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The Most Reversed Judge Before the Fourth DCA May Surprise You

By **Samantha Joseph**

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Who's the most reversed circuit judge before the Fourth District Court of Appeal?

Despite what lawyers have whispered for years about controversial judges, no one really knew.

But an independent analysis by the Daily Business Review shows that in 2016, the most reversed was Broward Circuit Judge Timothy Bailey, a well-respected and well-liked jurist that no one, including outspoken Public Defender Howard Finkelstein, criticized or expected to top the list.

"He's gracious, really charming and a pleasure to interact with," Finkelstein said.

But in a district where circuit judges averaged four reversals in 2016, Bailey's tally reached 17, a Daily Business Review study of a year's worth of appellate decisions revealed. The figure, boosted by appeals court rulings on two motions for reconsideration, was higher than the eight amassed by Broward Judge Lynn Rosenthal, who resigned in October amid an ethics probe following a DUI charge, and seven more than the total for former Judge Cynthia Imperato, who retired in early 2016 during disciplinary proceedings by the Florida Supreme Court. Challenges tend to become more frequent when a judge is under fire.

It was also nearly 50 percent higher than the count for former Broward Circuit Judge Matthew Destry, once the target of a petition for removal from the bench. Destry's rulings were the subject of 12 appellate decisions ordering reversals, including cases that made repeat appearances before the Fourth DCA for clarification.

Bailey's reversals topped the tallies for Broward Senior Judge Joel T. Lazarus, who had 14 appellate opinions reversing his rulings; Broward Judges Barbara McCarthy and John J. Murphy III, each with 13; and Palm Beach Senior Judge Howard H. Harrison, Broward Judge Jeffrey R. Levenson and retired Broward Judge Kathleen D. Ireland, who each had 12.

Broward Judge Michael L. Gates and St. Lucie Circuit Judge William L. Roby rounded off the top 10 with 11 written reversals apiece.

"As a trial judge I always heard anecdotal information about a certain judge being reversed more than the others," Fourth DCA Chief Judge Cory Ciklin said. "But now that I'm on the inside looking out ... I suppose there is a pattern, but it's never jumped out at me."

That pattern isn't easy to spot in a busy state appellate court that last year issued 832 written opinions and citations, highlighting a spate of unresolved issues — both civil and criminal — at the trial court level. It's especially hazy amid 535 reversals issued for 135 judges from Broward to Okeechobee counties, and in high-dollar complex suits, like tobacco cases.

Several factors, like appeals, cross appeals, motions for rehearing, requests for clarifications and other challenges from appellate proceedings skew the tally for judges like Murphy, who handles complex litigation. "Quite often a lot of money is at stake, so it's not unusual for those cases to be

appealed on a regular basis," Broward Chief Judge Peter Weinstein said. "It's just the nature of these kinds of cases."

By the Numbers

The 832 opinions from the appellate court in 2016 included 473 civil cases with written dispositions, of which 334, or about 70 percent, were reversed. Among the matters being appealed were summary judgment rulings, questions relating to imputed income and calculating alimony, "inflammatory arguments" by plaintiffs counsel in tobacco cases and legal standing to bring foreclosure claims.

Of 359 criminal cases disposed with written opinions or citations, the Fourth DCA reversed 201, or about 56 percent, largely on hearsay objections, calculating credit for jail time, evidence suppression or admissibility, witness credibility and sufficiency of evidence to support prosecutors' claims.

The reversed circuit judges did not respond to requests for comment, perhaps because the rules of judicial conduct prevent judges from commenting on pending litigation.

Buried in the reversals were hints about troublesome issues, like the one leading to a new trial for defendant Kevin Osorio, convicted of drug-related charges before McCarthy.

"While this court and others have repeated the recommendation that trial courts ought to refrain from directly declaring the expert status of a witness in front of the jury, we recognize this has been interpreted by some as merely a suggestion of judicial practice, and not a hard-and-fast rule," Fourth DCA Judge Mark Klingensmith wrote for a unanimous panel ruling in the Osorio case. "Today we clarify that such practice is impermissible. Judges must not use their position of authority to establish or bolster the credibility of certain trial witnesses."

In October, the court provided another nugget in its reversal of McCarthy for summarily denying a timely motion for post-conviction relief without ordering a response from prosecutors and with no explanation or record attachments.

"It is well settled that this is error," an appellate panel ruled.

In April, it ordered the acquittal of Abigail Damoah, convicted of vehicular homicide before McCarthy for a crash that killed her boyfriend. The appellate court found no evidence to support the conviction, despite a mandate to take a view most favorable to the state when weighing denials of motions for acquittal. "This was not a residential neighborhood; it was an exit ramp from an interstate highway. Damoah's blood alcohol level was well below the legal limit. There was no evidence of other drugs in her system. There was no description of erratic driving conduct before the skid began. There was no evidence of inclement weather conditions," panelists wrote in an April 19 ruling. "Because the ramp had recently been repaved, there were neither recommended speed signs nor warning signs about the curve in the exit ramp."

Real Estate Fallout

Sufficiency of evidence played out on appeal in dozens of cases addressing the legal right to bring foreclosure suits—an issue that appeared to exasperate the appellate court. In its rulings on appellant Fallon Rahima Jallali's challenge of decisions by Imperato and Palm Beach Senior Judge Barry Stone, the court noted it had "repeatedly" addressed legal standing.

The issue increased the tally of reversals for foreclosure judges like Roby, Ireland and Lazarus, who adjudicated thousands of disputes in the wake of the last real estate market collapse.

"They were heavily overwhelmed. They were inundated," said **real estate attorney David Haber**. "They would do nothing but foreclosures all day long, and people would be shoving papers in front of their faces saying, 'We own this; we own that.' Then after some discovery, it turned out maybe they didn't own it."

Data from the Office of the State Courts Administrator show Roby's residential and commercial

foreclosure docket was about three times larger than dockets in neighboring Martin and Indian River counties. The judge's assignment included all St. Lucie County residential and commercial mortgage foreclosures, as well as all nonjury, nonforeclosure cases.

"Residential foreclosure law was frequently evolving and changing," St. Lucie Circuit spokesman Thomas A. Genung said. "Based upon the extremely high volume of cases heard by Judge Roby during that time period, it is plausible that a higher number of foreclosure cases heard by him may have been appealed, and similarly that there may have been a higher number of reversals."

In Broward, Ireland and Lazarus were among a small contingency of judges adjudicating thousands of foreclosures. Their division disposed nearly 6,000 cases last year, or about 494 per month, according to Broward case management data.

"I tip my hat to trial judges every day because I see the action-packed docket they deal with," said Ciklin, the Fourth DCA chief.

As a trial judge, Ciklin said he spent about 20 days a month in courtrooms. In his current post, he hears argument about three days a month.

"Just by definition appellate judges have the opportunity to take time and hopefully provide a correct analysis," Ciklin said. "Trial judges really have a tough assignment because those folks are in the trenches."

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