

**IN THE SUPREME COURT OF FLORIDA**

**IN RE: IMPLEMENTATION OF COMMISSION ON  
DISTRICT COURT OF APPEAL PERFORMANCE  
AND ACCOUNTABILITY RECOMMENDATIONS**

**CASE NO.: SC08-1724**

**APPELLATE COURT RULES COMMITTEE'S RESPONSE  
TO COMMENTS REGARDING PROPOSED AMENDMENTS TO  
FLORIDA RULES OF APPELLATE PROCEDURE 9.130 AND 9.146**

The Appellate Court Rules Committee (ACRC) submits the following response, which was approved by the committee 50 to 1, to comments filed in connection with the ACRC's proposed amendments to Florida Rules of Appellate Procedure 9.130(b) and 9.146(c) and (d):

1. On July 15, 2008, a Joint Report addressing implementation of The District Court of Appeal Performance and Accountability Commission's Recommendations to Reduce Delay in Juvenile Dependency and Termination of Parental Rights Appeals ("Performance and Accountability Recommendations") was filed by the ACRC, the Juvenile Court Rules Committee, the Rules of Judicial Administration Committee, and John F. Harkness, Executive Director of The Florida Bar. The Joint Report proposed amendments to the Rules of Appellate Procedure, the Rules of Juvenile Procedure, and the Rules of Judicial Administration.

2. On September 26, 2008, the Florida Supreme Court issued a Publication Notice inviting comments on all the proposed rules.

3. On November 17, 2008, three interested parties filed comments to the proposed rules: The Legal Aid Society of Palm Beach County (LAS), The Department of Children and Family Services (DCF), and the Guardian ad Litem Program (GAL).

4. LAS and GAL directed their comments to some, but not all, of the proposed Rules of Appellate Procedure. DCF commented on particular rules proposed by all three committees.

5. Although the ACRC believes that the Joint Report and its extensive appendix explain the reasons for the proposed Rules of Appellate Procedure, some of the comments question whether the ACRC fully studied and debated the proposals. For purposes of addressing those concerns, the ACRC submits this response to answer those questions and to emphasize the rationale behind the proposals. The ACRC limits its response to three points.

6. Both LAS and DCF object, to different degrees, to the identification and list of appealable orders in proposed rule 9.146(c). *See* Joint Report, Appx. D-31 – D-32.

A. Identification and list of appealable final orders. *See* Joint Report, Appx. D-31 (proposed rule 9.146(c)(1)).

**Comment:** DCF objects to the proposal to list the types of final orders appealable in dependency and parental termination proceedings. DCF states that the rule would make the specified orders automatically appealable even if the order did not meet the requirements of finality.

**Response:** The ACRC's purpose in proposing a list of final appealable orders is to cure the current prevailing practice of filing appeals of nonfinal orders styled as an appeal from a final order. The current practice, which is common to every district court of appeal, delays proceedings because the substantive issues are not timely briefed. An appeal of a nonfinal order proceeds on an appendix, and the initial brief must be filed within 15 days of the service of the notice of appeal.<sup>1</sup> Fla. R. App. P. 9.130 (d), (e). If an appeal of nonfinal order is filed and docketed as one from a final order, rule 9.110 requires that a record be prepared and allows up to 70 days for the service of the initial brief. Fla. R. App. P. 9.110

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<sup>1</sup> Briefing of a non-final appeal consumes, at most, only 15 days more than certiorari proceedings. A petition for writ of certiorari must be filed within 30 days of rendition of the contested order. Fla. R. App. P. 9.100(c). In a non-final appeal, the notice of appeal must be filed no later than 30 days after rendition of the order appealed, and the initial brief must be filed no later than 15 days from the notice of appeal. Fla. R. App. P. 9.130(b), (e).

(e), (f). Under the current prevailing practice, by the time the appellate courts discover that the order under review is nonfinal, the reduced time periods for a nonfinal appeal have been exceeded, often by months. The mere listing of orders that may be considered final orders for appellate review does not decide the issue of whether a particular order is actually final and appealable. That determination rests with the appellate court. *See S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97 (Fla. 1974).

- B. Identification and list of appealable non-final orders. See Joint Report, Appx. D-32 (proposed rule 9.146(c)(2)).

**Comment:** LAS and DCF object to the ACRC's proposal to identify and list appealable non-final orders in dependency and parental termination proceedings. Both are concerned that expressly authorizing specified non-final appeals and listing the appealable orders will result in more appeals.

**Response:** The ACRC disagrees. The non-final appeals that concern LAS and DCF are already being filed, most often incorrectly as appeals from final orders. As previously discussed, this common procedural error is the source of much delay. Thus, the ACRC's purpose in proposing the list of appealable non-final

orders was not to increase the number of appeals filed but, rather, to bring order to an existing chaotic process. While DCF correctly points out that the district courts have opined on the finality of certain orders, see Comments of the DCF, pp. 12-13, n.10, most practitioners still seem unaware of these rulings. Proposed rule 9.130(c) is intended to serve as a definitive guide to the practitioner. The ACRC believes that the proposed rule will in fact expedite the appellate process because practitioners will, with reference to only a single rule, be able to match the order to be reviewed with the correct vehicle for obtaining appellate review. This will result in consistency across the districts and will allow the courts to immediately determine whether a proceeding has been properly filed.

7. DCF suggests that, if the Court adopts the ACRC's proposal to identify and list appealable non-final orders, the orders should be listed in rule 9.130.

**Response:** The ACRC disagrees with DCF's suggestion. The ACRC's analysis of the Performance and Accountability Recommendations was guided by the principle that all rules relating to dependency and parental termination cases should

appear in rule 9.146 in order to make navigation of the appellate process easier for inexperienced appellate practitioners handling juvenile cases. The many practitioners who are not aware of or do not understand rule 9.130 will find the list when they go directly to rule 9.146, which is commonly known to govern appeals in dependency and parental termination cases. Similarly, practitioners who are familiar with rule 9.130 will know to turn to rule 9.146 because, under the proposed amendment to rule 9.130(a)(2), the general rule governing non-final appeals will direct practitioners to rule 9.146. The ACRC notes that a similar reference presently exists in rule 9.130 with regard to nonfinal appeals in criminal cases. Fla. R. App. P. 9.130(a)(2). The ACRC believes such a reference is appropriate in the dependency and parental termination context as well.

8. DCF comments that proposed rule 9.146(d)(2), which revises the wording of present rule 9.146(c)(2) concerning stays of termination of parental rights orders placing children for adoption, may bring about unintended consequences. The change that concerns DCF is as follows:

**(2) Termination of Parental Rights.** The taking of an appeal shall not operate as a stay in any case unless pursuant to an order of the ~~court~~ lower tribunal, *except that a termination of parental rights order ~~with placement of that places the child~~*

with a licensed child-placing agency or the Department of Children and Family Services for subsequent adoption shall be suspended while the appeal is pending, ~~but~~. The child shall continue in custody under the order until the appeal is decided.

(contested portion in italics).

**Response:** The ACRC did not intend to propose a change to the substance of the rule. As noted in the Joint Report, when examining the rule, the ACRC found the wording of the rule to be cumbersome and not particularly clear. If the Court believes that the proposed rule in fact creates the problems suggested in DCF's comments, the ACRC does not object to retaining the existing language. DCF does not object to the other changes reflected in proposed rule 9.146(d)(2).

For these reasons and the reasons outlined in the Joint Report filed July 15, 2008, the ACRC respectfully requests that the Court amend the Rules of Appellate Procedure as proposed.

Respectfully submitted on January 28th, 2009 by

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## **CERTIFICATION OF COMPLIANCE**

I certify that these rules were read against *West's Florida Rules of Court – State* (2008).

I certify that this report was prepared in compliance with the font requirements of *Fla. R. App. P. 9.210(a)(2)*.

## **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served by U.S. Mail this \_\_\_\_\_ day of January 2009 as follows:

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