IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE (THREE-YEAR CYCLE) **Case No. SC11-**

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THREE-YEAR CYCLE AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE

John G. Crabtree, Chair, Appellate Court Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, file this three-year cycle report of the Appellate Court Rules Committee ("Committee") under *Fla. R. Jud. Admin.* 2.140(b). All rule amendments have been approved by the full Committee and, as required by rule 2.140(b)(2), have been reviewed by The Florida Bar Board of Governors. The voting records of the Committee and the Board of Governors are shown on the attached Table of Contents. (*See* Appendix A.)

The proposed amendments were published for comment in the June 15, 2010, Florida Bar *News* (*see* Appendix D) and posted on The Florida Bar's website. Three comments were received by the Committee and are addressed within the report. The proposed rules are attached in the full-page (*see* Appendix B) and two-column (*see* Appendix C) formats. All Committee supporting documents are within Appendix E with pertinent page numbers specified within the report. The reasons for change are as follows:

RULE 9.100(b). ORIGINAL PROCEEDINGS
RULE 9.120(b). DISCRETIONARY PROCEEDINGS TO REVIEW DECISIONS OF DISTRICT COURTS OF APPEAL
RULE 9.130(b). PROCEEDINGS TO REVIEW NON-FINAL ORDERS AND SPECIFIED FINAL ORDERS
RULE 9.160(b). DISCRETIONARY PROCEEDINGS TO REVIEW DECISIONS OF COUNTY COURTS

To be consistent with the Court's amendments to rules 9.110 and 9.360 in *In re Amendments to Florida Rules of Appellate Procedure*, 1 So. 3d 166 (Fla. 2009), the Committee reviewed these similar rules. The proposed amendments remove

the reference to "a filing fee" and allow for future court or legislative amendments by inserting the flexible "any filing fees." (*See* Appendix E, pages 1-4.)

RULE 9.110. APPEAL PROCEEDINGS TO REVIEW FINAL ORDERS OF LOWER TRIBUNALS AND ORDERS GRANTING NEW TRIAL IN JURY AND NON-JURY CASES

RULE 9.170. APPEAL PROCEEDINGS IN PROBATE AND GUARDIANSHIP CASES

The proposed amendment to rule 9.110 is in response to proposed new rule 9.170. The issue of finality in probate and guardianship cases was raised by Tom Karr, Vice Chair of the Probate and Trust Litigation Committee of the Real Property, Probate and Trust Law Section, who shared his concern that rule 9.110(2) does not sufficiently address an issue of finality in probate and guardianship cases. (*See* Appendix E, pages 5-17.) The Committee developed rule 9.170 in response. Because the rule should not limit what types of orders would be final in a court of equity, a list of example orders which "finally determine a right or obligation of an interested person as defined in the Florida Probate Code" was created. (Proposed *Fla. R. App. P.* 9.170(b).) To remove confusion and redundancy, subdivision 9.110(a)(2) was removed and the remaining subdivisions were renumbered.

RULE 9.125. REVIEW OF TRIAL COURT ORDERS AND JUDGMENTS CERTIFIED BY THE DISTRICT COURTS OF APPEAL AS REQUIRING IMMEDIATE RESOLUTION BY THE SUPREME COURT

A concern was raised by Thomas Hall, as a member of the Bar, requesting that the court's "pass through" jurisdiction be simplified. (*See* Appendix E, pages 18-19.) The subcommittee proposed a clarification by defining the responsible agent as "the clerk of the ~~district~~ court in possession of the record . . ." Additionally, the rule would provide for the Supreme Court to "issue a briefing schedule" and establish policy when it denies jurisdiction.

RULE 9.130. PROCEEDINGS TO REVIEW NON-FINAL ORDERS AND SPECIFIED FINAL ORDERS

In *WEG Industrias, S.A. v. Companin de Seqoras*, 937 So. 2d 248 (Fla. 3d DCA 2006), the District Court of Appeal, Third District, raised a concern that stemmed from the need to specify that *forum non conveniens* orders be

immediately appealable. (*See* Appendix E, pages 20-29.) The court suggested "that Florida Rule of Appellate Procedure 9.130 be clarified to reflect the reality that orders granting or denying motions to dismiss complaints on grounds of *forum non conveniens* have been *sub silentio* reviewed as non-final orders for more than a few legal generations." (*WEG Industrias, S.A.*, 937 So. 2d at 252.) The Committee proposes new subdivision (a)(3)(C)(ii) to clarify the appealability of such orders.

RULE 9.140. APPEAL PROCEEDINGS IN CRIMINAL CASES

A concern within subdivision (d) of this rule that was raised to the Committee by Glen Gifford, Second Circuit Assistant Public Defendant, and Laura Anstead, previously Assistant Regional Circuit Counsel, focused on a gap in representation that occurs when a trial attorney withdraws and a new appellate attorney enters a case. (*See* Appendix E, pages 30-39.) Specifically, the current rule provides for a transfer from the circuit public defender, who is re-appointed on an interim basis to supervise preparation of the record, to the district public defender, who is appointed for the appeal. This allows the circuit public defender who did the trial to supervise preparation of the record. But the rule does not clearly identify a procedure when the public defender has a conflict and the defendant is represented by the Office of Criminal Conflict and Civil Regional Counsel. The suggested amendment to subdivision (d)(1)(E) addresses this concern by including the district offices of criminal conflict and civil regional counsel.

A different concern was raised by Beth C. Weitzner, Attorney at Law, that rule 9.140(f)(1) requires a clerk to serve a record on appeal within 50 days of the filing of the notice of appeal, but because court reporters often request extensions of time to prepare transcripts, clerks are routinely submitting incomplete records within the 50-day time period. (*See* Appendix E, pages 40-43.) This then results in the appellate counsel being forced to file a motion to supplement the record with the omitted transcripts.

A proposed solution to this concern directs the clerk of the lower tribunal to provide a notice to the appellate court (upon expiration of the 50-day deadline set forth in rule 9.140(f)(1)) stating that transcripts have been designated but have not been received or filed. This would prevent the sending of an incomplete record. This notice would effectively update the parties and the appellate court and allow each to address the issue as necessary (*i.e.*, filing a motion for extension of time on behalf of the court reporter or otherwise requesting or directing the court reporter to file the transcripts).

RULE 9.150. DISCRETIONARY PROCEEDINGS TO REVIEW CERTIFIED QUESTIONS FROM FEDERAL COURTS

A concern was raised by Committee member Paul Regensdorf and previous Committee chair John Mills regarding questions certified by federal appellate courts. (*See* Appendix E, pages 44-50.) The proposed amendment to subdivision (a) allows more than one question to be certified to the Florida Supreme Court from the U.S. Supreme Court or the Eleventh Circuit Court of Appeal. The proposed amendment to subdivision (b) allows the federal appellate courts to certify questions in an opinion, as is their normal practice, or by a separate certificate, as the present rule provides. The amendment also clarifies that the federal courts "should" rather than "shall" provide certain information, because the federal courts are not bound by the Florida rules.

The proposed amendment to subdivision (d) provides that the Florida Supreme Court may, in its discretion, require briefing (in addition to the briefs submitted to the federal court). If required, the Florida Supreme Court will establish the order and schedule for such briefing. This replaces the language in the present rule that the party designated by the federal court as the moving party shall serve the initial brief. The present rule is unworkable because federal courts rarely designate a moving party, and in many cases there is no moving party, so it is unclear which party should file the initial brief.

The proposed amendment to subdivision (e) replaces language that provides for costs on certified questions to be divided equally, which is unworkable in cases in which the federal government is a party and is immune from liability for costs under federal law. Simply stated, liability for costs in the Supreme Court is a substantive issue best determined by the federal court, along with costs for the federal action.

RULE 9.180. APPEAL PROCEEDINGS TO REVIEW WORKERS' COMPENSATION CASES

Paula Kelley, Attorney at Law, raised a concern about whether, in workers' compensation cases, records on appeal for non-final orders can be permitted to be prepared in the same manner as for final orders. (*See* Appendix E, page 51.) The concern is rooted in the dilemma that the ruling authority does not want to make a pre-determination of whether an order submitted for review or appeal is final or non-final. To accomplish this, a reference to form 9.900(c), Notice of Appeal of Non-final Orders, and a Committee Note of clarification were added.

A second proposed amendment to Rule 9.180(f), presented by Committee member Judge John Lazzara on behalf of the Office of the Judges of Compensation Claims, is essentially a housekeeping measure to conform the rule to section 440.29(2), Florida Statutes. (*See* Appendix E, page 52.) In this statute, the Deputy Chief Judge of Compensation Claims has authority over designating transcribers and arranging for preparation of the record. The proposed amendment provides for electronic means of record preparation.

RULE 9.190. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

The Administrative Law Section Chair, Judge Elizabeth McArthur, and Chair Elect, Seann Frazier, submitted proposed amendments to rules 9.190(b) and (c), addressing procedures for the appeals of Immediate Final Orders and Emergency Suspension Orders. (*See* Appendix E, pages 53-54.) The subcommittee, with the Administrative Law Section, worked together to analyze the concern, and identified two types of emergency orders impacted: emergency suspension orders and immediate final orders based on immediate matters of public health, safety, and welfare. The proposed amendments make it clearer that emergency final orders are, indeed, final orders.

Another proposal to amend rule 9.190(e) was discussed in an article published by Katherine Giddings and Todd Englehardt, Attorneys at Law, and submitted to the Committee for consideration. (*See* Appendix E, pages 55-69.) The concern pertains to the different manner of handling stays for immediate final orders (§120.569(2)(n), Fla. Stat.) versus emergency suspension orders (§120.60(6), Fla. Stat.). Although the two stays are distinct, both allow the agency to take emergency action when the agency finds that an immediate danger to the public health, safety, or welfare exists. It is also intended that both stays require the existence of specific factual allegations and be narrowly tailored to ensure fairness. Because immediate final orders and emergency suspension orders operate similarly, the proposed rule amendment would include immediate final orders under section 120.569(2)(n), Florida Statutes.

RULE 9.200(b)(4). THE RECORD; TRANSCRIPT(S) OF PROCEEDINGS

In reviewing this rule for a different reason, the Committee identified the need to make it party neutral. To that end, the Committee proposes the removal of “appellee” and “appellant” and the substitution of “party.”

RULE 9.225. NOTICE OF SUPPLEMENTAL AUTHORITY
FORM 9.900(j). NOTICE OF SUPPLEMENTAL AUTHORITY

Thomas Hall, in his personal capacity, brought to the Committee's attention a concern that a Notice of Supplemental Authority should not include additional argument. The committee unanimously approved amendments to rule 9.225 and created form 9.900(j). (*See* Appendix E, pages 70-83.) A committee member then suggested a Committee Note be included; the Note was approved by an email vote of 36-0.

Subsequent to the publication of the proposed rule, Board Certified Florida Appellate Attorney Beverly Pohl asked the Committee to consider amending rule 9.225 so it would be more in line with Federal Rule of Appellate Procedure 28(j). She brought to the Committee's attention that "[i]f the supplemental authority is truly necessary and believed to be helpful to the Court, it makes no sense . . . to completely preclude any argument about its significance to the case." (*See* Appendix E, page 83.) She specifically mentioned that rule 28(j), Federal Rules of Appellate Procedure, states: "The body of the letter must not exceed 350 words."

Given Ms. Pohl's suggestion, the Committee reevaluated the proposed rule amendment and decided to not amend the proposed rule because Mr. Hall's concern was that "any sort of commentary on the authorities would not be appropriate." (*See* Appendix E, page 84-86.)

RULE 9.370(c). AMICUS CURIAE; TIME FOR SERVICE

The Committee received a referral from Thomas Hall, in his personal capacity, concerning whether rule 9.370(c) should be amended to make it easier to compute when the brief of an amicus curiae is due. (*See* Appendix E, pages 87-92.)

The proposed amendments will clarify the ambiguity that currently exists in how this rule is interpreted.

RULE 9.420. FILING; SERVICE OF COPIES; COMPUTATION OF TIME

The concern about rule 9.420 was brought to the Committee by Michael Catalano, Attorney at Law. (*See* Appendix E, pages 93-95.) Mr. Catalano received a letter from a county clerk of court advising that copies of orders would <u>not</u> be

mailed to the parties without the statutory fees for copies under section 28.24, Florida Statutes, being paid in advance and a self-addressed, stamped envelope being provided.

The Committee approved adding a new subdivision (b)(2) that conforms to the language of Florida Rules of Civil Procedure 1.080(h)(1), Service of Orders. (*See* Appendix E, pages 96-98.) This provision will require the clerk to provide copies, but also provides the option of courts to require parties to provide stamped, self-addressed envelopes for service of those copies.

There are additional proposed changes to subdivision 9.420(f) currently filed before this Court regarding computation of time, case SC10-2299.

RULE 9.800. UNIFORM CITATION SYSTEM

In response to amendments to Chapter 120, Florida Statutes, which encouraged agencies to post Division of Administrative Hearings (DOAH) documents on the internet, rule 9.800 was reviewed. (*See* Appendix E, pages 99-104.) Documents on the DOAH website are easily accessible, so the Committee voted to amend the rule to make the DOAH website the primary source for citations. To accomplish this, rule 9.800(c) and (d) were amended.

In response to the proposal, Judge Charles Stampelos raised a question regarding the inclusion of "Fla." in the citation to DOAH opinions. This concern was previously discussed within the subcommittee and the subcommittee chair explained this to Judge Stampelos, who was then satisfied with the proposal. (*See* Appendix E, pages 105-106.)

The amendment within subdivision (i) is a technical correction to conform to the updated and renumbered *Florida Jury Instructions (Civil)*.

RULE 9.900(f). FORMS

The proposed amendment to this form adds the title "Notice of Appeal of an Order Dismissing a Petition for a Judicial Waiver of Parental Notice of Termination of Pregnancy and Advisory Notice to Minor" within the document.

The Committee respectfully requests that the Court amend the Florida Rules of Appellate Procedure as outlined in this report.

Respectfully submitted on January ____, 2011 by

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John G. Crabtree
Chair
Appellate Court Rules Committee
240 Crandon Blvd., Ste. 234
Key Biscayne, Florida 33149-1624
(305) 361-3770
Florida Bar No. 886270

_____

John F. Harkness, Jr.
Executive Director
The Florida Bar
651 East Jefferson St.
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390

CERTIFICATION OF COMPLIANCE

I certify that these rules were read against *West's Florida Rules of Court – State* (2010).

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

True and full copies of this Three-year Cycle Amendments to the Florida Rules of Appellate Procedure were furnished, via U.S. Mail, on _____ of January 2011, to:

Frances H. Toomey, Attorney at Law
Second District Court of Appeal
1700 N. Tampa St., Ste. 300
Tampa, FL 33602-2648

Beverly A. Pohl, Attorney at Law
Broad and Cassel
P.O. Box 14010
Fort Lauderdale, FL 33302-4010

Judge Charles A. Stampelos
Division of Administrative Hearings
1230 Apalachee Pkwy.
Tallahassee, FL 32301-3060

Thomas M. Karr, Attorney at Law
Gunster, Yoakley & Stewart, P.A.
2 S. Biscayne Blvd., Ste. 3400
Miami, FL 33131-1807

Thomas Hall, Clerk of Court
Supreme Court of Florida
500 S. Duval St.
Tallahassee, FL 32399-1927

Glen P. Gifford, Attorney at Law
Public Defender's Office, 2nd Circuit
301 S. Monroe St., Ste. 401
Tallahassee, FL 32301-1861

Laura Anstead, Attorney at Law
Florida Dept. of Financial Services
200 E. Gaines St.
Tallahassee, FL 32399-6502

John S. Mills, Attorney at Law
203 N. Gadsden St., Ste. 1A
Tallahassee, FL 32301-7637

Paul Regensdorf, Attorney at Law
Sun Sentinal Building
200 E. Las Olas Blvd., Ste. 2100
Fort Lauderdale, FL 33301-2274

Paula F. Kelley, Attorney at Law
Kelley Stiffler, PLLC
P.O. Box 2485
Bonita Springs, FL 34133-2485

Judge John Lazzara
Division of Administrative Hearings
1180 Apalachee Pkwy., Ste. A
Tallahassee, FL 32301-4574

Judge Elizabeth W. McArthur
Division of Administrative Hearings
1230 Apalachee Pkwy
Tallahassee, FL 32399-0001

Seann Frazier, Attorney at Law
Greenberg Traurig, P.A.
101 E. College Ave.
Tallahassee, FL 32301-7742

Katherine E. Giddings, Attorney at Law
Akerman Senterfitt
106 E. College Ave., Ste. 1200
Tallahassee, FL 32301-7741

Todd D. Englehardt
Sniffen & Spellman, P.A.
211 E. Call St.
Tallahassee, FL 32301-7607

Michael Catalano, Attorney at Law
1531 NW 13th Ct.
Miami, FL 33125-1605

Beth C. Weitzner, Attorney at Law
1320 NW 14th St.
Miami, Florida 33125-1609

_____

Krys Godwin
Staff Liaison
Appellate Court Rules Committee
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399
(850) 561-5702
Florida Bar No. 2305