

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO
FLORIDA RULE OF APPELLATE
PROCEDURE 9.140**

CASE NO.: SC15-2296

**CRIMINAL COURT STEERING COMMITTEE’S RESPONSE TO FPDA
COMMENT**

Introduction

On January 7, 2016, the Florida Public Defender Association (“FPDA”) filed a comment to the Criminal Court Steering Committee’s (“CCSC”) amended petition to amend Florida Rule of Appellate Procedure 9.140.¹ After consideration of the FPDA comment, the majority of the CCSC voted to amend the proposal. The CCSC’s response to the FPDA comment is as follows:

FPDA Comment

The FPDA commented on three issues: 1) The permissive “may” language in proposed rule 9.140(g)(2)(B) should be amended to a mandatory “shall;” 2) the word “frivolous” in proposed rule 9.140(g)(2)(A) should be deleted and the proposal should be reworded in a way to alleviate possible friction between lawyers and their clients who may conclude, because of the word “frivolous,” that the attorney is treating the appeal as inconsequential; and 3) a drafting glitch appears to remove all time limits for the filing of *Anders* briefs because the proposed subdivision on merits brief has a time limit, but there is no time limit in the proposed subdivision on *Anders* briefs. The FPDA pointed out that one potential fix for the drafting glitch would be to rename the title of proposed rule 9.140(g)(1) as “time limits.”

CCSC response

In response to the FPDA comment, the CCSC solicited the opinion of Judge T.K. Wetherell, the chair of the Appellate Court Rules Committee (“ACRC”). Judge Wetherell referred the matter to the ad hoc subcommittee that had authored the proposal filed in the CCSC’s amended petition. The response of the ad hoc subcommittee to the FPDA comment is in Appendix C.

¹ The CCSC published its proposal in the November 1, 2015 issue of the Florida *Bar News*. No comments were received in response to publication. The CCSC filed its amended petition in mid-December 2015.

The ad hoc subcommittee did not agree with the FPDA's arguments about changing "may" to "shall" in rule 9.140(g)(2)(B), nor did they agree to delete the word "frivolous" in proposed rule 9.140(g)(2)(A). The ad hoc subcommittee did, however, agree with the FPDA that there was a drafting glitch with regard to time limits. As a remedy, the ad hoc subcommittee proposed the first sentence of rule 9.140(g)(1) be amended to: "Initial briefs, including those filed pursuant to subdivision (g)(2)(A), shall be served within 30 days of ~~service~~transmission of the record or designation of appointed counsel, whichever is later." The idea to substitute the word "transmission" for "service" was not in the FPDA comment but was suggested by the ad hoc subcommittee for purposes of consistency within the appellate rules.

The CCSC voted 9-1² to adopt the ideas of the ad hoc subcommittee of the ACRC.

The CCSC believes the word "may" is appropriate in proposed rule 9.140(g)(2)(B) so that appellate judges can remand for the correction of minor sentencing errors. The CCSC concluded appellate judges will be able to determine when it would be appropriate to remand for minor sentencing errors and when it would be appropriate to strike the brief to allow for a motion to be filed in the trial court. Also, the CCSC thought the word "frivolous" should be retained in the rule for consistency with the case law. Additionally, the CCSC thought the rule would read more clearly with the ACRC subcommittee's proposed fix of the drafting glitch than the FPDA's proposed fix. Finally, the CCSC saw no problem with substituting the word "transmission" for the word "service."

Conclusion

The CCSC thanks the FPDA, Judge Wetherell, and the ad hoc ACRC subcommittee for their time and input. The CCSC respectfully requests the Court amend rule 9.140 as set forth in Appendix A.

Respectfully submitted this 28th day of
January, 2016.

s/ Judge Jay P. Cohen
Judge Jay P. Cohen
Florida Bar No. 271160

² The dissenter was the CCSC's PD representative, who agreed with the FPDA.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Response to Comment has been sent by email to: Heather Telfer, Attorney Liaison to the Criminal Procedure and Appellate Court Rules Committees at the Florida Bar, at HTelfer@flabar.org; Krys Godwin, Attorney Liaison to the Rules of Judicial Administration Committee at the Florida Bar, at krgodwin@flabar.org; Judge T.K. Wetherell, II, Chair of the Appellate Court Rules Committee at wetherellk@1dca.org; Judge Stephanie Ray at rays@1dca.org; Amy Borman, Chair of the Rules of Judicial Administration Committee at ABorman@pbcgov.org; Meredith Charbula, Chair of the Criminal Procedure Rules Committee at MCharbula@coj.net; Ms. Julianne Holt, President of the FPDA at jholt@pd13.state.fl.us; Ms. Trisha Pate, Assistant Attorney General at Trisha.Pate@myfloridalegal.com; and Ms. Rebecca McGuigan, Assistant Attorney General at Rebecca.McGuigan@myfloridalegal.com, this 28th day of January, 2016.

s/ Judge Jay P. Cohen
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CERTIFICATION OF COMPLIANCE

I hereby certify that this Response has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

s/ Judge Jay P. Cohen
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