IN THE SUPREME COURT OF FLORIDA

AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE **CASE NO. SC02-270**

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COMMENTS

Per this Court's open invitation in the March 1, 2002, edition of The Florida Bar News, below are my comments on the proposed amendments to the Florida Rules of Appellate Procedure. The opinions expressed are mine, and not necessarily those of my employer (the Agency for Health Care Administration). I have used double-underlining and double-strike-through-type to differentiate my suggestions from those of the Appellate Court Rules Committee ("the Committee").

Rule 9.330(a)

I respectfully suggest altering proposed rule 9.330(a) as set forth below, followed by a sequential point-by-point explanation as to why.

> **(a) Time for Filing; Contents; Response.** A motion for rehearing, clarification, or certification may be filed within 15 days of an order or within such other time set by the court. A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding. A motion for clarification shall state with particularity the points of law or fact in the court's decision that, in the opinion of the movant, are in need of clarification. ~~A response may be served within 10 days of service of the motion. When a decision is entered without opinion, and a party~~If the court's decision is without written opinion (e.g., an unelaborated per curiam affirmance on direct appeal or an unelaborated denial of a petition for extraordinary relief), and the movant believes that a written opinion would provide a legitimate basis for supreme court review, the motion may include a request that the court issue a written opinion. A response to a motion for rehearing, clarification, or certification may be served within 10 days of service of the motion. ~~Such a request shall include the following statement:~~
>
> ~~I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for supreme court review because (state with specificity the reasons why the supreme court would be likely to grant review if an opinion were written).~~
>
> ~~s/~~
> ~~Attorney for~~
> ~~(Name of party)~~
>
> ~~(address and phone number)~~
>
> ~~(Florida Bar number)~~

First, I would submit that the sentence allowing for a response needs to be at the very end of subdivision (a) (i.e., where it is now in the existing rule). Its proposed placement in the middle of subdivision (a) both disrupts the flow of the discussion about the subject motions (as opposed to responses thereto) and renders unclear whether a response is allowed on a movant's request for a written opinion under the proposed new language regarding same. As such a request apparently may be made via any of the three subject motions (i.e., rehearing, clarification, or certification),[1] I recommend making explicitly clear that a response is allowed on any of those three types of motions, no matter what issues, arguments or requests (for written opinions or otherwise) are raised therein. In short, I recommend moving the sentence allowing for a response to the end of subdivision (a) and modifying it slightly to read as follows: "A response to a motion for rehearing, clarification, or certification may be served within 10 days of service of the motion."

Second, I recommend altering the opening of the next proposed sentence ("When a decision is entered without opinion, and a party") to promote consistency in the terms used throughout subsection (a) (i.e., using the terms "the court's decision" instead of the proposed "a decision"; "written opinion" instead of the proposed "opinion"; and "movant instead of the proposed "party"). Also, to the extent that the concept of a decision without written opinion may on first read seem confusing or oxymoronic, I recommend including the following non-exhaustive list of examples: "(e.g., an unelaborated per curiam affirmance on direct appeal or an unelaborated denial of a petition for extraordinary relief)." Inclusion of such examples would help make the rule more clear and would accurately track the Committee's development of the rule and its expressed intent in this regard. See Committee Report at 3 (Committee indicating that rule 9.330 was originally amended "to address concerns about per curiam affirmed opinions," but was ultimately broadened "to include all decisions issued without a[n] opinion, thereby including denials of petitions or writs").

Finally, I for two reasons recommend rejecting the Committee's proposal for a required signed statement when requesting a written opinion. First, it implicitly suggests that such a request may be made only by an attorney. What of pro se litigants? Second, and more importantly, such a required signed statement would seem both more effective and appropriate for all three types of motions contemplated in the rule (i.e., rehearing, clarification, and certification),

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[1] If the Committee intended otherwise, I would recommend redrafting the proposed language to more specifically dictate in exactly which of the three types of motions (i.e., rehearing, clarification, or certification) such a request for a written opinion may be made. See Committee Report at 3 (Committee indicating in its discussion of rule 9.330 that such a request was originally contemplated "as part of a motion to rehear").

not just those requesting a written opinion. Having to sign a single, more general statement covering all types of motions filed under this rule would perhaps give both attorneys and pro se litigants pause before pursuing, for example, rehearing based on issues not previously raised or clarification when none is really needed. I respectfully suggest submitting to the Committee this idea of a single, more general statement covering all types of motions filed under this rule, as well as the specific wording thereof.

Rule 9.330(d)

I also respectfully suggest altering proposed rule 9.330(d) as set forth below, followed by a sequential point-by-point explanation as to why.

> **(d) Exception; Review ~~under Rule 9.120~~of District Court Decisions**. No motion for rehearing ~~or for clarification~~or for clarification may be filed in the supreme court addressed to the grant or denial of a request for the court to exercise its discretion to review a decision described in rule 9.120, or ~~to review~~addressed to the dismissal of a petition for an extraordinary writ described in rule 9.100(a) when such writ is used to seek review of a district court decision without opinion.

First, it appears that the space between the words "Review" and "of" in the title of subdivision (d) was inadvertently omitted. I suggest leaving it in.

Second, the Committee's proposed omission of the words "or for clarification" in the first clause of subdivision (d) might have the unintended effect of inviting through motions for clarification challenges to the specified rulings of this Court. In other words, explicitly prohibiting only motions for rehearing may be read as implicitly allowing motions for clarification in this regard (i.e., *expressio unius est exclusio alterius*)--exactly what this Court would presumably want to discourage. But see Committee Report at 4 (Committee explaining that, "at the request of the Supreme Court, the committee clarified the language [of subdivision (d)] to expressly provide that the Supreme Court will not entertain motions for rehearings after dismissals of . . . petitions for extraordinary writs when used to seek review of a district court decision without an opinion") (emphasis added). All things considered, I recommend leaving the words "or for clarification" in the first clause of subdivision (d).

Finally, I suggest replacing the proposed words "to review" with "addressed to" in the second clause of subdivision (d) in order to render it grammatically parallel with the first clause of subdivision (d).

Rule 9.370

The proposed new amicus curiae rule is fantastic, especially subdivision (c) thereof addressing time for filing and the portion of subdivision (a) requiring that "[a] motion for leave to file must state the movant's interest, the

particular issue to be addressed, and how the movant can assist the court in the disposition of the case." This new proposed rule goes a long way toward achieving the Committee's intent "to address concerns that some parties had abused the amicus brief-writing privilege, and there were no rules that governed those problems." I whole-heartedly support the Court's adoption of the proposed new and improved amicus curiae rule in its entirety.

Rule 9.800(n)

I respectfully suggest that the Court reject the Committee's proposal to add the ALWD Citation Manual as an equal alternative (as opposed to a subordinate adjunct) to the Bluebook. I do not dispute the Committee's assertion that the ALWD Citation Manual "has become a scholarly and well respected authority," Committee Report at 4, but the very title of the rule is "Uniform Citation System" (emphasis added)--having two separate but equal systems of citation would hardly promote uniformity. I instead suggest altering proposed rule 9.800(n) to provide as follows:

> **(n) Other Citations**. When referring to specific material within a Florida court's opinion, pinpoint citation to the page of the Southern Reporter where that material occurs is optional, although preferred. All other citations not covered in this rule shall be in the form prescribed by the latest editions of the following treatises, in descending order of controlling authority: The Bluebook: A Uniform System of Citation, the Harvard Law Review Association, Gannett House, Cambridge, ~~Mass.~~MA 02138~~;~~, ~~or~~ the ALWD Citation Manual, Association of Legal Writing Directors, Aspen Law & Business, New York, NY 10036~~. Citations not covered in this rule, or in the Bluebook, or the ALWD Manual shall be in the form prescribed by~~; and the Florida Style Manual published by the Florida State University Law Review, Tallahassee, ~~Fla.~~FL 32306.

Such an approach would help ensure uniformity in citation, yet still be true to the Committee's intent "to allow practitioners to use the ALWD Citation Manual as a default reference, in addition to the Blue Book." Committee Report at 4.

Conclusion

Thank you for the opportunity to express my above comments--it is my hope they are of use to the Court and the Committee. Please do not hesitate to contact me if I may be of further service in this regard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished by postage-paid U.S. Mail to The Honorable Winifred J. Sharp, Appellate Court Rules Committee Chair, Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, FL 32114-5002, on March 27, 2002.

_____/s/_____
Gregory J. Philo