

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA
RULES OF APPELLATE PROCEDURE
9.300, 9.400, AND 9.410

Case No. 09-_____

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**OUT-OF-CYCLE REPORT
OF THE APPELLATE COURT RULES COMMITTEE**

The Florida Appellate Court Rules Committee (“ACRC”), through John G. Crabtree, Chair, and John F. Harkness, Jr., Executive Director of The Florida Bar, files this out-of-cycle report requesting amendments to *Fla. R. App. P.* 9.300, 9.400, and 9.410, under *Fla. R. Jud. Admin.* 2.140. The proposed amendments are intended to implement the spirit behind the safe-harbor provision of section 57.105, Florida Statutes (2009), and to eliminate potential conflict with the Florida Rules of Appellate Procedure with regard to motions for sanctions under that statute.

The matter was initially studied by ACRC’s Civil Practice Subcommittee, which prepared a detailed report and proposed amendments for the full ACRC’s consideration. (*See* Appendix A.) The full ACRC debated and made changes to the subcommittee’s proposal, and it ultimately approved amendments to rules 9.410 by 31-13 vote and to rules 9.300 and 9.400 by a 45-0 vote at its June 2007 meeting. (*See* Appendix B.) These proposed amendments were omitted from the

2008 triennial report by oversight, and due to their importance to appellate practice, the ACRC has decided to submit them out-of-cycle in lieu of waiting for the next regular-cycle report.

The proposed amendments and committee note were published for comment on June 1, 2009 in *The Florida Bar News*, and no comments were received by the deadline of June 15, 2009. They were then reviewed and approved by the Board of Governors of The Florida Bar by a vote of 39-0 on May 29, 2009. The text of the amendments and committee note are attached in both full-page format (Appendix C) and two-column format (Appendix D).

Section 57.105, Florida Statutes (2009), gives prevailing parties the substantive right to recover attorney's fees if the losing party raised a claim or defense that was not supported by either "the material facts necessary to establish the claim or defense" or "the application of then-existing law to those material facts." § 57.105(1), *Fla. Stat.* It also provides a substantive right to recover attorney's fees "in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, ... the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay." § 57.105(3), *Fla. Stat.* The statute further provides the following safe-harbor provision: "A motion by a

party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. § 57.105(4), Fla. Stat. The Court has recognized that the statute authorizes awards of attorney's fees on appeal. *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 569-70 (Fla. 2005).

The Florida Rules of Appellate Procedure currently fail to accommodate the provisions and spirit of section 57.105, in at least three regards. First, they do not expressly authorize a party to file a motion for sanctions. Rule 9.410 governs sanctions, and it only authorizes an appellate court to grant sanctions "on its own motion." Second, rule 9.400(b) requires that any motion for attorney's fees by a party "be served not later than the time for service of the reply brief." Thus, a motion for attorney's fees under section 57.105 could not be timely served in response to a claim made in a reply brief, at oral argument, or in any other paper filed after the reply brief deadline. Third, rule 9.300(b) provides that a response to a motion must be served within 10 days of service of the motion. But if the movant complies with the safe-harbor directive of section 57.105(4), this means that a response would have to be served before the motion was even filed.

The ACRC proposes to cure these problems by dividing rule 9.410 into two subdivisions and placing the current rule, which applies to sanctions on the court's

motion, as the first subdivision. The second subdivision would apply to motions for sanctions filed by a party under general law, which would include section 57.105.

The proposed new subdivision would require the motion to be served, but not filed, no later than the time for serving any permitted response to a challenged paper, or if no response is permitted under the rules, within 15 days after the challenged paper is served or challenged statement is made at oral argument.

It would also set forth specific procedures to implement the safe-harbor provision of section 57.105. If the nonmoving party does not withdraw the challenged claim within 21 days of service of the motion, the movant would be authorized to file the motion no later than the time for serving the reply brief, if applicable, or 30 days after serving the motion. The new subdivision would require the motion to be served twice and include both a regular certificate of service showing when it was originally served and a second certificate of filing to show that the non-moving party received notice of when it was filed. The opposing party would have 10 days from the date of final service in which to file a response.

If the proposed amendments to rule 9.410 are approved, the ACRC proposes amending rules 9.300(b) and 9.400(b) to recognize that their deadlines do not apply to motions under the new rule 9.410(b).

The ACRC does not believe that a committee note is required if these amendments are approved.

Respectfully submitted on November ____, 2009 by

/s/ John G. Crabtree
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CERTIFICATION OF COMPLIANCE

I certify that these rules were read against *West's Florida Rules of Court – State* (2009).

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

/s/ Krys Godwin
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