be ordered by a district court *on its own motion.* A judge may call for an en banc vote, and the court may "go en banc" on the case whether a party has filed a motion or not. Although a party motion for en banc consideration must be filed within the time allowed for rehearing, a court acting on its own motion faces a different time limitation. In *Rogers v. State Farm Mutual Automobile Insurance Co.*,[69] the Fifth District ordered a rehearing en banc on its own motion two months after the end of the term in which the court issued the original PCA decision and mandate. On rehearing en banc, the court withdrew its prior mandate and reversed the trial court. On application for an extraordinary writ, the Florida Supreme Court ordered the district court to vacate its en banc judgment because the mandate was recalled after the expiration of the term in which the original mandate was issued.[70] The en banc rule does not prescribe a time limit for sua sponte motions for en banc consideration; however, the supreme court held that the district court's power to recall its mandate can be exercised only *during* the term in which the mandate was issued.[71] A panel of judges that wishes to recede from a prior decision of the court can, and as the First District invariably does, request en banc consideration.[72] Such a panel request can result in en banc con-

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68. A vote will not be taken on the [party] motion unless requested by a judge on the panel that heard the proceedings, or by any judge in regular active service on the court. Judges who did not sit on the panel are under no obligation to consider the motion unless a vote is requested.

FLA. R. APP. P. 9.331(c)(1).

69. 383 So. 2d 1221 (Fla. 5th D.C.A. 1980).

70. State Farm Mutual Auto. Ins. Co. v. Judges of the District Court of Appeal, 405 So. 2d 980 (Fla. 1981).

71. *Id.* at 982. The supreme court's decision poses some difficult questions as to the finality of cases. Presumably, however, the courts will use the power to recall the mandate sparingly, in keeping with past use of that power. *See* FLA. STAT. § 35.10 (1983) (authority to recall mandate).

72. The practice in the First District is to distribute copies of the en banc request of a judge or panel to everyone on the court. The request, in memorandum form, is usually accompanied by a copy of the opinion in the pending case and copies of the opinion(s) believed to be in conflict. The court file is not generally circulated at this time, although any judge can have the file sent to his office. Each judge entitled to vote, that is a judge who is in active service and not disqualified from serving on the case for any reason, would then submit a vote for or against en banc consideration. The vote is submitted to the Clerk with a copy to each other

sideration before a written opinion is released in the pending case. In view of the large number of cases filed and disposed of by the district courts,[73] the question arises as to how nonpanel judges can become aware that a case presenting grounds for en banc consideration is pending or has been released by the court.

One of the primary functions of party motions for rehearing en banc is to inform *nonpanel* judges of the potential decisional conflict and, under the most recent amendment, of cases of "exceptional importance" which may qualify for en banc consideration. Another method by which judges keep abreast of new cases due to be released by other panels of the court is the pre-release waiting period. All districts courts allow a waiting period of approximately one week between the time a proposed opinion is circulated in-house to all judges and the actual release date of the opinion.[74] During this time, the judges and their staffs are expected to review these pending opinions and check for errors and grounds for en banc consideration. A nonpanel judge who discovers an apparent conflict between another panel's opinion due to be released and a prior or a pending decision should immediately request en banc consideration; otherwise, the opinion may be released and become final if one of the parties does not file a timely motion for rehearing. Due to heavy caseload, however, nonpanel judges may find it difficult to promptly review opinions circulating on a pre-release basis. Nonetheless, pre-release review of opinions has been and continues to be an effective procedure by which multi-panel courts locate conflicts.[75]

Once a majority of the court votes in favor of the requested en banc review, a conference of the whole court is scheduled by the Chief Judge.[76] If the majority votes against en banc consideration,

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judge on the court. Voting may extend over several weeks, and one or more judges may change their views on the basis of views expressed by other members of the court.

73. *See, e.g.*, THE ANNUAL REPORT OF THE FIRST DISTRICT COURT OF APPEAL (1983) (of the 3,369 cases which were disposed of by the First District in 1983, 1,116 had written opinions).

74. *See* Questionnaires, *supra* note 10.

75. The Second District reports that effective use of pre-release review, followed by an informal conference to work out problems, has alleviated need for en banc consideration in all but two cases. Response to Questionnaire by Second District, Questionnaires, *supra* note 10.

76. A review of the en banc proceedings in the First District Court shows that judges of that court have requested en banc consideration in 38 cases. These requests have resulted in 25 en banc conferences and 5 en banc oral arguments. *See* appendix I.

In the First District, en banc conference is begun by the judge requesting the en banc making a presentation supporting his request. This is followed by a response from the author of the panel decision, and discussion by other members of the court. The procedure varies when it is the original panel requesting en banc because the panel majority wants to recede from one or more prior cases. In that event, the judge having primary responsibility for the case will address the court concerning the pending case and the need to recede from the earlier decisions. In either event, each judge of the court, in order of seniority, is allowed the opportunity to speak

the case is returned to the panel. Regardless of the outcome, the en banc rule does not require notifying the parties that an en banc vote has been taken or the results of such a vote. Apparently, the practice in all districts is not to give notice to parties that en banc proceedings are underway. Seldom is oral argument or supplemental briefing ordered in most of the districts. Even if an en banc opinion is ultimately written, the opinion frequently does not specify the grounds for en banc consideration or the proceedings followed by the court.

The *Schreiber* case is one of the few cases decided under rule 9.331 that has discussed the grounds for en banc consideration.[77] Many cases do not indicate the nature of the conflict, much less discuss the standard applied by the court in granting en banc review.[78] Without judicial guidance as to the basis for claiming en banc consideration, both party motions and judge requests for en banc review will probably increase, under an "anything goes" theory.

Failure of the courts to articulate the grounds for en banc consideration is one of the shortcomings of en banc proceedings. Also lacking is a prescribed method or standard practice of notifying counsel that en banc proceedings are underway.[79] A stated purpose of the rule is to provide a method for securing input of counsel in determining cases worthy of en banc consideration.[80] In practice, however, ef-

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concerning conflict and the merits. An effort is made to keep separate the two issues, conflict and merits, and to vote separately on each.

77. *See supra* notes 38-43 and accompanying text.

78. Criticism of the present state of affairs is well stated by the dissenting judge in *In re* Interest of K.A.F., 442 So. 2d 365, 370 (Fla. 5th D.C.A. 1983):

> A litigant who has presented his appeal to a district court of appeal panel in accordance with the constitution, the appellate rules and constitutional due process and has won it fair and square, should not be deprived of the result by an en banc majority which merely disagrees with the rationale or result in the given case and under circumstances where the litigant cannot obtain review of the jurisdictional issue involved in the claimed conflict. The en banc rule should be amended or construed to require that an en banc decision affirmatively demonstrate decisional conflict subject to review by the supreme court.

79. The First District, in June of 1984, adopted Rule 9, Rule of Internal Operating Procedure, which provides for some notification of the parties, as follows:

> Upon a majority vote by participating judges in favor of en banc consideration, an order may issue advising the parties of the court's determination to decide the case en banc. Such order may, upon request of one-third of the participating judges, require supplemental briefs and/or additional copies of briefs already filed for distribution to all judges, and may set the case for oral argument when deemed appropriate.
>
> *Note:* This rule is intended to furnish the parties notice of the court's action, and attachment of the proposed opinion will also demonstrate predicate for en banc consideration.

(see appendix I, for full text of Internal Operating Rules).

80. *Report of the Supreme Court Commission on the Florida Appellate Court Structure,*

fective participation by counsel in the en banc process is limited. Indeed, an attorney may be completely unaware that the case is being considered by judges other than those who heard oral argument.

In addition to the innate propriety of giving notice when a case is removed from the regular panel, the court itself can benefit from counsel's input regarding en banc issues. Arguably, en banc proceedings might be less time consuming and the court undoubtedly better prepared if parties were allowed to make oral arguments and submit additional briefs in more of the en banc cases.[81] For example, if the court discovers the point of conflict, that point may not have received sufficient, if any, attention in the briefs or at oral argument before the original panel. Even if the alleged conflict was briefed and orally argued, nonpanel judges might also benefit from hearing those arguments on rehearing. Weighing against reargument before the en banc court is the administrative problem resulting from assembling all the district court judges.[82] An en banc proceeding imposes a time-consuming burden that hampers individual judges in the discharge of their regular duties.[83] Statistics available to date indicate that only

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53 FLA. B.J. 274, 279 (1979) [hereinafter cited as *Report on Appellate Structure*]:

> 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.*

Id. (emphasis added).

81. Failure to allow oral argument was criticized by Judge Hubbart in Joseph v. State, 447 So. 2d 243, 248 (Fla. 3d D.C.A. 1983) (dissenting opinion):

> This case was originally assigned to a three-judge panel of this court before whom the case was briefed and orally argued on the merits by the parties. Subsequently, a majority of the judges on the assigned panel sought an en banc hearing on this case because they wished to recede from a controlling decision. . . . The court sitting en banc acceded to this request and voted to conduct an en banc hearing under Fla. R. App. P. 9.331(a). Since then, however, no such en banc hearing has ever been conducted. The parties have not filed any briefs or memoranda or made any oral argument to this court en banc; *indeed, the parties have not even been notified that this case is now an en banc proceeding.* I am certain they will find the court's en banc decision today quite a surprise, as the last they heard this case had been submitted to a three-judge panel of this court. I, therefore, think it unwarranted for this court to decide this case en banc on the merits, as it does today, when in fact no en banc hearing has ever been held.

Id. at 248 (emphasis added).

82. Presently the First District Court of Appeal has 12 judges, the Second District ten, the Third and Fourth Districts nine each and the Fifth District six. FLA. STAT. § 35.06. Each of these courts, except the Fifth District, began its existence with three judges. The initial composition of the Fifth District Court, created in 1979, was six judges. Ch. 79-413, Laws of Fla.

83. "There is difficulty involved just in getting nine judges together." Interview with former Judge John Beranek, April 5, 1983. "As I view it, an automobile production line conveyor belt system such as this precludes adequate consideration of individual cases, never mind adding the increased burden of en banc matters involving all nine judges." Response to authors'

the Third District has allowed oral argument and supplemental briefing in any significant number of en banc cases.[84]

At least one reported decision reveals that the court went en banc on its own motion, and that the proceeding could have been avoided if counsel had been notified of the issue which appeared to the court as creating a conflict.[85] In *State v. Mayle*,[86] the court sua sponte ordered an en banc hearing based on an apparent conflict, but receded from its order after determining that the point of apparent conflict had not been preserved below. The case illustrates the pitfalls awaiting the court that goes through en banc proceedings intramurally without informing counsel.

There is a feeling among some judges that en banc proceedings are strictly the business of the court since the rule is designed to maintain the integrity of the system by requiring each court to keep its own house in order. Under this view, explanations by order or published opinion as to the basis of en banc consideration or en banc procedures followed by the court may elicit responses from counsel requiring more paperwork and could restrict the court's ability to freely operate en banc. This view overlooks the dual function of the en banc decision. An en banc opinion is usually an important precedent, but it also decides the particular case before the court, determining the rights of the litigants in that case. The larger aspect of the en banc proceeding should not obscure its equally important function of deciding the case before the court. Litigants are entitled to representation in that regard. Counsel who has won his appeal before the regular panel should be entitled to defend that decision and the court can benefit from the input of counsel.

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questionnaire by former Chief Judge Gavin K. Letts, Fourth District Court Appeal. *See* Questionnaires, *supra* note 10.

Judges' schedules aside, en banc sittings pose other functional problems for the court, most notably in the Second District. When the Second District Court of Appeal heard oral argument as an en banc court for the first time, members of the court walked next door to assemble in the auditorium of the Florida Citrus Commission Building because the court's bench and courtroom were too small to seat all its judges simultaneously. Space is not the only problem encountered when all the court's judges sit together. Even in the ample facility of the Citrus Commission building, the difficulty of orchestrating an en banc proceeding was apparent. Eight of the nine judges sitting participated in the questions directed at counsel, producing approximately three dozen questions that had to be answered within the strictly-observed allocations of 20 minutes to the side. The case heard en banc was The Tribune Co. v. Cannella, 438 So. 2d 516 (Fla. 2d D.C.A. 1983).

84. Questionnaire responses revealed that the First, Fourth and Fifth District Courts have granted en banc oral arguments infrequently. The Second District Court granted oral argument in one of the two cases to date that have been considered by the court sitting en banc. In the Third District, additional briefing and oral argument have usually been allowed prior to en banc determination.

85. State v. Mayle, 406 So. 2d 108 (Fla. 5th D.C.A. 1981).

86. *Id.*

The federal system provides a method for reporting information regarding en banc proceedings. The United States Supreme Court in *Pacific Railroad Corp. v. Western Pacific Railroad*[87] required each federal circuit court to publicize fully its en banc procedures. Because the Florida rule is modeled closely after the federal rule, Florida should follow the federal practice of requiring written opinions which include the basis for invoking the court's en banc jurisdiction.

VI. The Federal En Banc Rule

Florida's en banc rule is patterned after the en banc rule of the United States Court of Appeals for the Fifth and Eleventh Circuits.[88] That Rule evolved as a result of the United States Supreme Court decision in *Textile Mills Securities Corp. v. Commissioner*.[89] In *Textile Mills*, the Court upheld the authority of a court of appeals to hear and decide cases en banc as well as by three-judge panels. Congress subsequently codified *Textile Mills* in section 46(c) of the Judicial Code of 1948.[90] More recently, the procedure for en banc review in federal appellate courts has been set forth in rule 35 of the Federal Rules of Appellate Procedure.[91]

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87. 345 U.S. 247, 260-61, 267-68 (1953).

88. Fla. R. App. P. 9.331, committee notes, 32 F.S.A. at 533. Effective Oct. 1, 1981, the former Federal Fifth Circuit Court of Appeals was divided into two new circuits, the "new Fifth" and the Eleventh. Florida presently falls within the territorial jurisdiction of the Eleventh Circuit. Rules of the United States Court of Appeals, Eleventh Circuit, Rule 26, provides, in part:

> A suggestion of en banc consideration, whether upon initial hearing or rehearing, is an extraordinary procedure intended to bring to the attention of the entire court a precedent setting error of exceptional importance in an appeal or other proceeding and, with specific reference to a suggestion of en banc consideration upon rehearing, is intended to bring to the attention of the entire court a panel opinion that is allegedly in direct conflict with precedent of the Supreme Court or of this circuit. Alleged errors in a panel's determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the panel's misapplication of correct precedent to the facts of the case, are matters for rehearing before the panel but not for en banc consideration. . . . A suggestion of en banc consideration shall contain . . . one or both of the following statements of counsel as applicable:
>
> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [cite specifically the case or cases].
>
> I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence].

89. 314 U.S. 326 (1941).

90. 28 U.S.C. § 46(c) (1952).

91. Fed. R. App. P. 35, Determination of Causes by the Court En Banc:

Federal Rule 35 authorizes "in banc" consideration for cases implicating a need for uniformity and "when the proceeding involves a question of exceptional importance."[92] The recent amendment to Florida's en banc rule, providing for en banc consideration in cases of exceptional importance, has yet to be interpreted by any Florida courts. Federal authorities construing and commenting on the exceptional importance ground under federal rules will no doubt be looked to in construing the new Florida provision.[93]

The federal rule, unlike Florida's, does not require that a request for rehearing en banc be accompanied by a motion for rehearing. Rule 35 merely requires that the suggestion for a rehearing en banc be filed within the time for filing a petition for rehearing, "whether the suggestion is made in such petition or otherwise." In practice, however, most federal petitions for rehearing en banc are submitted in tandem with a petition for rehearing.[94]

(a) When hearing or rehearing en banc will be ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. . . .

92. The Florida Appellate Structure Commission in 1979 recommended an en banc Rule virtually identical to the federal Rule insofar as grounds for review were concerned. *See Report on Appellate Structure, supra* note 80, at 279-80. In adopting Rule 9.331, the Florida Supreme Court eliminated "question(s) of exceptional importance" as a basis for en banc consideration.

In 1983 the Chief Justice of the Florida Supreme Court, James E. Alderman, appointed an Article V Review Commission to make recommendations concerning Florida's judicial system. One of the Commission's proposals was that district courts of appeal be authorized to sit en banc to consider questions of exceptional importance. Subsequently, the Florida Bar's Appellate Rules Committee invited comments on the proposal from all district court of appeal judges. The responses did not establish a consensus favoring the proposal, and it was not included in the Committee's recommendations to the supreme court in July, 1984.

On Sept. 13, 1984, the supreme court released its rule opinion in Case No. 65,082, *amending* FLA. R. APP. P. 9.331, to allow district courts of appeal to consider en banc cases of exceptional importance, with this comment in the opinion:

Rule 9.331 has been amended to allow en banc proceedings in the district courts of appeal for cases that are of exceptional importance. This amendment is consistent with recommendation 11 of the Supreme Court's Article V Review Commission. This change broadens the authority of the district courts of appeal to sit en banc and makes that authority consistent with other jurisdictions that provide for en banc proceedings.

93. Annotations: In Banc Proceedings in Federal Courts of Appeal, 37 A.L.R. FED. 274, 296 (1978), and cases cited therein; *En Banc Hearings in the Federal Courts of Appeals; Accomodating Institutional Responsibilities*, 40 N.Y.U. L. REV. 563, 386 (1965); Comment, *In Banc Procedures in the United States Courts of Appeal*, 43 Fordham L. Rev. 401, 411 (1974).

94. The Eleventh Circuit Court of Appeals has a local rule dealing with en banc procedure. Its Rule 26 (effective Jan. 1, 1983) requires that 13 copies of a suggestion for en banc consideration must be filed, whether for initial hearing or rehearing. Rule 26 also extends the time for filing either a petition for rehearing or a suggestion of en banc consideration on rehearing to 20 days. In the event en banc consideration is granted, the Rule requires the filing of 13

The Eleventh Circuit Court's first decision, *Bonner v. City of Prichard*,[95] was an en banc decision. The court sat en banc for the purpose of adopting the decisions of the former Fifth Circuit "for governance of legal affairs within the jurisdiction of this new circuit."[96] By the end of June, 1983, the court had considered seventeen cases en banc, thirteen with oral argument and four on the non-argument calendar.[97]

A review of two recent decisions of the Eleventh Circuit Court of Appeals illustrates some of the problems inherent in en banc review by a court that customarily sits in panels of three. In *Washington v. Strickland*,[98] a divided panel's opinion was reheard en banc. On rehearing, the members of the court filed six separate opinions, aggregating forty-eight pages in the Federal Reporter. The panel opinion was issued April 23, 1982; the rehearing en banc was ordered May 14, 1982; and the decision on rehearing en banc was issued December 23, 1982. Those numbers were soon exceeded in *Ford v. Strickland*,[99] in which the court's judges again filed six opinions, consuming eighty pages. The increase in the length of time required to dispose of these cases is apparent; the additional burden thrust upon the judges is best understood by reading all of the opinions.[100]

V. Conclusion

In addressing some of the perceived problems that have arisen during Florida's brief en banc experience, this article has identified criticisms that en banc proceedings are cumbersome and time consuming and they tend to hinder the judges' discharge of their regular duties. Nonetheless, the en banc rule appears likely to remain a part of Florida's appellate process for the foreseeable future.[101] So long as the present scheme exists, those criticisms can perhaps best be ad-

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copies of all previously filed briefs and 13 copies of each supplemental brief on rehearing. It also provides that the clerk will set a briefing schedule for en banc briefs.

95. 661 F.2d 1206 (11th Cir. 1981).

96. Although the published opinion in *Bonner* is dated Nov. 3, 1981, that portion of the opinion adopting Fifth Circuit precedent was announced by Chief Judge John Godbold at the opening ceremonies of the new court held in Atlanta on Oct. 2, 1981. Sitting en banc, the Court had heard oral argument earlier in the day.

97. Letters from Norman Zoller, former clerk of the Eleventh Circuit Court of Appeals now serving as Circuit Executive, to Julian Clarkson (June 6 and June 17, 1983).

98. 693 F.2d 1243 (5th Cir. 1982) (Unit B en banc), *cert. granted*, 103 S. Ct. 2451 (1983). The en banc court was the new Eleventh Circuit Court of Appeals.

99. 696 F.2d 804 (11th Cir. 1983) (en banc).

100. "Judges don't like en bancs much; they are time-consuming, result in a flood of opinions, and usually don't end the case." Remarks of Judge Patricia M. Wald, District of Columbia Bar annual meeting, June, 1983, republished in District Lawyer, July-Aug., 1983, at 38.

101. *See* Overton, *A Prescription for the Appellate Caseload Explosion*, 12 Fla. St. U.L. Rev. 205, 212-20 (1984).

dressed by limiting en banc proceedings to those few cases that truly exhibit a basis for en banc jurisdiction, by disposing of those cases under well-publicized procedures with notice to and participation by the parties, and by identifying in the published opinions the basis for en banc consideration and the procedure followed.

APPENDIX I

CASES INVOLVING EN BANC PROCEEDINGS

FIRST DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
1	Latisi v. Florida Parole & Probation Comm., 382 So.2d 1355 (Fla. 1st D.C.A. 1980).	Courts: filing fee required of prisoner filing for writ of mandamus.	Unstated.	Unstated.	Unstated.	Unanimous.
2	Fauls v. Sheriff, 384 So.2d 238 (Fla. 1st D.C.A. 1980), *aff'd*, 394 So.2d 117 (Fla. 1981).	Habeas corpus: challenging extradition.	Unstated.	Unstated, but apparently, conflict with Simpson v. Woodham, 332 So.2d 693 (Fla. 1st D.C.A. 1976), since that case is receded from.	Unstated.	7/2
3	Myers v. Carr Const. Co. 387 So.2d 417 (Fla. 1st D.C.A. 1980).	Workers' compensation: rate of interest on past-due benefits.	Judge request.	Unstated.	Unstated.	6/3
4	DOR v. Anderson, 389 So.2d 1034 (Fla. 1st D.C.A. 1980), *review denied*, 399 So.2d 1141 (Fla. 1981).	Taxation: taxes on party fishing boat admission fees.	Unstated.	Unstated.	Panel decision approved by en banc majority.	6/3 (3 judges recused).

CASES INVOLVING EN BANC PROCEEDINGS

FIRST DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
5	Nichols v. Florida Parole & Probation Comm., 393 So.2d 13 (Fla. 1st D.C.A. 1980).	Courts: filing fee not required of indigents; Fla. Stat., Section 57.081(1).	Unstated.	A statute was enacted changing the law as stated in *Latisi, supra.*	Unstated.	Unanimous.
6	Belam Fla. Corp. v. Dardy, 397 So.2d 756 (Fla. 1st D.C.A. 1981).	Workers' compenation: credit for overpayment of benefits.	Unstated.	Conflict with prior cases from which court recedes.	Unstated.	Unanimous. (Concurring & special concurring opinions, filed.)
7 *	Daniels v. Florida Parole & Probation Comm., 401 So.2d 1351 (Fla. 1st D.C.A. 1981), *approved*, 444 So.2d 917 (Fla. 1983).	Administrative law: review under Chapter 120, Fla. Stat., allowed to challenge setting of parole release date by Commission.	Unstated.	Unstated.	Unstated.	10/2
8	Hubbard v. State, 411 So.2d 1312 (Fla. 1st D.C.A. 1981), *appeal dismissed*, 424 So.2d 761 (Fla. 1982).	Criminal law: mandatory jury instruction on penalties.	Judge request based on party motion.	Conflict with Holland v. State, 400 So.2d 767 (Fla. 1st D.C.A. 1981).	Panel decision rejected.	11/1
9 *	Regency Inn v. Johnson, 422 So.2d 870 (Fla. 1st D.C.A. 1982), *review denied*, 431 So.2d 989 (Fla. 1983).	Workers' compensation: "work search" needed to establish wage loss.	Court on its own motion.	Unstated.	Panel decision upheld.	Unanimous.

* orally argued en banc

CASES INVOLVING EN BANC PROCEEDINGS

FIRST DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
10	Jenkins v. State, 422 So.2d 1007 (Fla. 1st D.C.A. 1982), *approved in part*, 444 So.2d. 947 (Fla. 1984).	Criminal law: defendant may be assessed cost for Crimes Compensation Fund under Section 960.25 even though he is "indigent."	Court on its own motion.	Conflict with Mobley v. State, 414 So.2d 25 (Fla. 1st D.C.A. 1982).	Adopt panel opinion and recede from Mobley v. State, 414 So.2d 25 (Fla. 1st D.C.A. 1982).	10/2
11	Ardmore Farms v. Smith, 423 So.2d 1039 (Fla. 1st D.C.A. 1982).	Workers' compensation: proper execution of wage-loss form.	Court on its own motion.	Conflict with Fla. Erection Service v. McDonald, 395 So.2d 203 (Fla. 1st D.C.A. 1981).	Panel decision receded from in part.	9/3
12	Gomez v. Neckwear, 424 So.2d 106 (Fla. 1st D.C.A. 1982).	Workers' compensation: competent substantial evidence supporting deputy.	Request of original panel.	Unstated.	Unstated.	8/4
13	State Dept. of Environ. Reg. v. Falls Chase Special Taxing Dist., 424 So.2d 787 (Fla. 1st D.C.A. 1982); *pet. for rev. denied*, 436 So.2d 98 (Fla. 1983).	Administrative law: exhaustion of remedies.	Unstated.	Unstated.	Panel decision adopted.	6/6
14	McIntosh v. McIntosh, 432 So.2d 176 (Fla. 1st D.C.A. 1983).	Dissolution of Marriage: complaint for alimony need not specify "lump sum" in order to support lump sum award.	Request of original panel.	Unstated, but apparently conflict with cases from which court expressly recedes.	Unstated.	7/5

CASES INVOLVING EN BANC PROCEEDINGS

FIRST DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
15	Cruz v. State, 437 So.2d 692 (Fla. 1st D.C.A. 1983).	Criminal law: stare decisis: as applied to appeals of co-defendants who were tried together for same offense, but whose appeals, considered by different panels of the court, reached different results.	Party motion (by appellee), as submitted to vote of court at request of judge.	"The motion for rehearing en banc was considered by the full court and, after deliberation, a majority determined not to consider it."	Panel decision stands.	None taken.
16	Powe v. State, 443 So.2d 154 (Fla. 1st D.C.A. 1983).	Criminal law: admissibility of taped telephone conversation between defendant and undercover agent.	Request of original panel.	Unstated.	Panel decision adopted by court en banc.	10/2
17 *	Trinade v. Abbey Rd., 443 So.2d 1007 (Fla. 1st D.C.A. 1983).	Workers' Compensation: Use of A.M.A. Guides to determine permanent impairment.	On court's own motion.	Conflict between proposed panel decision and prior decisions of the court.	En banc majority agreed with panel *result* but en banc opinion substituted for panel decision.	Unanimous.
18	Peck v. Palm Beach County Bd., 442 So.2d 1050 (Fla. 1st D.C.A. 1983).	Workers' Compensation: Use of A.M.A. Guides not required as to accidents occurring on or before Aug. 1, 1979.	On Court's own motion.	Conflict with prior decisions.	Unstated.	9/2/1 (11 supporting result of en banc majority opinion).

* orally argued en banc

CASES INVOLVING EN BANC PROCEEDINGS

FIRST DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
19	Pape v. Pape, 444 So.2d 1058 (Fla. 1st D.C.A. 1984).	Parent and child: custody rights as between natural parent and step-parents stated.	Unstated.	Apparent conflict with Scott v. Singleton, 378 So.2d 885 (Fla. 1st D.C.A. 1979).	Unstated.	10/3
20	Cooper v. State, 9 Fla. L. Weekly 1884, opinion filed 9/5/84.	Criminal Law: sentencing to consecutive three-year minimum mandatory sentences reversed.	Unstated.	Unstated.	Unstated.	Unanimous on merits but two specially concurring on need for en banc proceeding.

CASES INVOLVING EN BANC PROCEEDINGS

SECOND DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
1 *	The Tribune Co. v. Cannella, 438 So.2d 516 (Fla. 2d D.C.A. 1983); *quashed*, 1984 Fla. L. Week 341 (Sept. 6, 1984).	Public records: whether disclosure of nonexempt public records (personnel files) may be automatically delayed for a specific period of time.	Court's own motion.	Majority of three-judge panel that originally heard argument desired to recede from prior holding.	No panel decision published; apparently panel decision, if formalized would have been contrary to en banc result.	5/4
2	Linehan v. State, 442 So.2d 244 (Fla. 2d D.C.A. 1983).	Criminal law: whether voluntary intoxication is a defense to arson or felony murder; whether failure to instruct on second degree (depraved mind) murder was reversible error.	Court's own motion.	To recede from prior decision; "matters of first impression."	Initial hearing en banc.	10/0

* orally argued en banc

CASES INVOLVING EN BANC PROCEEDINGS

THIRD DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
1 *	Royer v. State, 389 So.2d 1007 (Fla. 3d D.C.A. 1979), *cert. denied*, 397 So.2d 779 (Fla. 1981), *aff'd* 460 U.S. 491 (1983).	Criminal law: whether suspect's consent to search luggage was tainted by illegal detention at airport so as to be ineffective to justify search.	Party motion.	Conflict with two prior decisions.	Panel decision vacated.**	6/0
2 *	Quest v. Joseph, 392 So.2d 256 (Fla. 3d D.C.A. 1982), *quashed*, 414 So.2d 1063 (Fla. 1982).	Contribution: action for contribution may be maintained by tortfeasor against negligent parent of minor child-plaintiff.	Court's own motion.	Panel decision "conflicts with and specifically recedes from prior decision."	Same result as panel decision.	7/0
3 *	Lewis v. State, 411 So.2d 880 (Fla. 3d D.C.A. 1981), *appeal denied*, 418 So.2d 1279 (Fla. 1982).	Criminal law: no abuse of discretion in refusing to allow defendant to call alibi witness whose name had not been supplied to state.	Party motion.	Apparent conflict with prior decision.	Panel decision reinstated.	7/2
4 *	Washington v. State, 414 So.2d 522 (Fla. 3d D.C.A. 1981).	Criminal law: whether defendant knowingly waived right to jury trial.	Party motion.	Potential conflict with prior decision.	Opinion on rehearing adhering to panel decision.	No en banc vote on merits because rehearing demonstrated absence of conflict.
5 *	Jaris v. Tucker, 414 So.2d 1164 (Fla. 3d D.C.A.), *review denied*, 419 So.2d 1198 (Fla. 1982).	Judgment dissolving marriage: court lacks power to enter nunc pro tunc judgment of dissolution after death of party.	Party motion.	"Lack of uniformity" with prior decision.	Panel opinion vacated; en banc opinion adheres to prior decision.	Unanimous.

* orally argued

** 2 associate judges in majority on original panel where ineligible to participate in en banc proceeding.

CASES INVOLVING EN BANC PROCEEDINGS

THIRD DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
6	Unistar Corporation v. Child, 415 So.2d 733 (Fla. 3d D.C.A. 1982).	Torts: action lies where party tortiously interferes with contract terminable at will.	Unstated.	Conflict with prior decision.	Panel decision adopted as en banc decision; prior decision disapproved.	Unanimous.
7 *	Puga v. Suave Shoe Corp., 417 So.2d 678 (Fla. 3d D.C.A. 1981).	Appeals: Improper to dismiss appeal solely because notice sought review of post-trial order rather than final judgment.	Party motion.	"lack of uniformity" with prior decision.	Panel decision vacated; en banc opinion reaches contrary result.	Unanimous.
8 *	Recinos v. State, 420 So.2d 95 (Fla. 3d D.C.A. 1982).	Criminal law: trial judge's comment that defendant "is like any other witness on the stand" held harmless error.	Unstated.	Duty to apply Florida Supreme Court decision rendered after panel decision.	Panel decision approved.	6/2
9 *	Finney v. State, 420 So.2d 639 (Fla. 3d D.C.A. 1982).	Criminal law: stipulation that motion to suppress would be dispositive held binding on appeal.	Court's own motion.	Conflict with prior decision (*Neilson* type of conflict approved).	Panel decision withdrawn.	8/1
10 *	Schreiber v. Chase Federal Savings & Loan Assn., 422 So.2d 911 (Fla. 3d D.C.A. 1982); *disapproved in part* 9 FLW 313, Sup. Ct. Case #63.017, opinion filed July 26, 1984.	Deeds: deed in consideration of love and affection held invalid.	Party motion.	Conflict with prior decision; court divided 5/4 on proper basis for en banc review; question certified to Supreme Court.	Dissenting panel opinion adopted (see Ross v. Chase Federal Savings & Loan Assn., 424 So.2d 779); panel decision vacated.	5/4 on merits; 4/5 on basis for en banc review.

* orally argued

CASES INVOLVING EN BANC PROCEEDINGS

THIRD DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
11 *	Dumas v. State, 439 So.2d 246 (Fla. 3d D.C.A. 1983).	Criminal law: whether defendant knowingly waived right to jury trial.	Court's own motion.	Conflict with prior decision.	No panel decision published.	7/2
12	Rodriguez v. State, 441 So.2d 1129 (Fla. 3d D.C.A. 1983).	Criminal law: sentence imposed after probation agreed to by defendant did not constitute double jeopardy.	Unstated.	To recede from three prior decisions of the court.	Panel decision approved but modified.	7/2
13	Joseph v. State, 447 So.2d 243 (Fla. 3d D.C.A. 1983).	Criminal law: evidence of collateral crimes inadmissible and no waiver of objection occurred.	Court's own motion.	Conflict with prior decision involving a co-defendant.	No panel decision published.	5/3
14	State v. Eicher, 431 So.2d 1009 (Fla. 3d D.C.A. 1982) (*on rehearing en banc* May 10, 1983).	Criminal law: exclusionary rule does not taint information already in official hands prior to any illegality.	Party motion.	Per curiam affirmance by panel conflicted with prior opinion.	Panel decision withdrawn.	Unanimous.
15 *	Coralluzzo v. Fass, 435 So.2d 262 (Fla. 3d D.C.A. 1983).	Pretrial procedure: in medical malpractice action, health care providers not within contemplation of expert witness discovery rule.	Court (hearing en banc).	Unstated; apparent arguable misapplication of prior decision.	No panel decision.	6-3
16	Taylor v. State, 436 So.2d 124 (Fla. 3d D.C.A. 1983).	Criminal law: no prejudice to defendant in procedure leading to order revoking probation.	Party motion.	Conflict with prior decision.	Panel decision vacated.	5-3

*orally argued

CASES INVOLVING EN BANC PROCEEDINGS

THIRD DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
17 *	State v. C.C., 8 FLW 2381 (Fla. 3d D.C.A. 1983).	Appeals: state has no right of appeal in juvenile cases.	Party motion.	Unstated.	Panel decision approved.	5-4
18 *	Sanchez v. State, 392 So.2d 555 (Fla. 3d D.C.A. 1981).	Criminal Law: Search and Seizure.	Unstated.	Unstated.	Panel decision adopted.	Unanimous.
	IN ADDITION TO THE THIRD DISTRICT EN BANC OPINIONS:	FOREGOING PUBLISHED EN BANC, BUT WERE RESTORED TO PA	OPINIONS, THE F NEL JURISDICTIO	OLLOWING CASES N AND RESULTED	WERE ORALLY ARG IN PUBLICATION O	UED IN THE F PANEL
19 *	Gans v. State of Fla., Dept. of Prof. & Occupational Reg., 390 So.2d 107 (3d D.C.A. 1980), *pet. for rev. denied*, 399 So.2d 1142 (Fla. 1981).	Administrative Law.	Unstated.	Unstated.	Panel decision.	—

* orally argued

CASES INVOLVING EN BANC PROCEEDINGS

THIRD DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
20 *	Schoen v. Gilbert, 404 So.2d 128 (3d D.C.A. 1981), *approved*, No. 61,331 (Fla. July 28, 1983).	Negligence.	Unstated.	Unstated.	Panel decision.	—
21 *	Corsa Boats, Inc. v. Sun Bank of Miami, 405 So.2d 1340 (3d D.C.A.), *pet. for rev. denied*, 412 So.2d 464 (Fla. 1981).	Priority of Liens, i.e., Secured Transactions.	Unstated.	Unstated.	Panel decision.	—
22 *	Fuller v. State, 414 So.2d 264 (Fla. 3d D.C.A. 1982).	Criminal.	Unstated.	Unstated.	Panel decision.	—
23 *	Brown v. State, 414 So.2d 267 (Fla. 3d D.C.A. 1982).	Criminal.	Unstated.	Unstated.	Panel decision.	—
24 *	Bedford v. State, 417 So.2d 771 (Fla. 3d D.C.A. 1982).	Criminal.	Unstated.	Unstated.	Panel decision.	—

* orally argued

CASES INVOLVING EN BANC PROCEEDINGS

THIRD DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
25 *	Besley v. Besley, 437 So.2d 247 (3d D.C.A. 1983), *pet. for rev. den.*, 450 So.2d 485 (Fla. 1984).	Dissolution.	Unstated.	Unstated.	Panel decision	—
26 *	State v. Guerra, 9 Fla. L.W. 1900 (opinion filed Sept. 4, 1984).	Criminal Law: Reliability of identification procedures.	Party motion.	Unstated.	En banc court adopts this dissenting panel opinion reported at 9 Fla. L.W. 627 (1984).	6/9

* orally argued

CASES INVOLVING EN BANC PROCEEDINGS

FOURTH DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
1 *	City of Tamarac v. Garchar, 398 So.2d 889 (Fla. 4th D.C.A. 1981).	Torts: five points of law resolved en banc.	Party motion.	Unstated.	No panel decision published; first argued to a panel, then argued before en banc court.	6/1
2	Goodell v. Goodell, 421 So.2d 736 (Fla. 4th D.C.A. 1982).	Injunction: whether court has power to issue a perpetual injunction.	Unstated.	To recede from statement in a prior opinion.	Unstated.	7/0
3	Adams v. State, 423 So.2d 439 (Fla. 4th D.C.A. 1982) *appeal denied*, 431 So. 2d 988 (Fla. 1983), *cert. denied*, 103 S.Ct. 2434 (1983).	Criminal law: denial of right to severance based on improper joinder is not per se reversible error.	Unstated.	To recede from a prior decision.	Unstated.	7/2
4 *	Tronconi v. Tronconi, 425 So.2d 547 (Fla. 4th D.C.A. 1982).	Divorce: standards to be used in ordering equitable distribution between spouses.	Unstated.	Unstated.	Unstated.	9/0
5	Lobo v. Florida Parole & Probation Commission, 433 So.2d 622 (Fla. 4th D.C.A. 1983).	Criminal law: whether application of different parole guidelines adopted after commission of the crime violates ex post facto clauses of Constitutions.	Court's own motion.	". . . there are presently pending several other similar and undecided cases pending before various panels of the court."	Unstated.	6/3
6	Florida Coast Bank of Pompano Beach v. Kimmitt, 1983 Fla. L.W. 2205 (Sept. 8, 1983).	Appeals: timeliness of notice of appeal.	Unstated.	Possible conflict with prior decision.	Unstated.	9/0

* orally argued

CASES INVOLVING EN BANC PROCEEDINGS

FOURTH DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
7	Zimbrick v. Zimbrick, 9 FLW 1558, (opinion filed 7/13/84).	Appeals: effect of premature motion for rehearing on date of rendition of final order.	Unstated.	Conflict with prior decisions stated.	Unstated.	Unanimous (two concur in result only.)

CASES INVOLVING EN BANC PROCEEDINGS

FIFTH DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
1	Rogers v. State Farm Mutual Auto Ins. Co., 390 So.2d 138 (Fla. 5th D.C.A. 1980), *vacated sub nom.* State v. Judges of D.C.A., 405 So.2d 980 (Fla. 1981).	Appeal and error: D.C.A. withdrawal of mandate on discovery of conflicting case in automobile insurance law.	The Court on its own motion.	Unstated.	Panel decision withdrawn.	Unanimous.
*2	State v. Mayle, 406 So.2d 108, (Fla. 5th D.C.A. 1981) *review denied*, 419 So.2d 1200 (Fla. 1982).	Criminal law: motion under Rule (c)(4), legal sufficiency of.	The Court on its own motion.	Apparent conflict with State v. Upton, 392 So.2d 1013 (Fla. 5th D.C.A. 1981).	Panel decision restored, and en banc "receded from."	Unstated, or none taken.
*3	Baxley v. State, 411 So.2d 194 (Fla. 5th D.C.A. 1981), *quashed*, 427 So.2d 166 (Fla. 1983).	Criminal law: specific intent required for grand theft not alleged rendered informations fatally defective.	Unstated.	Unstated.	Panel decision not stated. En banc majority adheres to a prior decision.	4/2 supporting en banc decision on the merits.
4	Holmes v. Leffler, 411 So.2d 889 (Fla. 5th D.C.A. 1982), *review denied sub. nom.* State v. Holmes, 419 So.2d 1200 (Fla. 1982).	Criminal Law: speedy trial rule violated and prohibition issued	Party motion.	Conflict alleged with prior case.	No en banc. Panel decision stands.	No en banc vote because of panel's unanimous denial of party motion.
5	Bently v. State, 411 So.2d 1361 (Fla. 5th D.C.A. 1982), *review denied*, 419 So.2d 1195 (Fla. 1982).	Criminal law: search and seizure and validity of sentence.	The Court on its own motion.	Unstated.	Panel decision not stated.	Unanimous.

* orally argued en banc

CASES INVOLVING EN BANC PROCEEDINGS

FIFTH DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
6	Brewer v. State, 413 So.2d 1217 (Fla. 5th D.C.A. 1982), *review denied*, 426 So.2d 25 (Fla. 1983).	Criminal law: sufficiency of charge and of evidence as to mental intent to sustain conviction of grand theft.	Unstated, but apparently Court's own motion.	"Believing that a consideration by the full court was desirable in this case, all of the judges . . . agreed that this case be determined en banc . . ." (at p.. 1221).	Unstated.	Unanimous.
7	Jones v. State, 423 So.2d 520 (Fla. 5th D.C.A. 1982).	Appeals/criminal law: defective notices of appeal.	"Unanimous vote of the assigned panel acting on its own motion."	"Lack of uniformity in prior *orders* or decisions." (e.s.) (at p. 522).	Panel denial of motion to dismiss approved by court en banc.	5/1
8	Ocala Pavers, Inc. v. Fla.-Ga. Tractor, 434 So.2d 34 (Fla. 5th D.C.A. 1983).	Judgment: attorney's fees following default judgment reversed due to lack of notice.	Unstated, but apparently court's own motion.	"[P]otential conflict with a decision in another case pending before this court."	Unstated.	5/1
9	Amlotte v. State, 435 So.2d 249 (5th D.C.A. 1983), *approved*, 9 FLW 344 (Fla. Sup. Ct., Case No. 64,107, opinion filed 9/6/84).	Criminal law: whether attempted felony-murder a crime.	Unstated.	"Because this case presents a ruling which could have resulted in a conflict with another case pending before a different panel . . ., we have decided this case en banc."	Panel decision; if any, not stated.	5/1 supporting *result* of en banc majority.

CASES INVOLVING EN BANC PROCEEDINGS

FIFTH DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
10	Platel v. MaGuire Voorhis & Wells, 436 So.2d 303 (5th D.C.A. 1983), *pet. for rev. denied*, 440 So.2d 353 (1983), *pet. for rev. denied*, 441 So.2d 632 (Fla. 1983).	Attorney and Client: Pro se litigant who abused right of access to court prohibited from further pro se appearance as appellant or petitioner.	Unstated.	Unstated.	Unstated.	Unanimous.
11	Torrence v. State, 440 So.2d 392 (Fla. 5th D.C.A. 1983).	Criminal Law: Affirmed conviction of aggravated assault despite error in charging that offense was a lesser included offense of attempted robbery.	Unstated.	"Potential conflict with Carter v. State, 380 So.2d 541 (Fla. 5th D.C.A. 1980) & Wilson v. State, 383 So.2d 670 (Fla. 5th D.C.A. 1980)."	Under panel decision conviction would have been reduced to simple assault.	4/2
12	Keenan v. Keenan, 440 So.2d 642 (Fla. 5th D.C.A. 1983).	Parent and Child: Parent has no legal obligation to support 18 year old child who is student but is neither physically nor mentally disabled.	Unstated.	Apparent conflict with Owens v. Owens, 415 So.2d 855 (Fla. 5th D.C.A. 1982).	Unstated.	4/2

CASES INVOLVING EN BANC PROCEEDINGS

FIFTH DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
13	Mohican Valley v. MacDonald, 443 So.2d 479 (Fla. 5th D.C.A. 1984).	Lis Pendens: In suit not founded on an instrument of record, trial court has discretion to require bond for filing of a lis pendens.	Court on its own motion.	"When it became apparent to the panel deciding this case that its decision would be in conflict with . . . Fla. Peach Corp. v. Lurie, 411 So.2d 339 (Fla. 5th D.C.A. 1982) . . ." en banc proceedings were had.	Apparently no panel decision.	Unanimous.
14	Askew v. County of Volusia, 450 So.2d 233 (Fla. 5th D.C.A. 1984).	Sovereign immunity: Notice requirements of F.S. § 768.28 met in suit against county.	Unstated.	Conflict with Saleh v. Watkins, 415 So.2d 858 (Fla. 5th D.C.A. 1982).	Unstated.	5/1
15 *	In Int. of K.A.F. v. State, 442 So.2d 365 (Fla. 5th D.C.A. 1983).	Infants: Abandonment as basis for severing visits of mother defined and trial court order of permanent commitment affirmed.	Dissenting judge on original panel.	Unstated, but apparently conflict with Hinkle v. Lindsey, 424 So.2d 983 (Fla. 5th D.C.A. 1983).	Panel would have reached contrary result.	4/2

* orally agreed en banc.

CASES INVOLVING EN BANC PROCEEDINGS

FIFTH DISTRICT

	CASE	SUBJECT OF EN BANC	EN BANC INITIATED BY	BASIS FOR EN BANC	RESULT OF EN BANC PROCEEDING ON PANEL DECISION	EN BANC VOTE [ON MERITS]
16	Royal v. State, ___ So.2d ___, 1984 Fla. L.W. 1561 (Fla. July 27, 1984).	Criminal Law: Definition of "taking" under robbery statutes.	Panel request.	Unstated in majority opinion, but dissent states en banc was had in order to receed from prior case.	Unstated.	5/1
17	Edge v. State, ___ So.2d ___, (opinion filed 9/13/84).	Criminal Law: Exercise of peremptory challenges.	Panel request.	Conflict with prior case.	Proposed panel opinion approved.	Unanimous as to result.

APPENDIX II: INTERNAL RULES FOR EN BANC PROCEEDINGS

A. First District Court of Appeal

Rule 9

1. A copy of each motion for rehearing en banc filed by a party shall be distributed to each judge. A vote will not be taken unless requested by a judge.

2. Any judge, prior to a request for en banc consideration or rehearing, sua sponte or after a party request, shall confer with the panel on the opinion in question in an attempt to better understand the differences and resolve the apparent conflict without full court consideration.

3. All active judges, within a period of ten days commencing three days after a judge's request for en banc hearing or rehearing, shall indicate their votes or recusal for cause by written notice to all judges and the clerk or, by direction of the chief judge, upon an appropriate form circulated in order of seniority.

> *Note*: The three-day delay is intended to afford all judges an opportunity, before voting on the request, to respond in substance, by memo or otherwise, to the request for en banc consideration.

4. Upon an evenly divided vote on a request for en banc consideration, any judge may call for conference discussion of the issue and may, upon motion, poll the members of the court for a vote on reconsideration. In the event of a final tie vote, a majority would not be reached and the case would not be decided en banc.

5. Upon a majority vote by participating judges in favor of en banc consideration, an order may issue advising the parties of the court's determination to decide the case en banc. Such order may, upon request of one third of the participating judges, require supplemental briefs and/or additional copies of briefs already filed for distribution to all judges, and may set the case for oral argument when deemed appropriate.

> *Note*: This rule is intended to furnish the parties notice of the court's action, and attachment of the proposed opinion will also demonstrate the predicate for en banc consideration.

6. After issuance of an order for en banc proceeding, a participating judge who favored en banc may alter or withdraw that vote only

by motion to dissolve en banc consideration, which motion may be made at any time.

Note: It is contemplated that any vote may be changed prior to issuance of the en banc order but such a change should be accomplished by a motion (either written or oral) calculated to reaffirm the continuing majority.

7. Upon a majority vote by participating judges in favor of en banc hearing before a case is decided by a panel, the final disposition of the case shall be by en banc opinion unless such consideration is dissolved upon appropriate motion. Upon rehearing en banc, the court may limit the issues to be reheard.

Note: It is intended that the entire case, rather than isolated issues, shall be decided when a case is heard en banc prior to a published panel decision.

8. Cases set for en banc consideration on the merits shall be decided at an en banc conference of all participating judges. Conference shall commence with an opportunity for presentation by the judge requesting en banc consideration, or another judge deemed appropriate. There shall then be an opportunity for presentation in opposition by an appropriate judge. There shall thereafter be afforded an opportunity for discussion, in order of seniority, by all participating judges. The vote on the merits shall then be made in order of seniority, and the case may be assigned to an appropriate judge for drafting an en banc opinion which shall be so captioned, to include the names of the judges participating in the en banc proceeding.

Note: The provision for discussion in order of seniority is intended only to afford all judges an opportunity for full expression of their views, and should not be construed as a limitation on rebuttal, elaboration or explanation by any judge during the course of discussion.

9. Circulation of the proposed en banc opinion shall be made by furnishing each judge with a copy on which he will record his concurrence or dissent. The record shall be circulated by seniority to those judges so requesting, and copies of concurring or dissenting opinions shall be furnished to all participating judges.

10. The absence of a majority vote on the merits among judges participating in en banc hearing of a case shall result in a denial of the requested relief or reinstatement of the trial court's decision. The absence of such a vote on rehearing en banc shall reinstate the panel

decision.

B. Second District Court of Appeal

1. When a petition for rehearing en banc is filed pursuant to Rule of Appellate Procedure 9.331(c), the Clerk will circulate the petition in the usual manner first to the panel which heard the case. Each judge shall note his ruling thereon. The Clerk will then deliver the petition to each judge who did not serve on the panel.

2. Each judge on the court will indicate on the form furnished by the Clerk whether that judge desires a court vote on the petition for rehearing en banc. If no judge wishes to call for a vote on the petition, it will be returned to the Clerk's Office and an order entered to reflect the action of the panel.

3. If, however, any judge requests a vote on the petition for rehearing en banc, the petition will be brought to the Chief Judge who will cause copies of it to be distributed to all judges. The Chief Judge will set a time for conference where discussion may be had and a vote taken. A majority vote of the entire court is required to grant a rehearing en banc.

4. If the court grants a rehearing en banc, the merits of the case on rehearing shall be decided by a majority vote of the entire court. A tie vote on the merits will mean the court will adhere to the panel's decision.

C. Fourth District Court of Appeal

11.1 Hearing or Consideration En Banc

At any time before a case has been orally argued or, if oral argument is waived, before the opinion is released, any judge may direct the clerk to poll the judges to determine whether a hearing en banc (or consideration en banc if no oral argument is granted) is desired by a majority of the judges. In the event that a majority of the judges vote to consider the matter en banc, the Chief Judge shall promptly schedule an en banc meeting of the judges as provided in section 11.4.

11.2 Rehearing En Banc

Upon the filing of a motion for rehearing en banc by a party, the clerk shall circulate the wallet with the EN BANC FORM attached. In the absence of such a motion by a party, any judge may instruct the clerk to circulate the EN BANC FORM. In the event that a majority of the judges vote to consider the matter en banc, the Chief

Judge shall promptly schedule an en banc meeting of the judges as provided in section 11.4.

11.3 General

Any request for a formal vote shall be accompanied by a memorandum to be prepared and furnished by the requesting judge explaining why en banc consideration is necessary. A copy of the memorandum shall accompany the voting slip circulated to the judges. A copy of the poll showing the results of the voting shall be furnished to each judge. Any judge opposed to en banc consideration is encouraged to circulate a memorandum stating his position.

11.4 Meeting for En Banc Consideration

Upon the affirmative vote of a majority of the judges participating, the Chief Judge shall cause notice to be given and shall schedule a meeting of the judges for hearing or rehearing of the matter en banc. Proponents and opponents of en banc consideration are encouraged to circulate memoranda in support of their views to the other judges in advance of the meeting.

The first order of business at such a meeting shall be to discuss whether conflict exists and in due course a vote shall be taken on that question. If a majority finds conflict, then the matter shall be determined en banc.

In the event of conflict then, after discussion, the court en banc may at that time, or at a later meeting to be scheduled for that purpose, determine whether a prior opinion is to be followed or overruled or receded from or explained or whether prior conflicting opinions may be reconciled or may take any other appropriate action by majority vote.

Oral argument may be scheduled at any time, whether on hearing en banc or on rehearing en banc and either before or after a vote is taken by the court en banc as to whether conflict in fact exists or would be created by a proposed opinion.

The Chief Judge shall assign the writing of an en banc ruling or opinion to any judge who voted for the majority view.

11.5 Policy

A majority of the participating judges shall be necessary for the issuance of any en banc decision. In the absence of such a majority the case shall revert to the originally assigned panel of three judges; the order granting en banc consideration shall be vacated and the case finally disposed of by the original three judge panel. In accor-

dance with Rule 9.331(a), Florida Rules of Appellate Procedure, en banc consideration shall not be ordered unless necessary to maintain uniformity in the court's decisions. A tie vote shall have the consequences provided for in Rule 9.331(a).