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Appellate Practice

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Appellate Practice: 1997 Survey of Florida Law

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I. INTRODUCTION

This article will discuss recent developments in the field of appellate practice in Florida.[1] Although this article will focus primarily on cases decided between July 1, 1996, and June 30, 1997, it will also deal with certain cases decided shortly before and after that period which are either of particular interest to the appellate practitioner or which provide the background for, or the culmination of, issues that were addressed by cases decided during that period.

In a broad sense, every appellate decision falls within the scope of appellate practice. Decisions relating to substantive areas of the law, however, are more properly dealt with in articles relating to those substantive areas and therefore will not be discussed here. Rather, this article will focus on matters relating to practice in the appellate courts and

1. For a discussion of developments in appellate practice for 1993, 1995, and 1996, see Anthony C. Musto, *Appellate Practice: 1996 Survey of Florida Law*, 21 NOVA L. REV. 13 (1996) [hereinafter *1996 Survey*]; Anthony C. Musto, *Appellate Practice: 1995 Survey of Florida Law*, 20 NOVA L. REV. 1 (1995) [hereinafter *1995 Survey*]; Anthony C. Musto, *Appellate Practice: 1993 Survey of Florida Law*, 18 NOVA L. REV. 1 (1993) [hereinafter *1993 Survey*].

will deal with those areas. Additionally, this article will not discuss cases relating to the preservation of issues, nor the question of whether particular errors were harmless.

II. FOUR-YEAR CYCLE AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE

The most significant development in the field of appellate practice in Florida, during the 1996-97 year, was the four-year cycle revision of the *Florida Rules of Appellate Procedure*.[2] As is the case with each set of Florida court rules, revisions occur every four years pursuant to the cycle established by rule 2.130(c) of the *Florida Rules of Judicial Administration*.[3] Proposals are submitted by the Florida Appellate Court Rules Committee to the Supreme Court of Florida, which adopts such portions of the proposals as it deems appropriate. The numerous changes that resulted from this process were initially adopted by the Supreme Court of Florida on November 22, 1996,[4] were corrected on denial of rehearing on December 26, 1996,[5] and took effect on January 1, 1997.[6]

A. *Rule 9.010: Effective Date and Scope*

This rule was amended to state that the appellate rules, as provided in rule 2.135 of the *Florida Rules of Judicial Administration*,[7] shall supersede all conflicting rules of procedure. It is likely that the most significant impact of this change will be to require circuit courts, considering requests for extraordinary writs that do not involve the submission of evidence or testimony to follow the procedure set forth by rule 9.100 of the *Florida Rules of Appellate Procedure*, rather than that contained in rule 1.630 of the *Florida Rules of Civil Procedure*.

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2. Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103 (Fla. 1996).

3. FLA. R. JUD. ADMIN. 2.130(c).

4. Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d at 1103.

5. *Id.*

6. *Id.*

7. As part of its four-year cycle review of the rules of judicial administration, the court adopted new rule 2.135, which states: "The Florida Rules of Appellate Procedure shall control all proceedings in the supreme court and the district courts, and all proceedings in which the circuit courts exercise their appellate jurisdiction, nothwithstanding any conflicting rules of procedure." Amendments to the Florida Rules of Judicial Administration, 682 So. 2d 89, 103 (Fla. 1996).

B. *Rule 9.020: Definitions*

The court defined "Family Law Matter" as "[a] matter governed by the Florida Family Law Rules of Procedure,"[8] and amended the definition of "Lower Tribunal" to include a "judge of compensation claims . . . whose order is to be reviewed."[9] The court also added to the list of authorized and timely motions that delay rendition of orders, a motion to withdraw a plea after sentencing pursuant to rule 3.170(l) of the *Florida Rules of Criminal Procedure*.[10] The reference to one of the motions already included in the rule, a motion to correct a sentence or order of probation, was amended to make clear that in order to delay rendition, such motion had to be made pursuant to rule 3.800(b) of the *Florida Rules of Criminal Procedure*.[11]

Another amendment to the rule provides that when a notice of appeal is filed during the pendency of a motion to correct a sentence, or order of probation, or a motion to withdraw a plea after sentencing, the notice "shall be treated as prematurely filed and the appeal held in abeyance until the filing of a signed, written order disposing of such motion."[12] A new provision was created to provide:

> An order based upon the recommendation of a hearing officer in accordance with Florida Family Law Rule of Procedure 12.492 shall not be deemed rendered if there has been filed in the lower tribunal an authorized and timely motion to vacate until the filing of a signed, written order disposing of such motion.[13]

C. *Rule 9.100: Original Proceedings*

The references to "common law certiorari" were changed to simply "certiorari" in order to make clear that the thirty-day time limit for instituting a proceeding applies to all petitions for certiorari.[14] Also, past references to "administrative" action were changed to "agency" action.[15]

Added to the list of petitions that must be filed within thirty days of rendition of the order to be reviewed in order to be timely were petitions

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8. FLA. R. APP. P. 9.020(d).
9. *Id.* 9.020(e).
10. *Id.* 9.020(h).
11. *Id.*
12. *Id.* 9.020(h)(3).
13. FLA. R. APP. P. 9.020(i).
14. *See* 1996 Committee Note to FLA. R. APP. P. 9.100.
15. FLA. R. APP. P. 9.100(c).

challenging orders of the Department of Corrections in prisoner disciplinary proceedings.[16]

A new subdivision of the rule sets forth the procedures to be followed with regard to petitions for writs of mandamus and prohibition directed to a judge or lower tribunal.[17] The procedures provide that "[t]he name of the judge or lower tribunal shall be omitted from the caption," which shall instead "bear the name of the petitioner" and which shall name the "other parties to the proceeding in the lower tribunal" as respondents. The judge or lower tribunal must be named as a formal party in the body of the petition, which must be served on all parties, including the judge, who are formal parties.[18] The rule makes clear that "[t]he responsibility to respond to an order to show cause is that of the litigant opposing the relief requested in the petition. Unless otherwise specifically ordered, the judge or lower tribunal has no obligation to file a response" but retains the discretion to do so.[19] "The absence of a separate response . . . shall not be deemed to admit the allegations of the petition."[20]

Another new subdivision[21] establishes additional requirements for proceedings invoking the jurisdiction of the circuit court to review judicial or quasi-judicial action.[22] The caption of a petition seeking such review must contain a statement that the petition is being filed pursuant to the subdivision.[23] When such a petition is filed, "the circuit court clerk shall forthwith transmit" it to the appropriate judge or judges "for a determination as to whether an order to show cause should be issued."[24] The clerk shall not enter a default in a case in which the petition is filed pursuant to the subdivision.[25]

D. *Rule 9.110: Appeal Proceedings to Review Final Orders of Lower Tribunals and Orders Granting New Trial in Jury and Non-Jury Cases*

The rule was amended to indicate its applicability to proceedings that "seek review of orders entered in probate and guardianship matters that

16. *Id.* 9.100(c)(4).
17. *Id.* 9.100(e).
18. *Id.* 9.100(e)(2).
19. FLA. R. APP. P. 9.100(e)(3).
20. *Id.*
21. *Id.* 9.100(f).
22. *Id.* 9.100(f)(1).
23. *Id.* 9.100(f)(2).
24. FLA. R. APP. P. 9.100(f)(3).
25. *Id.* 9.100(f)(4).

finally determine a right or obligation of an interested person as defined in the Florida Probate Code."[26]

Another amendment provides that in an appeal of an administrative order:

> [T]he appellant shall file the original notice [of appeal] with the clerk of the lower administrative tribunal within 30 days of rendition of the order to be reviewed, and file a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the [appellate] court.[27]

A new subdivision of the rule states that "[j]udgments that determine the existence or nonexistence of insurance coverage in cases in which a claim has been made against an insured and coverage thereof is disputed by the insurer may be reviewed either by the method prescribed in this rule or that in rule 9.130,"[28] the rule governing proceedings to review non-final orders. This subdivision was a response to the opinion in *Canal Insurance Co. v. Reed*,[29] which suggested that the Appellate Court Rules Committee consider an appropriate method for providing expedited review in this type of case in order to avoid unnecessary delays in the final resolution of the underlying actions.[30]

E. *Rule 9.130: Proceedings to Review Non-Final Orders*

The court adopted an amendment that shifted a phrase used in setting forth one of the rule's appealable non-final orders. The old version of the rule provided for review of non-final orders that determined "that a party is not entitled to workers' compensation immunity as a matter of law."[31] The new version refers instead to non-final orders which determine "that, as a matter of law, a party is not entitled to workers' compensation immunity."[32] This change was made to resolve the confusion evidenced in *Breakers Palm Beach, Inc. v. Gloger*,[33] *City of Lake Mary v. Franklin*,[34] and their progeny

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26. *Id.* 9.110(a)(2).

27. *Id.* 9.110(c).

28. *Id.* 9.110(n).

29. 666 So. 2d 888 (Fla. 1996). For a discussion of the decision in *Canal Insurance*, see *1996 Survey, supra* note 1, at 25–26.

30. *See* 1996 Committee Note to FLA. R. APP. P. 9.110.

31. FLA. R. APP. P. 9.130(a)(3)(C)(vi) (amended 1996).

32. FLA. R. APP. P. 9.130(a)(3)(C)(vi).

33. 646 So. 2d 237 (Fla. 4th Dist. Ct. App. 1994). For a discussion of the decision in *Breakers Palm Beach*, see *1995 Survey, supra* note 1, at 42–43.

by clarifying that the rule does not intend "to grant a right of nonfinal review if the lower tribunal denies a motion for summary judgment based on the existence of a material fact dispute."[35]

Added to the list of reviewable non-final orders were those that determine "that, as a matter of law, a party is not entitled to absolute or qualified immunity in a civil rights claim arising under federal law."[36] This addition was in response to the decision in *Tucker v. Resha*,[37] which asked that the Appellate Court Rules Committee submit a proposed amendment to allow for review of orders of this nature.[38]

A new subdivision was also added to the rule making it clear that multiple non-final orders within the scope of the rule may be reviewed by a single notice of appeal if the notice is timely filed as to each such order.[39]

F. *Rule 9.140: Appeal Proceedings in Criminal Cases*

Several amendments expanded the number of appealable orders. The rule now allows defendants to appeal from: 1) orders granting or modifying community control;[40] 2) unlawful sentences;[41] or 3) sentences, if appeals are permitted by general law[42] or "as otherwise provided by general law."[43] In addition, it now allows the state to appeal from orders: 1) dismissing affidavits "charging the commission of a criminal offense, the violation of probation, the violation of community control, or the violation of any supervised correctional release;"[44] 2) granting motions for judgment of acquittal after jury verdicts;[45] 3) finding a defendant incompetent;[46] 4) "imposing an unlawful or illegal sentence or imposing a sentence outside the range permitted by the sentencing guidelines;"[47] 5) "imposing a sentence outside the range recommended by the sentencing guidelines;"[48] or 6)

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34. 668 So. 2d 712 (Fla. 5th Dist. Ct. App. 1996).
35. 1996 Committee Note to FLA. R. APP. P. 9.130.
36. FLA. R. APP. P. 9.130 (a)(3)(C)(viii).
37. 648 So. 2d 1187 (Fla. 1994). For a discussion of the decision in *Tucker*, see *1995 Survey, supra* note 1, at 10-11.
38. *Tucker*, 648 So. 2d at 1190.
39. FLA. R. APP. P. 9.130(h).
40. *Id.* 9.140(b)(1)(B) and (C).
41. *Id.* 9.140(b)(1)(D).
42. *Id.* 9.140(b)(1)(E).
43. *Id.* 9.140(b)(1)(F).
44. FLA. R. APP. P. 9.140(c)(1)(A).
45. *Id.* 9.140(c)(1)(E).
46. *Id.* 9.140(c)(1)(H).
47. *Id.* 9.140(c)(1)(J).
48. *Id.* 9.140(c)(1)(K).

"denying restitution;"[49] or "as otherwise provided by general law for final orders."[50] The amendments also indicate that "[t]he state as provided by general law may appeal to the circuit court non-final orders rendered in the county court."[51]

A new subdivision[52] was added to the rule to accurately reflect the limited right of direct appeal after a plea of guilty or nolo contendere.[53] It states that "[a] defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved."[54] The new subdivision goes on to state:

> (B) A defendant who pleads guilty or nolo contendere may otherwise directly appeal only
>
> (i) the lower tribunal's lack of subject matter jurisdiction;
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> (ii) a violation of the plea agreement, if preserved by a motion to withdraw plea;
>
> (iii) an involuntary plea, if preserved by a motion to withdraw plea;
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> (iv) a sentencing error, if preserved; or
>
> (v) as otherwise provided by law.[55]

Except for those appeals in which a defendant expressly reserves the right to appeal a dispositive order, the record for appeals involving a plea of guilty or nolo contendere shall be limited to:

> a. all indictments, informations, affidavits of violation of probation or community control and other charging documents;
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> b. the plea and sentencing hearing transcripts;
>
> c. any written plea agreements;

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49. FLA. R. APP. P. 9.140(c)(1)(L).
50. *Id.* 9.140(c)(1)(M).
51. *Id.* 9.140(c)(2).
52. *Id.* 9.140(b)(2).
53. *See* 1996 Committee Note to FLA. R. APP. P. 9.140.
54. FLA. R. APP. P. 9.140(b)(2)(A).
55. *Id.* 9.140(b)(2)(B)(i)-(v).

> d. any judgments, sentences, scoresheets, motions and orders to correct or modify sentences, orders imposing, modifying, or revoking probation or community control, orders assessing costs, fees, fines, or restitution against the defendant, and any other documents relating to sentencing;
>
> e. any motion to withdraw plea and order thereon;
>
> f. notice of appeal, statement of judicial acts to be reviewed, directions to the clerk, and designation to the court reporter.[56]

In addition, "[u]pon good cause shown, the court, or the lower tribunal before the record is transmitted, may expand the record."[57]

The rule was also clarified to indicate that a defendant may institute an appeal by filing a notice of appeal "at any time between rendition of a final judgment and 30 days following rendition of a written order imposing sentence."[58]

Pursuant to the dictates of *Lopez v. State*,[59] the rule now also provides that when the state appeals an order, a defendant may cross appeal on related issues involved in the same order by serving a notice within ten days of service of the state's notice of appeal.[60]

Another amendment affects the procedures to be used in death penalty cases. It provides that in such cases "all petitions for extraordinary relief over which the supreme court has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief in the appeal from the lower tribunal's order on the defendant's application for relief under Florida Rule of Criminal Procedure 3.850."[61] It further indicates that the provision of the rule relating to belated appeals[62] shall not apply to death penalty cases.[63]

A new subdivision[64] dealing with sentencing errors provides that claims of such errors "may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal: (1) at the time of

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56. *Id.* 9.140(b)(2)(C)(i)(a)-(f).
57. *Id.* 9.140(b)(2)(C)(ii).
58. *Id.* 9.140(b)(3).
59. 638 So. 2d 931 (Fla. 1994).
60. FLA. R. APP. P. 9.140(b)(4).
61. FLA. R. APP. P. 9.140(b)(6)(E).
62. *Id.* 9.140(j).
63. *Id.* 9.140(b)(6)(E).
64. *Id.* 9.140(d).

sentencing; or (2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b)."[65]

The portion of the rule relating to transcripts was amended to allow nonindigent defendants to order just the original transcripts from the court reporters and to make copies for all parties.[66] Parties electing to use the procedure must serve notice of its use on counsel for the state, file the original transcripts and copies for the state and each defendant with the clerk of the lower tribunal for inclusion in the record, and attach a certificate to each copy certifying that it is an accurate and complete copy of the original transcript.[67] When this procedure is used, the clerk of the lower tribunal shall be required to "retain the original transcript[s] for use as needed by the state in any collateral proceedings and shall not destroy the transcripts without the consent" of the Attorney General's office.[68] The procedures can also be utilized by the state when it appeals.[69]

The adoption of this amendment is intended to supersede the dictates of *Brown v. State*,[70] and allow the use by nonindigent defendants and the state of a procedure previously available only in civil cases pursuant to rule 9.200(b)(2) of the *Florida Rules of Appellate Procedure*.[71]

In cases in which the defendant is indigent, or in which the party taking the appeal elects not to use the above discussed procedure, "the parties shall designate the court reporter to file with the clerk of the lower tribunal the original transcripts for the court and sufficient copies for the state and all indigent defendants."[72] The lower tribunal may, however, in publically funded cases, direct its clerk, rather than the court reporter, to prepare the necessary copies of the original transcripts.[73]

Regardless of the method of transcript preparation, the clerk of the lower tribunal shall within fifty days of the filing of the notice of appeal,[74] prepare and serve copies of the record to the court, counsel for the state, and all counsel appointed to represent indigent defendants on appeal.[75] The clerk "shall simultaneously serve copies of the index to all nonindigent defendants

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65. *Id.* 9.140(d)(2).
66. FLA. R. APP. P. 9.140(e)(2)(D).
67. *Id.*
68. *Id.*
69. *Id.* 9.140(e)(2)(E).
70. 639 So. 2d 634 (Fla. 5th Dist. Ct. App. 1994). For a discussion of the decision in *Brown*, see *1995 Survey*, *supra* note 1, at 51–52.
71. *Brown*, 639 So. 2d at 635.
72. FLA. R. APP. P. 9.140(e)(2)(C).
73. *Id.* 9.140(e)(2)(F).
74. *Id.* 9.140(e)(1).
75. *Id.* 9.140(e)(4).

and, upon their request, copies of the record or portions thereof at the cost prescribed by law."[76]

"Unless otherwise ordered by the court, the clerk of the lower tribunal shall retain all original documents except the original transcripts designated for appeal which shall be included in the record transmitted to the [appellate] court."[77] "Except in death penalty cases, the [appellate] court shall return the record to the lower tribunal after final disposition of the appeal."[78]

The appellant's initial brief "shall be served within 30 days of service of the record or designation of appointed counsel, whichever is later."[79]

The time period for filing any appellant's brief in appeals from orders denying relief under rules 3.800(a) or 3.850 of the *Florida Rules of Criminal Procedure* was limited to within fifteen days of the filing of the notice of appeal.[80]

Another new subdivision of the rule establishes the procedure for petitions seeking belated appeals or alleging ineffective assistance of counsel.[81] The procedure calls for both of these types of claims to be presented directly to the appellate courts.[82] Previously, the dictates of *State v. District Court of Appeal of Florida, First District*,[83] mandated that a claim that an appeal was frustrated by ineffective assistance of trial counsel (most frequently, the failure to file a notice of appeal) must be raised by a motion in the trial court pursuant to rule 3.850 of the *Florida Rules of Criminal Procedure*, and that a claim of ineffective appellate counsel was to be raised in a habeas corpus petition filed in the appellate court.[84] The second district, in *Stephenson v. State*,[85] had expressed frustration with its inability to grant relief when trial counsel was ineffective for failing to file a notice of appeal.[86] On review of the district court's decision in *Stephenson*, the Supreme Court of Florida continued to require the then-existing procedure,[87] but gave some indication of a willingness to eventually change the process, noting that it was adhering to the principle established in *District Court of*

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76. *Id.*
77. FLA. R. APP. P. 9.140(e)(3).
78. *Id.* 9.140(e)(5).
79. *Id.* 9.140(f).
80. *Id.* 9.140(i).
81. *Id.* 9.140(j).
82. FLA. R. APP. P. 9.140(j)(1).
83. 569 So. 2d 439 (Fla. 1990).
84. *Id.* at 441-42.
85. 640 So. 2d 117 (Fla. 2d Dist. Ct. App. 1994).
86. *Id.* at 119.
87. Stephenson v. State, 655 So. 2d 86, 87 (Fla. 1995). For a discussion of both *Stephenson* opinions, see *1995 Survey, supra* note 1, at 52-53.

Appeal "for now" and that the issue was at that time under review by both the court and the Appellate Court Rules Committee.[88]

The new subdivision requires both petitions for belated appeals and petitions "alleging ineffective assistance of appellate counsel [to] be filed in the appellate court to which the appeal was or should have been taken."[89] Such petitions are to be in the form prescribed by the rule dealing with original proceedings in the appellate courts[90] and shall recite in the statement of facts:

> (A) the date and nature of the lower tribunal's order sought to be reviewed;
>
> (B) the name of the lower tribunal rendering the order;
>
> (C) the nature, disposition, and dates of all previous proceedings in the lower tribunal and, if any, in the appellate courts;
>
> (D) if a previous petition was filed, the reason the claim in the present petition was not raised previously;
>
> (E) the nature of the relief sought; and
>
> (F) the specific facts sworn to by the petitioner or petitioner's counsel that constitute the alleged ineffective assistance of counsel or basis for entitlement to belated appeal, including in the case of a petition for belated appeal whether the petitioner requested counsel to proceed with the appeal.[91]

The petitioner is required to serve copies of the petition on both the attorney general and the state attorney.[92] "The [appellate] court may by order identify any provision of this rule that the petition fails to satisfy and, pursuant to rule 9.040(d), allow the petitioner a specified time to serve an amended petition."[93] The appellate court may also "dismiss a second or successive petition if it does not allege new grounds and the prior determination was on the merits, or if a failure to assert the grounds was an abuse of procedure."[94]

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88. *Stephenson*, 655 So. 2d at 87 n.1.
89. FLA. R. APP. P. 9.140(j)(1).
90. *Id.* 9.100.
91. *Id.* 9.140(j)(2)(A)-(F).
92. *Id.* 9.140(j)(4).
93. *Id.* 9.140(j)(5)(B).
94. FLA. R. APP. P. 9.140(j)(5)(C).

The appellate rule relating to original proceedings[95] shall govern the processing of the petition.[96] "An order granting a petition for belated appeal shall be filed with the lower tribunal and treated as the notice of appeal, if no previous notice of appeal has been filed."[97]

The new subdivision also establishes time limits for the filing of petitions:[98]

> (A) A petition for belated appeal shall not be filed more than two years after the expiration of time for filing the notice of appeal from a final order, unless it alleges under oath with a specific factual basis that the petitioner
>
> (i) was unaware an appeal had not been timely filed or was not advised of the right to an appeal; and
>
> (ii) should not have ascertained such facts by the exercise of reasonable diligence.
>
> (B) A petition alleging ineffective assistance of appellate counsel shall not be filed more than two years after the conviction becomes final on direct review unless it alleges under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel.
>
> (C) Time periods under this subdivision shall not begin to run prior to the effective date [January 1, 1997[99]] of this rule.[100]

G. *Rule 9.145: Appeal Proceedings in Juvenile Delinquency Cases*

This new rule provides that appeal proceedings in juvenile delinquency cases shall be as in criminal cases, except as modified by this rule.[101] It states:

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95. *Id.* 9.100.
96. *Id.* 9.140(j)(5)(A).
97. *Id.* 9.140(j)(5)(D).
98. *Id.* 9.140(j)(3).
99. Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103, 1107 (Fla. 1996).
100. FLA. R. APP. P. 9.140(j)(3).
101. *Id.* 9.145(a).

> (b) Appeals by Child. To the extent adversely affected, a child or any parent, legal guardian, or custodian of a child may appeal
>
> (1) an order of adjudication of delinquency or withholding adjudication of delinquency, or any disposition order entered thereon;
>
> (2) orders entered after adjudication or withholding of adjudication of delinquency, including orders revoking or modifying the community control;
>
> (3) an illegal disposition; or
>
> (4) any other final order as provided by law.[102]

It further indicates the state may appeal an order:

> (A) dismissing a petition for delinquency or any part of it, if the order is entered before the commencement of an adjudicatory hearing;
>
> (B) suppressing confessions, admissions, or evidence obtained by search and/or seizure before the adjudicatory hearing;
>
> (C) granting a new adjudicatory hearing;
>
> (D) arresting judgment;
>
> (E) discharging a child under Florida Rule of Juvenile Procedure 8.090;
>
> (F) ruling on a question of law if a child appeals an order of disposition;
>
> (G) constituting an illegal disposition;
>
> (H) discharging a child on habeas corpus; or
>
> (I) finding a child incompetent pursuant to the Florida Rules of Juvenile Procedure.[103]

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102. *Id.* 9.145(b)(1)-(4).
103. *Id.* 9.145(c)(1)(A)-(I).

Under the rule,

> [i]f the state appeals a pre-adjudicatory hearing order of the trial court, the notice of appeal must be filed within 15 days and before commencement of the adjudicatory hearing.
>
> (A) A child in detention whose case is stayed pending state appeal shall be released from detention pending the appeal if the child is charged with an offense that would be bailable if the child were charged as an adult, unless the lower tribunal for good cause stated in an order determines otherwise. The lower tribunal retains discretion to release from detention any child who is not otherwise entitled to release under the provisions of this rule.
>
> (B) If a child has been found incompetent to proceed, any order staying the proceedings on a state appeal shall have no effect on any order entered for the purpose of treatment.[104]

Appeals in juvenile delinquency cases "shall be entitled and docketed with the initials, but not the name, of the child and the court case number. All references to the child in briefs, other papers, and the decision of the court shall be by initials."[105] The rule does not require the deletion of the name of the child from pleadings or other papers transmitted to the court from the lower tribunal.[106]

All papers in juvenile delinquency appeals "shall remain sealed in the office of the clerk of court when not in use by the court, and shall not be open to inspection except by the parties and their counsel, or as otherwise ordered."[107]

H. *Rule 9.146: Appeal Proceeding in Juvenile Dependency and Termination of Parental Rights Cases and Cases Involving Families and Children in Need of Services*

This new rule provides that "[a]ppeal proceedings in juvenile dependency and termination of parental rights cases and cases involving families and children in need of services shall be as in civil cases except as

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104. *Id.* 9.145(c)(2).
105. FLA. R. APP. P. 9.145(d).
106. *See* 1996 Committee Note to FLA. R. APP. P. 9.145.
107. FLA. R. APP. P. 9.145(e).

modified by this rule."[108] It permits "[a]ny child, any parent, guardian ad litem, or legal custodian of any child, any other party to the proceeding affected by an order of the lower tribunal, or the appropriate state agency as provided by law" to appeal to the appropriate court within the time and in the manner prescribed by the appellate rules.[109]

"The taking of an appeal shall not operate as a stay in any case unless pursuant to an order of the court."[110] With two exceptions, a party seeking to stay an "order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief, after considering the welfare and best interest of the child."[111] The two exceptions are as provided by general law[112] and that a termination of parental rights order with placement of 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.[113]

Transmittal of the record in cases governed by the rule will not remove the jurisdiction of the lower tribunal to conduct judicial reviews or other proceedings related to the health and welfare of the child pending appeal.... When the parent or child is a party to the appeal, the appeal shall be docketed and any papers filed in the court shall be entitled with the initials, but not the name, of the child or parent and the court case number. All references to the child or parent in briefs, other papers, and the decision of the court shall be by initials.[114]

The rule "does not require deletion of the names of the child and parents from pleadings and other papers transmitted to the court from the lower tribunal."[115]

All papers in cases governed by the rule "shall remain sealed in the office of the clerk of the court when not in use by the court, and shall not be open to inspection except by the parties and their counsel, or as otherwise ordered."[116]

The appellate court is required to give priority to appeals under this rule.[117]

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108. *Id.* 9.146(a).
109. *Id.* 9.146(b).
110. *Id.* 9.146(c)(2).
111. *Id.* 9.146(c)(1).
112. FLA. R. APP. P. 9.146(c)(1).
113. *Id.* 9.146(c)(2).
114. *Id.* 9.146(d)-(e).
115. 1996 Committee Note to FLA. R. APP. P. 9.146.
116. FLA. R. APP. P. 9.146(f).
117. *Id.* 9.146(g).

I. *Rule 9.180: Appeal Proceedings to Review Workers' Compensation Cases*

This new rule consolidates and moves into the appellate rules the procedures previously set forth in *Florida Rules of Workers' Compensation Procedure* 4.160, 4.161, 4.165, 4.166, 4.170, 4.180, 4.190, 4.220, 4.225, 4.230, 4.240, 4.250, 4.260, 4.265, 4.270, and 4.280.[118] The change was intended to eliminate duplicative rules and not to change the general nature of workers' compensation appeals.[119]

J. *Rule 9.200: The Record*

A new subdivision was added to the rule to provide that in family law cases "the clerk of the lower tribunal shall retain the original orders, reports and recommendations of masters or hearing officers, and judgments within the file of the lower tribunal and shall include copies thereof within the record."[120] This subdivision "was added because family law cases frequently have continuing activity at the lower tribunal level during the pendency of appellate proceedings and that continued activity may be hampered by the absence of orders being enforced during the pendency of the appeal."[121]

The wording of the rule was also changed to require that "[t]he transcript of the trial shall be securely bound in consecutively numbered volumes not to exceed 200 pages each, and each page shall be numbered consecutively."[122] Prior to the amendment, the rule referred to the "transcript of proceedings."[123] The purpose of the change was "to be consistent with and to clarify the requirement in subdivision (d)(1)(B) that it is only the transcript of trial that is not to be renumbered by the clerk."[124] Under the amended rule, "it remains the duty of the clerk to consecutively number transcripts other than the transcript of the trial."[125] The Appellate Court Rules Committee indicated its view that "if the consecutive pagination requirement is impracticable or becomes a hardship for the court reporting entity, relief may be sought from the court."[126]

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118. 1996 Committee Note to FLA. R. APP. P. 9.180.
119. *Id.*
120. FLA. R. APP. P. 9.200(a)(2).
121. 1996 Committee Note to FLA. R. APP. P. 9.200.
122. FLA. R. APP. P. 9.200(b)(2).
123. 1996 Committee Note to FLA. R. APP. P. 9.200.
124. *Id.*
125. *Id.*
126. *Id.*

K. *Rule 9.210: Briefs*

The rule, which had required briefs to be bound in book form and fastened along the left side,[127] was amended to state that briefs "should" be bound and fastened as previously required and added the words "in a manner that will allow them to lie flat when opened."[128] The amended rule also provides that "[a]lternatively, briefs may be securely stapled in the upper left corner" and that no method of securing the brief other than the two set forth in the rule is acceptable.[129]

The rule was also amended to require references to the appropriate volume, as well as the appropriate page number of the record on appeal, in the statement of the case and of the facts.[130]

Another change to the rule eliminates the requirement that in answer briefs, the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified.[131] The new version of the rule simply states that "the statement of the case and of the facts may be omitted."[132] The purpose of the change is "to permit appellees to file their own statements of case and facts."[133] In amending the rule, the court recognized "that there are some instances in which it is difficult, if not impossible, for the appellee to intelligibly specify the area of disagreement in the statement of the case and facts of the appellants,"[134] but encouraged "appellees not to rewrite the statement . . . except where clearly necessary."[135]

The portion of the rule dealing with notices of supplemental authority was transferred to the new rule 9.225 of the *Florida Rules of Appellate Procedure*.[136]

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127. FLA. R. APP. P. 9.210(a)(3) (amended 1996).
128. *Id.*
129. *Id.*
130. *Id.* 9.210(b)(3).
131. *See* FLA. R. APP. P. 9.210(c).
132. *Id.*
133. Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103, 1106 (Fla. 1996).
134. *Id.*
135. *Id.*
136. *See* 1996 Committee Notes to FLA. R. APP. P. 9.210.

L. *Rule 9.225: Notice of Supplemental Authority*

This new rule is an amended version of the former rule 9.210(g) of the *Florida Rules of Appellate Procedure*.[137] It adds language that requires that supplemental authorities be significant to the issues raised.[138]

M. Rule 9.300: Motions

This rule was amended to add "[m]otions relating to expediting the appeal" to the list of motions that do not toll the time schedule of proceedings in appellate courts.[139]

N. Rule 9.310: Stay Pending Review

This rule was amended to eliminate former subdivision (b)(3), which provided that the timely filing of a notice of appeal automatically operated as a stay pending review of an award by a judge of compensation claims on a claim for birth related neurological injuries.[140]

O. *Rule 9.315: Summary Disposition*

The references in the rule to "expedited" disposition, affirmance, and reversal were changed to "summary" disposition, affirmance, and reversal.[141]

P. *Rule 9.400: Costs and Attorneys' Fees*

An amendment clarified the fact that only orders rendered "by the lower tribunal" are subject to review by the appellate court under this rule.[142]

Q. *Rule 9.420: Filing; Service of Copies; Computation of Time*

This rule was amended to require that certificates of service must specify the party each attorney being served represents.[143]

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137. *Id.*
138. FLA. R. APP. P. 9.225.
139. *Id.* 9.300(d)(9).
140. *Id.* 9.310 (amended 1996).
141. *Id.* 9.315.
142. *Id.* 9.400(c).
143. FLA. R. APP. P. 9.420(c)(2).

R. *Rule 9.430: Proceedings by Indigents*

Added to this rule was a new paragraph that provides that "[a]n appellate court may, in its discretion, presume that an incarcerated party who has been declared indigent for purposes of proceedings in the lower tribunal remains indigent, in the absence of evidence to the contrary."[144]

The language replaced an emergency amendment that the court had adopted in *McFadden v. Fourth District Court of Appeal*[145] in response to concerns expressed by the fourth district in *McFadden v. West Palm Beach Police Officer*[146] regarding the need for an amendment to the rules that would allow determination of indigency for appellate purposes to be made at the appellate level.[147] The emergency amendment, which had called for an indigent incarcerated party to file a motion and affidavit with the appellate court and which allowed the court to either determine the issue or remand to the lower tribunal for determination when an objection is filed,[148] had been retroactively stayed due to concerns that it could create procedural problems.[149] The new language submitted by the Appellate Court Rules Committee was agreed upon by representatives of each of the district courts of appeal[150] and, in the view of the supreme court, appears to give "each court the flexibility necessary to handle these matters."[151]

S. *Rule 9.600: Jurisdiction of Lower Tribunal Pending Review*

The portion of this rule relating to family law matters was amended to state that "[t]he receipt, payment, or transfer of funds or property . . . shall not prejudice the rights of appeal of any party."[152] Added was a new sentence which provides that "[t]he lower tribunal shall have the jurisdiction to impose, modify, or dissolve conditions upon the receipt or payment of such awards in order to protect the interests of the parties during the appeal."[153] Additionally, "[r]eview of orders entered pursuant to this

144. *Id.* 9.430.

145. 682 So. 2d 1068 (Fla. 1996).

146. 658 So. 2d 1047 (Fla. 4th Dist. Ct. App. 1995). For a discussion of both opinions in *McFadden*, see *1996 Survey, supra* note 1, at 16.

147. *West Palm Beach Police Officer*, 658 So. 2d at 1048.

148. *Fourth Dist. Court of Appeal*, 682 So. 2d at 1069.

149. Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103, 1106 (Fla. 1996).

150. *Id.*

151. *Id.*

152. FLA. R. APP. P. 9.600(c)(2).

153. *Id.*

subdivision shall be by motion filed in the appellate court within 30 days of rendition."[154]

A new subdivision of the rule[155] recognizes that while an appeal is pending, trial courts have the jurisdiction to rule on motions for posttrial release and motions pursuant to rule 3.800(a) of the *Florida Rules of Criminal Procedure*.[156] The new subdivision requires that within ten days of any order granting relief under the criminal rule, the movant must file a copy of the order with the appellate court.[157]

T. *Rule 9.700: Guide to Times and Acts under Rules*

This rule was eliminated.

U. *Rule 9.800: Uniform Citation System*

Examples of citations were adopted for the *Florida Rules for Certified and Court-Appointed Mediators*, the *Florida Rules for Court-Appointed Arbitrators*, and the *Florida Family Law Rules of Procedure*. They are as follows:

Fla. R. Med. 10.010;

Fla. R. Arb. 11.010;

Fla. Fam. L. R. P. 12.010.[158]

The court eliminated the requirement that initial references to the United States Supreme Court should cite to the United States Reports, Supreme Court Reporter, and Lawyer's Edition and that subsequent citations, as well as pinpoint citations, shall be to the United States Reports only. Substituted was the following language: "Cite to United States Reports, if published therein; otherwise cite to Supreme Court Reporter, Lawyer's Edition, or United States Law Week, in that order of preference."[159]

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154. *Id.* 9.600(c)(3).
155. *Id.* 9.600(d).
156. 1996 Committee Note to FLA. R. APP. P. 9.600.
157. FLA. R. APP. P. 9.600(d).
158. *Id.* 9.800(i).
159. *Id.* 9.800(k).

III. OTHER AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE

The Supreme Court of Florida adopted, on an emergency basis, changes to the appellate rules necessary to facilitate administrative appeals pursuant to the new Administrative Procedure Act, chapter 120, *Florida Statutes*, which took effect on October 1, 1996.[160] The court redefined the term "administrative action" to include:

> (1) final agency action as defined in the Administrative Procedure Act, chapter 120, Florida Statutes;
>
> (2) non-final action by an agency or administrative law judge reviewable under the Administrative Procedure Act;
>
> (3) quasi-judicial decisions by any administrative body, agency, board or commission not subject to the Administrative Procedure Act; and
>
> (4) administrative action for which judicial review is provided by general law.[161]

The court also adopted a new rule[162] relating to judicial review of administrative action; except as specifically modified by the rule, such review shall be governed by the general rules of appellate procedure.[163] The rule further states that an appeal from a final agency action or other administrative action for which judicial review is provided by law shall be commenced in accordance with rule 9.110(c), the rule governing review of final orders of administrative tribunals.[164] On the other hand, unless judicial review by appeal is provided by general law, review of a non-final action is commenced by the filing of a petition for review in accordance with rules 9.100(b) and (c),[165] which deal with the commencement of original proceedings in appellate courts.[166] Similarly, unless judicial review by appeal is provided by general law, review of a quasi-judicial decision is also

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160. Amendment to Florida Rule of Appellate Procedure 9.020(a) & Adoption of Florida Rule of Appellate Procedure 9.190, 681 So. 2d 1132 (Fla. 1996).

161. FLA. R. APP. P. 9.020(a)(1)-(4).

162. *Id.* 9.190.

163. *Id.* 9.190(a).

164. *Id.* 9.190(b)(1).

165. *Id.* 9.190(b)(2).

166. FLA. R. APP. P. 9.190(b)(2).

to be commenced by the filing of a petition for certiorari in accordance with rule 9.100 (b) and (c).[167]

The rule also sets forth the materials to be included in the record in cases in which judicial review of administrative action is sought.[168] The requirements of the rule are quite extensive, specific, and vary significantly depending on the type of order under review.[169] Regardless of the nature of the order, however, the rule provides that when "hearing testimony is preserved through the use of videotape rather than through an official transcript, the testimony from the videotape shall be transcribed and the transcript shall be made a part of the record before the record is transmitted to the court."[170] The rule also provides that "[t]he contents of the record may be modified as provided in rule 9.200(a)(2),"[171] which at the time of adoption of Rule 9.190, allowed an appellent to direct the clerk to include or exclude other documents and required a statement of judicial acts to be reviewed if the clerk was being directed to transmit less than the entire record or less than all testimony in a proceeding.[172]

The rule also addresses attorneys' fees, stating that a motion for such fees may be served not later than the time for service of the reply brief and shall state the grounds on which the recovery is sought, citing all pertinent statutes. The assessment of attorneys' fees may be remanded to the lower tribunal or the administrative law judge or referred to a special master.[173]

Review of attorneys' fees orders rendered under rule 9.190(d)(2) shall be by motion filed in the court within thirty days of the order's rendition.[174] "Review of objections to reports of special masters shall be on motion filed in the court within 30 days of the report's filing."[175]

IV. COURT DIVISIONS

In an administrative order,[176] the first district, the only Florida district court that has divided itself into divisions,[177] merged its Criminal Division

167. *Id.* 9.190(b)(3).
168. *Id.* 9.190(c).
169. *Compare id.* 9.190(c)(2)(A)-(E), (c)(3) and (c)(4).
170. *Id.* 9.190(c)(5).
171. FLA. R. APP. P. 9.190(c)(6).
172. *Id.* 9.200(a)(3). As part of the subsequent four-year cycle amendments to the appellate rules, rule 9.200(a)(2) was renumbered as (a)(3).
173. *Id.* 9.190(d)(1).
174. *Id.* 9.190(d)(2).
175. *Id.*
176. Fla. Admin. Order No. 97-1 (Fla. 1st Dist. Ct. App. May 20, 1997).

into its General Division effective January 1, 1998. After the effective date, the court will sit in two divisions called the General Division and the Administrative Division.

V. JURISDICTION

The fourth district, in *Caruso v. Terry's Foods, Inc.*,[178] transferred to the first district, a case which sought review by certiorari of an order entered by a judge of compensation claims.[179] The court noted that although the first district has exclusive jurisdiction over workers' compensation appeals, there exists no specific provision relating to jurisdiction over extraordinary writs in such cases.[180] In determining that the case should be transferred, the court relied on cases[181] expressing the principle that extraordinary writs can only be issued by courts with appellate jurisdiction over the tribunal whose order is challenged.[182]

VI. APPEALS TO CIRCUIT COURTS

In *Montero v. Oak Casualty Insurance Co.*,[183] a direct appeal to the circuit court in Dade County was dismissed by an order entered by one judge.[184] Reviewing the order of dismissal on a petition for certiorari, the third district noted that the Supreme Court of Florida rule establishing the appellate division of the Dade County Circuit Court provides for cases to be heard on their merits by three-judge panels.[185] Although the rule also permits "matters preliminary to final determination" to be decided based on subsequent rules, the court noted that it appears no subsequent rules have ever been adopted.[186] The court found in any event that, "[o]rders

177. In *In re Court Divisions*, the court was split into a "General Division" and an "Administrative Division." *In re* Court Divisions, 648 So. 2d 761, 761 (Fla. 1st Dist. Ct. App. 1994). In a subsequent administrative order, the Criminal Division was created. Fla. Admin. Order No. 95-2 (Fla. 1st Dist. Ct. App. Jan. 31, 1996).

178. 683 So. 2d 1136 (Fla. 4th Dist. Ct. App. 1996).

179. *Id.* at 1136.

180. *Id.*

181. State *ex rel.* Bettendorf v. Martin County Envtl. Control Hearing Bd., 564 So. 2d 1227 (Fla. 4th Dist. Ct. App. 1996); Nellen v. State, 226 So. 2d 354 (Fla. 1st Dist. Ct. App. 1969).

182. *Caruso*, 683 So. 2d at 1136-37 (citing State *ex rel.* Bettendorf v. Martin County Environmental Control Hearing Bd., 564 So. 2d 1227 (Fla. 4th Dist. Ct. App. 1990)).

183. 693 So. 2d 1024 (Fla. 3d Dist. Ct. App. 1997).

184. *Id.* at 1024.

185. *Id.*

186. *Id.*

dismissing appeals are of lasting import[,]" and that they are "not merely 'preliminary to final determination,'" but are "the end of the road" for appeals.[187] The court, therefore, granted certiorari concluding that any order of the appellate division which dismisses an appeal "must be entered by the majority of a three-judge panel assigned to the case."[188]

VII. ORDERS REVIEWABLE

As usual, a large number of cases dealt with the question of whether certain orders were reviewable, either by appeal or by certiorari. The sheer volume of these cases precludes discussion of the reasoning relied on in each case. Therefore, this article will set forth some of the cases indicating the type of order involved and the conclusion reached.[189]

A. *Orders Reviewable by Appeal*

Among the orders found to be reviewable by appeal were: 1) an order denying a motion to dismiss and compelling arbitration under a homeowner's insurance policy, in a case in which the appellate court determined that an appraisal provision in the policy constituted an agreement to arbitrate;[190] 2) an order denying a motion to dismiss that rejected a defense of qualified immunity, as a matter of law;[191] 3) an order on a motion for permanent injunction, which allowed an election to proceed with a disputed question on the ballot and that reserved ruling on the legality of the ballot question;[192] 4) an order compelling a law firm to disburse funds partially to the guardian ad litem of a minor with the residue to be paid to a particular attorney;[193] 5) an order denying a motion by a personal representative to strike and dismiss a decedent's brother's petition to revoke

187. *Id.*

188. *Montero*, 693 So. 2d at 1024.

189. This section of the article will deal only with civil cases. Criminal cases will be discussed in section XXIV(a).

190. Florida Farm Bureau Cas. Ins. Co. v. Sheaffer, 687 So. 2d 1331, 1335 (Fla. 1st Dist. Ct. App. 1997).

191. Junior v. Reed, 693 So. 2d 586, 588-89 (Fla. 1st Dist. Ct. App. 1997).

192. Miami Heat Ltd. Partnership v. Leahy, 682 So. 2d 198, 201 (Fla. 3d Dist. Ct. App. 1996).

193. Garel and Jacobs, P.A. v. Wick, 683 So. 2d 184, 185-87 (Fla. 3d Dist. Ct. App. 1996).

probate;[194] and 6) an order expressly granting recognition of a foreign judgment.[195]

B. *Orders Not Reviewable by Appeal*

Among the orders found nonreviewable by appeal were: 1) an order setting an evidentiary hearing in a dissolution case on the propriety of a wife's relocation out of state;[196] 2) an order denying a motion seeking relief from an order denying without prejudice a motion for final judgment;[197] 3) an order denying a motion for summary judgment in an action against an insurance company for failure to defend claims and stating that the "duty to defend may well have been triggered" by certain allegations;[198] 4) an order granting a creditor's motion to extend the time for filing a statement of claim in an estate;[199] and 5) an order requiring a plaintiff to have no contact with the defendants, except through counsel, nor to go within a certain distance of a law firm representing the defendant in one case, and that was itself a defendant in a second case brought by the plaintiff.[200]

C. *Orders Reviewable by Certiorari*

Among the orders found reviewable by certiorari were: 1) an order revoking a clerk of the court's reassignment of the trial court clerks and making assignments of the trial court clerks to a circuit judge;[201] 2) an order disqualifying counsel;[202] 3) an order sustaining an objection to a request for admission, as to the amount in controversy, when the requested admission involved the defendant's right to remove the case to federal court;[203] 4) an order requiring a wife to undergo a psychological evaluation;[204] 5) an order denying an objection to accounting and a motion to extend the time for filing

194. *In re* Estate of Pavlick, 697 So. 2d 157, 157 (Fla. 2d Dist. Ct. App. 1996).

195. Chabert v. Bacquié, 694 So. 2d 805, 808 (Fla. 4th Dist. Ct. App. 1997).

196. Shaw v. Shaw, 696 So. 2d 391, 392 (Fla. 4th Dist. Ct. App. 1997).

197. Bell v. Broward County Personnel Review Bd., 691 So. 2d 514, 515 (Fla. 4th Dist. Ct. App. 1997).

198. Liberty Mut. Ins. Co. v. Bethune-Cookman College, Inc., 687 So. 2d 991, 992 (Fla. 5th Dist. Ct. App. 1997).

199. *In re Estate of Lefkowitz*, 679 So. 2d 63, 64 (Fla. 4th Dist. Ct. App. 1996).

200. Lamothe v. Sellars, 695 So. 2d 1259, 1260 (Fla. 4th Dist. Ct. App. 1997).

201. Morse v. Moxley, 691 So. 2d 504, 506 (Fla. 5th Dist. Ct. App. 1997).

202. Laino v. Laino, 686 So. 2d 786, 786 (Fla. 4th Dist. Ct. App. 1997).

203. Sunrise Mills (MLP) Ltd. Partnership v. Adams, 688 So. 2d 464, 465 (Fla. 4th Dist. Ct. App. 1997).

204. Vo v. Bui, 680 So. 2d 601, 601 (Fla. 2d Dist. Ct. App. 1996).

further objections when an allegation was made that the trial court's decision was based on improper ex parte communication;[205] 6) an order dismissing numerous defendants due to a conclusion that they were improperly joined;[206] 7) an order denying a motion to strike a *lis pendens*;[207] 8) an order denying dismissal of a complaint in a medical malpractice action alleging that the plaintiff failed to comply with the statutory pre-suit screening and corroboration requirements;[208] 9) an order awarding costs and attorneys' fees after a voluntary dismissal;[209] and 10) an order returning a child to the custody of her mother in a dependency proceeding.[210]

D. *Orders Not Reviewable by Certiorari*

Among the orders found non-reviewable by certiorari were: 1) an order denying a motion for summary judgment based on collateral estoppel;[211] 2) an order denying a motion to compel a defendant to produce a photograph of an accident scene;[212] 3) an order granting a motion to strike from a wife's witness list, two lawyers in her husband's law firm;[213] 4) an order denying a motion for summary judgment based on the contention that certain claims were preempted by federal law;[214] and 5) an order imposing the sanction of attorneys' fees and costs for discovery violations.[215]

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205. Wilson v. Armstrong, 686 So. 2d 647, 649 (Fla. 1st Dist. Ct. App. 1996).

206. Intercapital Funding Corp. v. Gisclair, 683 So. 2d 530, 533 (Fla. 4th Dist. Ct. App. 1996).

207. Archer v. Archer, 692 So. 2d 1009, 1009 (Fla. 4th Dist. Ct. App. 1997).

208. Citron v. Shell, 689 So. 2d 1288, 1292-93 (Fla. 4th Dist. Ct. App. 1997).

209. Sholkoff v. Boca Raton Community Hosp., Inc., 693 So. 2d 1114, 1115 (Fla. 4th Dist. Ct. App. 1997).

210. *In re* Interest of K.D., 679 So. 2d 39, 39 (Fla. 2d Dist. Ct. App. 1996).

211. South Broward Hosp. Dist. v. Dupont, 683 So. 2d 1135, 1135 (Fla. 4th Dist. Ct. App. 1996).

212. Calfin v. McInnis, 683 So. 2d 1137, 1137 (Fla. 4th Dist. Ct. App. 1996).

213. Young v. Young, 682 So. 2d 678, 678 (Fla. 4th Dist. Ct. App. 1996).

214. Brown & Williamson Tobacco Corp. v. Carter, 680 So. 2d 546, 547 (Fla. 1st Dist. Ct. App. 1996).

215. Leonhardt v. Masters, 679 So. 2d 73, 74 (Fla. 4th Dist. Ct. App. 1996).

VIII. NOTICES OF APPEAL

A. *Designation of Order to be Reviewed*

In *Duran v. John Stalder, Inc.*,[216] the court reviewed, by certiorari, a decision of a circuit court which, acting in its appellate capacity, decided a case in favor of an appellee because an appellant's notice of appeal designated the wrong order to be reviewed.[217] The fifth district indicated that the notice of appeal was timely filed with regard to the reviewable order.[218] The district court indicated that it was clear from the initial brief what order was being appealed from, and that the circuit court's order did not even discuss whether the appellee had been prejudiced by the defective notice.[219] "In the absence of serious prejudice," and in light of the fact that "the defective notice of appeal did not affect the circuit court's jurisdiction," the court concluded that the case "should have been disposed of on the merits" and therefore granted certiorari.[220]

B. *Timeliness*

In *Broward County v. Bell*,[221] the fourth district granted certiorari to quash a circuit court order that dismissed, as untimely, a petition filed in that court challenging an order of the county's personnel board.[222] The record reflected that the petition had been filed in the clerk's office on the last allowable date. However, the clerk's computer recorded it as having been filed the following day because it was filed between four o'clock, "the time at which filing is clocked in as of the next business day, but before five o'clock, when the office closes for the day."[223]

In *Tanner v. State*,[224] an appeal was reinstated, after the case's dismissal, because of an apparently untimely notice of appeal.[225] The appellant's counsel demonstrated that a timely, authorized motion for rehearing of the order under review was filed, but was returned by the clerk

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216. 686 So. 2d 627 (Fla. 5th Dist. Ct. App. 1996).
217. *Id.* at 628.
218. *Id.*
219. *Id.* at 629.
220. *Id.* at 628-29.
221. 681 So. 2d 918 (Fla. 4th Dist. Ct. App. 1996).
222. *Id.* at 918.
223. *Id.*
224. 22 Fla. L. Weekly D1471 (Fla. 4th Dist. Ct. App. June 18, 1997).
225. *Id.* at D1471.

because it had the wrong case number.[226] The fourth district concluded that such an error "is no basis for refusing to accept the paper for filing"[227] nor does it "authorize the clerk to return the paper to the lawyer who filed it."[228] Thus, the court held that the motion was deemed filed as of the date it was originally received.[229] Therefore, the motion served to delay rendition of the order to be reviewed, making the appeal timely.[230] The court suggested that in such situations, "[a] simple telephone call [from the clerk] to the filing lawyer could sort out any discrepancies in file numbers, or other errors in the caption, that inhibit the clerk's ability to file the paper in the proper place."[231]

IX. SUPERSEDEAS BOND

In *Shvarts v. O'Connor*,[232] the appellees instituted an independent appeal from an order determining the amount of a supersedeas bond rather than seeking review, by motion, under rule 9.310(f) of the *Florida Rules of Appellate Procedure*.[233] The appellate court consolidated the two cases, affirmed the underlying appeal, and therefore, found the appeal challenging the bond to be moot.[234] The court noted that if review of the order setting the bond had been sought by motion, the matter would have been disposed of months earlier.[235] By taking a separate appeal, however, the matter "followed the lengthy course of all full appeals."[236]

X. MOTIONS FOR EXTENSIONS OF TIME

In *Merritt v. Promo Graphics, Inc.*,[237] the appellant's counsel filed a motion for extension of time which failed to contain a certificate indicating counsel had consulted with opposing counsel, as required by rule 9.300(a) of the *Florida Rules of Appellate Procedure*.[238] The denial of this motion

226. *Id.*
227. *Id.* at D1472.
228. *Id.*
229. *Tanner*, 22 Fla. L. Weekly at D1471.
230. *Id.*
231. *Id.* at D1472.
232. 692 So. 2d 960 (Fla. 4th Dist. Ct. App. 1997).
233. *Id.* at 960.
234. *Id.*
235. *Id.*
236. *Id.*
237. 679 So. 2d 1277 (Fla. 5th Dist. Ct. App. 1996).
238. *Id.* at 1277.

because of this failure, triggered a series of pleadings setting forth conflicting versions of the facts relating to what efforts were made to comply with the rule, some of which involved contact between secretaries or other support personnel. Stating that it relies on "representations made to us by lawyers, not their support staff,"[239] the court discussed the rule's requirement:

> An allegation that a lawyer has complied with rule 9.300 by relying on a staff person's statement that he or she spoke to another lawyer's secretary is simply not adequate to comply with the personal obligation imposed on lawyers by the rules. Rule 9.300 requires some actual contact with opposing counsel. That was missing here. Apparently, neither the lawyer nor the paralegal spoke with opposing counsel. We realize that, in a rush, it may be difficult to contact opposing counsel, or opposing counsel may not return calls. In such case it would be far better to allege that an attempt to contact was made, but failed after due diligence. Further, to avoid this kind of triple-hearsay buck passing between staff persons, illustrated by this case, some sort of acknowledgement of the contact should be made. The modern era of technology provides creative lawyers with a feast of such opportunities, including e-mail, voice mail, fax machines, and other devices. These can be employed to confirm oral communications and avoid misunderstandings, if written confirmation cannot be timely obtained.[240]

XI. TRANSCRIPTS

In *Weise v. Repa Film International, Inc.*,[241] a plaintiff claiming on appeal that a remark in closing argument by the defendant's counsel constituted fundamental error did not provide the court with any part of the transcript, other than the defense counsel's closing argument.[242] Pointing out that appellants must demonstrate that errors are not harmless, the court indicated that when appellants argue that the alleged prejudice from a remark in closing argument resulted in an adverse verdict, the liability portion of the transcript will generally be necessary for the court to determine whether a new trial is warranted.[243]

239. *Id.* at 1279.
240. *Id.*
241. 683 So. 2d 1128 (Fla. 4th Dist. Ct. App. 1996).
242. *Id.* at 1129.
243. *Id.*

The court, in *Estrada v. Unemployment Appeals Commission*,[244] concluded that it was unable to review a claim that a decision was not supported by competent substantial evidence because of the appellant's failure to provide a transcript of the hearing conducted by the appeals referee.[245] The court took this approach despite the fact that after the briefs in the case were submitted, the appellant filed a motion with the court in which he requested permission to supplement the record with the transcript.[246] The court recognized that rule 9.200(f) of the *Florida Rules of Appellate Procedure* states that "'[n]o proceeding shall be determined, because of an incomplete record, until an opportunity to supplement the record has been given.'"[247] The court declined to apply the rule, however, because the day after he filed his notice of appeal, the appellant had been advised by the Unemployment Appeals Commission "that a transcript would be prepared for him at no cost upon his request and that, if he wished to have a transcript prepared, it was his responsibility to make the request within ten days of the appeal."[248] Since the appellant made no such request, the court concluded that he had waived his opportunity to obtain the transcript.[249]

XII. STATEMENTS OF PROCEEDINGS

No record was made in *Warnken v. Warnken*[250] of a trial court hearing and thus, the appellant sought to rely on a "state of proceedings" attached to his brief.[251] The court noted that although under rule 9.200(b)(4) of the *Florida Rules of Appellate Procedure* an appellant can utilize a statement of proceedings, such a statement must be submitted to and approved by the trial court.[252] Since the appellant in the case failed to comply with that requirement, the court concluded that it was unable to fully review the matters about which he complained.[253]

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244. 693 So. 2d 1091 (Fla. 5th Dist. Ct. App. 1997).
245. *Id.* at 1092.
246. *Id.*
247. *Id.* (quoting FLA. R. APP. P. 9.200(f)).
248. *Id.*
249. *Estrada*, 693 So. 2d at 1092.
250. 689 So. 2d 1123 (Fla. 5th Dist. Ct. App. 1997).
251. *Id.* at 1123.
252. *Id.*
253. *Id.*

XIII. BRIEFS

A. *Page Limitations*

In *Johnson v. Singletary*,[254] a criminal defendant sentenced to death sought habeas corpus. The defendant's petition alleged, among many other claims, that he received ineffective assistance of counsel on direct appeal because the Supreme Court of Florida refused to accept his ninety-four page brief, limiting him to seventy pages instead.[255] In denying habeas corpus, the court noted that the appeal had "occurred before [the court] had adopted a policy of allowing briefs of up to one hundred pages in capital cases as a matter of course. An 'exception' to the fifty page-limit prescribed by rule was, therefore, still an 'exception' to the rule."[256] Finding that the twenty page enlargement that was granted was not inadequate, and pointing to the fact that the full seventy pages allowed were not used, the court found that no prejudice had occurred and that the issue was without merit.[257]

B. References to Matters Outside the Record

In *Ullah v. State*,[258] the appellant's appointed counsel, pursuant to the dictates of *Anders v. California*,[259] filed a brief indicating that he could "discern no reversible error in proceedings below."[260] In response, the State filed an answer brief which included a preliminary statement referring to the case as "another" *Anders* appeal, listing 112 other pending appeals in which *Anders* briefs had been filed during the calendar year, and suggesting "that these cases should be submitted to an '*Anders* panel' for determination of the common question of whether the appeal is wholly frivolous or requires adversarial briefing" on the merits.[261]

The court struck the State's brief,[262] finding that the other pending cases were matters outside the record and thus, not proper for consideration in the case under review.[263] The State's suggestion that "all *Anders* cases present the common issue of whether the appeal is wholly frivolous," the court said

254. 695 So. 2d 263 (Fla. 1996).
255. *Id.* at 264.
256. *Id.* at 266.
257. *Id.*
258. 679 So. 2d 1242 (Fla. 1st Dist. Ct. App. 1996).
259. 386 U.S. 738 (1967).
260. *Ullah*, 679 So. 2d at 1243.
261. *Id.* at 1244.
262. *Id.* at 1245.
263. *Id.* at 1244.

"ignores the fact that our review in this appeal is limited to the record of proceedings as they occurred in this case," and "is akin to suggesting that reference to any other pending appeal in a brief before this court is necessarily appropriate because all appeals, at their heart, present the common question of whether reversible error occurred in the proceedings below."[264]

XIV. NOTICES OF SUPPLEMENTAL AUTHORITY

On the afternoon prior to oral argument in *Brown & Williamson Tobacco Corp. v. Young*,[265] the appellee filed a notice of supplemental authority to which was attached copies of five cases, the most recent of which was decided in 1989.[266] The first district struck the notice,[267] and stated in its opinion that "the filing of last-minute notices of supplemental authority is occurring in this court with increasing frequency."[268] The court published its ruling to quote and reiterate the advice it had set forth in *Ogden Allied Services v. Panesso*.[269] In that case, the court had indicated that rule 9.210(g) of the *Florida Rules of Appellate Procedure*,[270] which allowed for the filing of notices of supplemental authority, was "not intended to permit a litigant to submit what amounts to an additional brief, under the guise of 'supplemental authorities'; [sic] or to ambush an opponent by deliberately withholding significant case citations until just before oral argument."[271] The quoted portion of *Ogden Allied Services* indicated that filing such last minute notices "places the opposing party at a disadvantage," forces that party to "divert attention from preparation for the argument," and frequently, requires that party "at oral argument to request an opportunity to respond in writing" to the notice.[272]

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264. *Id.*

265. 690 So. 2d 1377 (Fla. 1st Dist. Ct. App. 1997).

266. *Id.* at 1380.

267. *Id.*

268. *Id.*

269. *Id.* (referencing Ogden Allied Servs. v. Panesso, 619 So. 2d 1023 (Fla. 1st Dist. Ct. App. 1993)). For a discussion of the decision in *Odgen Allied Services*, see *1993 Survey, supra* note 1, at 25.

270. The rule referred to in *Odgen Allied Services* was subsequently renumbered as rule 9.225 of the *Florida Rules of Appellate Procedure*. See sections II (K) and (L) of this article.

271. *Brown & Williamson Tobacco, Corp.*, 690 So. 2d at 1380 (quoting Odgen Allied Servs. v. Panesso, 619 So. 2d 1023 (Fla. 1st Dist. Ct. App. 1993)).

272. *Id.*

XV. DISMISSAL

In *Leonard v. First Union National Bank of Florida*,[273] the third district reviewed an order of the circuit court, acting in its appellate capacity, that had dismissed an appeal because of the late filing of the initial appellate brief.[274] The appellant filed the brief three days after receipt of the denial of the last of several motions for extension of time.[275] Finding "dismissal to be too harsh a sanction for the minimal time involved," the district court granted certiorari and quashed the dismissal order.[276]

An appeal was taken in *Robbie v. Robbie*[277] from an order requiring the appellant to pay attorney's fees and costs to his ex-wife's attorney.[278] The fourth district entered an order requiring the appellant to pay the amounts due within twenty days and indicated that the failure to do so would result in the dismissal of the appeal.[279] When the appellant did not make payment, the appeal was dismissed.[280]

XVI. REINSTATEMENT OF APPEALS

In *Fletcher v. State*,[281] the appeal was dismissed because of the defendant's escape from custody.[282] Six months later, the defendant's public defender filed a motion to reinstate the appeal because the defendant had been returned to custody.[283] The second district published its denial of the motion because of what it termed the "disturbing argument" presented by the public defender, which suggested that the defendant had "not 'thwarted the orderly effective administration of justice' because the 'immense appellate backlog' render[ed] his escape a harmless footnote in the process."[284] The court pointed out that "no 'immense appellate backlog'" existed in the court, but that one "exists and has existed for years in the Office of the Public

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273. 685 So. 2d 98 (Fla. 3d Dist. Ct. App. 1997).
274. *Id.* at 98.
275. *Id.*
276. *Id.*
277. 683 So. 2d 1131 (Fla. 4th Dist. Ct. App. 1996).
278. *Id.* at 1132.
279. *Id.*
280. *Id.* (citing Gazil v. Gazil, 343 So. 2d 595, 597 (Fla. 1977)).
281. 696 So. 2d 794 (Fla. 2d Dist. Ct. App. 1997).
282. *Id.* at 795.
283. *Id.*
284. *Id.*

Defender of the Tenth Judicial Circuit, which is responsible for handling appeals for indigent defendants throughout the Second District."[285]

The court noted that "[m]any believe that the legislature's chronic underfunding of the public defender's office has contributed significantly to this problem," but indicated that it was "unable to state with certainty, however, that underfunding is the sole cause leading to the backlog in the office of the Public Defender of the Tenth Judicial Circuit because that office appears to be the only appellate public defender in Florida with such a severe problem."[286] The court went on to say that "[r]egardless of the causes, the public defender's office continues to fail to serve many of its clients in a timely fashion" and that when the court "relieves that office of its statutory obligations in many cases," the costs of those appeals are "frequently shifted to taxpayers in counties who have no right to vote for or against the person who holds the Office of Public Defender in the Tenth Judicial Circuit."[287]

Turning to the facts, the court noted that the public defender had spent time and resources on the case long after the appeal would have been dismissed had the court known of the defendant's escape.[288] Those resources, the court said, "should have been employed for the benefit of a prisoner lawfully awaiting the resolution of his or her appeal."[289]

The court concluded by stating: "Admittedly, the public defender's office would cease to have a backlog if many of its clients successfully escaped. This court has been willing to consider a wide array of potential solutions to the public defender's backlog. Suffice it to say, escape is not among them."[290]

XVII. MOOTNESS

In *Archer v. State*,[291] an appeal was taken from an order that involuntarily committed the appellant for a period of no more than six months.[292] Although that period had long elapsed and the appellant might have been released, the first district found that the appeal was not moot.[293] Relying on the principle that "an otherwise moot case will not be dismissed

285. *Id.* at 795-96.
286. *Fletcher*, 696 So. 2d at 796.
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. 681 So. 2d 296 (Fla. 1st Dist. Ct. App. 1996).
292. *Id.* at 297.
293. *Id.*

if collateral legal consequences that affect the rights of a party flow from the issue to be determined," the court found that because an order of commitment may serve as the predicate for continued involuntary placement orders, it would address the substance of the appeal.[294]

The third district rejected a mootness claim in *Consortion Trading International, Ltd. v. Lowrance*,[295] in which the defendants in a foreclosure action paid the final judgment and satisfied the mortgage.[296] The plaintiff argued that had "the defendants wanted to preserve their right to appeal, they should have obtained a stay of execution by posting a supersedeas bond, instead of paying the final judgment."[297] The court pointed out that "'[t]he majority rule is that if a defendant who has suffered the entry of an adverse money judgment against him voluntarily pays the judgment, the case is moot, but if payment is involuntary, it does not result in a waiver of the right to appeal.'"[298] Because in the case under review the defendants paid the judgment to avoid the public sale of their property, the court considered the payment to be involuntary and therefore, the appeal not to be moot.[299]

XVIII. LAW OF THE CASE

In *State v. Owen*,[300] a criminal defendant faced a retrial after the Supreme Court of Florida reversed his conviction due to its conclusion that the defendant's confession was improperly admitted into evidence.[301] After the reversal but before the retrial, the United States Supreme Court issued a decision that demonstrated that the confession was admissible as a matter of federal law.[302] The trial court refused a request by the state to reconsider the admissibility of the confession in light of the new precedent.[303] The fourth district denied the state's petition for certiorari review of the trial court's order.[304] The district court, however, certified the question of whether the principles announced by the United States Supreme Court applied to the

294. *Id.* at 297–98 (quoting Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992)).

295. 682 So. 2d 221 (Fla. 3d Dist. Ct. App. 1996).

296. *Id.* at 222.

297. *Id.*

298. *Id.* (quoting Ronette Communications Corp. v. Lopez, 475 So. 2d 1360, 1360 (Fla. 5th Dist. Ct. App. 1985)).

299. *Id.* at 223.

300. 696 So. 2d 715 (Fla. 1997).

301. Owen v. State, 560 So. 2d 207 (Fla. 1990), *cert. denied*, 498 U.S. 855 (1990).

302. *Id.* (citing Davis v. United States, 512 U.S. 452, 452 (1994)).

303. *Owen*, 696 So. 2d at 717.

304. State v. Owen, 654 So. 2d 200 (Fla. 4th DCA 1995). For a discussion of the district court's decision in *Owen*, see *1993 Survey*, *supra* note 1, at 33–34.

admissibility of confessions in Florida courts.[305] After determining that the Florida Constitution placed no greater restrictions on law enforcement than those mandated under federal law, and that confessions of the sort with which the case was concerned were admissible in Florida,[306] the Supreme Court of Florida faced the question of how the particular confession before the court should be treated.[307]

The court recognized that "[g]enerally, under the doctrine of the law of the case, 'all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts.'"[308] The court went on to note, however, that this "doctrine is not an absolute mandate"[309] and that the court "has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become law of the case."[310] Since "[a]n intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case"[311] and since, under the facts of the case, reliance on the prior decision "would result in manifest injustice to the people of this state because it would perpetuate a rule which [the court] determined to be an undue restriction of legitimate law enforcement activity," the court quashed the district court's decision and remanded with directions to grant the State's petition for certiorari.[312]

However, the court refused the State's request that it reinstate the convictions on the ground that a retrial is unnecessary in light of the court's decision on the admissibility of the confession.[313] The court stated that its prior decision, which reversed the convictions, was a "final decision that was no longer subject to rehearing."[314] The court also indicated that with respect

305. *Owen*, 560 So. 2d at 202.

306. *Owen*, 696 So. 2d at 718–20.

307. *Id.* at 720.

308. *Id.* (quoting Brunner Enters., Inc. v. Department of Revenue, 452 So. 2d 550, 552 (Fla. 1984)).

309. *Id.* (citing Strazzaella v. Hendrick, 177 So. 2d 1, 3 (Fla. 1965)).

310. *Owen*, 696 So. 2d at 720 (citing Preston v. State, 444 So. 2d 939 (Fla. 1984), *vacated*, 564 So. 2d 120 (Fla. 1990)).

311. *Id.* (citing Brunner Enters., Inc. v. Department of Revenue, 452 So. 2d 550, 552 (Fla. 1984); Strazulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965)).

312. *Id.*

313. *Id.*

314. *Id.*

to the issue in question, the defendant stood in the same position as any other defendant who had been charged but not yet tried.[315]

An approach similar to that taken in *Owen* was utilized by the third district in *Schindler Elevator Corp. v. Viera*.[316] There, while the case was pending on remand after a reversal, the court decided another case en banc in a manner that overruled the principle that had formed the basis for the reversal.[317] The court concluded that "this is one of the exceptional cases in which we should reconsider the law of the case because to do otherwise would work a manifest injustice."[318] The court therefore affirmed a trial court order granting a new trial based on the en banc decision.[319]

Other cases in which courts found it appropriate to depart from the law of the case included: 1) *Trotter v. State*,[320] in which the court stated that "[a]n intervening act of the legislature refining a portion of Florida's death penalty statute may be sufficiently exceptional to warrant" such an approach;[321] 2) *Zolache v. State*,[322] in which the court found that reliance on a previous erroneous ruling would require the defendant to serve a sentence in excess of that legally authorized;[323] and 3) *Horton v. State*,[324] in which a previously argued claim that a county judge was improperly assigned to the circuit court was proven to be meritorious by a subsequent decision of the Supreme Court of Florida.[325]

XIX. AFFIRMANCES WITHOUT OPINION

In *Lowe Investment Corp. v. Clemente*,[326] the court denied a motion for rehearing in a case that had been affirmed without opinion.[327] In doing so, the court discussed some of the reasons why cases are decided in such a manner:

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315. *Owen*, 696 So. 2d at 720.
316. 693 So. 2d 1106 (Fla. 3d Dist. Ct. App. 1997).
317. *Id.* at 1108.
318. *Id.*
319. *Id.* at 1109.
320. 690 So. 2d 1234 (Fla. 1996).
321. *Id.* at 1237.
322. 687 So. 2d 298 (Fla. 4th Dist. Ct. App. 1997).
323. *Id.* at 300.
324. 682 So. 2d 647 (Fla. 1st Dist. Ct. App. 1996).
325. *Id.* at 648.
326. 685 So. 2d 84 (Fla. 2d Dist. Ct. App. 1996).
327. *Id.* at 84. In doing so, the court expressed some thoughts about the nature of motions for rehearing. *Id.* at 85. That portion of the opinion is discussed in section XX of this article.

> There are many reasons this court decides that a written opinion is unnecessary when affirming a trial court. Usually, the panel of judges considering the appeal agrees that no error occurred. It may be that the claim of error involves the discretion of the trial judge and the panel concludes that such was not abused. Or, the perceived error was harmless. The considerations involved in preparing written opinions were addressed in *Whipple*: "We write opinions in all reversals and remands and, as noted, in affirmances where we believe an opinion will make a substantial contribution to the law, or where necessary to disclose conflict or certify questions." 431 So. 2d at 1015-16. In addition, this court is frequently presented with claims of error which were not properly preserved at trial. Such a claim of error does not warrant a written opinion because the law in this area is clear. This is the reason why this appeal was affirmed—trial counsel failed to properly preserve the error.[328]

XX. REHEARING

In *Goter v. Brown*,[329] the appellees presented in support of a motion for rehearing a missing second page to an agreement that was at issue in the case.[330] The page had not been previously presented to either the trial or the appellate court.[331] In its opinion on rehearing, the fourth district indicated that had the page been presented to the trial court and accepted as the controlling document, it would have ruled in the appellees' favor.[332] In denying rehearing, the court stated it had "little hesitancy in concluding that this is all too late to change our initial decision."[333] The court expressed the belief that it would be "starkly unfair to allow a party who has fought the battle below and on appeal on one evidentiary basis, to be given leave to fight it on appellate rehearing on quite a different one."[334] The court also stated that even if there was no unfairness present, "it hardly needs belaboring by us that none of this relates to something *we* overlooked or misapprehended, the standards for rehearing on appeal."[335]

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328. *Lowe Inv. Corp.*, 685 So. 2d at 85. (quoting Whipple v. State, 431 So. 2d 1011, 1015-16 (Fla. 2d Dist. Ct. App. 1983)).

329. 682 So. 2d 155 (Fla. 4th Dist. Ct. App. 1996).

330. *Id.* at 157.

331. *Id.*

332. *Id.*

333. *Id.* at 158.

334. *Goter*, 682 So. 2d at 158.

335. *Id.*

Noting that much of the motion was in open defiance of the prohibition against argument in such motions, the court also took the opportunity to discuss the proper nature of rehearing requests.[336] The court stated that "[m]otions for rehearing are strictly limited to calling our attention—*without argument*—to something we have obviously overlooked or misapprehended."[337] Such a motion, the court continued, "is not a vehicle for counsel or the party to continue its attempts at advocacy"[338] but should be "demonstrative only—i.e. merely point to the overlooked or misunderstood fact or circumstance."[339] The court concluded: "If we want additional argument, we know how to say so."[340]

The second district, in *Lowe Investment Corp. v. Clemente*, also discussed rehearing motions.[341] There, the court affirmed the case without a written opinion, and the appellant filed a motion for rehearing that asked the court to reconsider one of the points previously briefed and argued.[342]

The court denied the motion, finding that it did not contain a point of law or fact that the court overlooked or misapprehended,[343] but used its opinion doing so to express some thoughts regarding rehearing:

> Motions for rehearing directed to this court are overused, if not abused. *See Whipple v. State,* 431 So. 2d 1011 (Fla. 2d DCA 1983). The motions seem to spring from a belief among some attorneys that this court failed to understand the arguments, ignored those same arguments, or worse, failed to consider the arguments. None of these beliefs are valid, but certain advocates seem to believe one of the above is the only explanation for their loss on appeal. Some losing advocates, as here, apparently believe that a request for rehearing has a better chance for success if demanded in the strongest of terms. *See Patton v. State Dep't. of Health and Rehabilitative Servs.,* 597 So. 2d 302, 303 (Fla. 2d DCA 1991) ("We also understand that human emotions occasionally cause such motions to be written with stronger

336. *Id.*
337. *Id.*
338. *Id.*
339. *Goter,* 682 So. 2d at 158.
340. *Id.*
341. 685 So. 2d 84, 85 (Fla. 2d Dist. Ct. App. 1996).
342. *Id.* at 85.
343. *Id.* at 86.

rhetoric than is truly necessary or effective.") This is especially true in cases where the court has not issued a written opinion.[344]

XXI. MANDATE

About four and a half months after issuance of the mandate following the affirmance of an order, but within the same term of court as the affirmance, the appellants in *Peter v. Seapine Corp.*[345] filed a motion to recall mandate.[346] The term of court expired before the appellate court ruled, and the appellees contended that such expiration deprived the court of jurisdiction to grant the motion.[347] The fourth district disagreed, finding that the timely filing of the motion within the same term of court as the challenged judgment and mandate vested the court with jurisdiction.[348]

XXII. ATTORNEYS' FEES

In *U.S.B. Acquisition Co., v. Stamm*,[349] a trial court on remand after an affirmance on a main appeal and a reversal on a cross appeal[350] entered two separate final orders awarding attorney's fees, one in favor of an attorney who had handled the appeal and one in favor of the individual appellees for their trial court attorney's fees.[351] The payor of the fees filed a single notice of appeal directed to both orders[352] and the appellate attorney filed a motion under rule 9.400(c) of the *Florida Rules of Appellate Procedure* to review the appellate fee award.[353] The fourth district entered an order granting review of the award of appellate fees and, upon such review, affirmed the order.[354] The payor moved for rehearing or clarification of that order, as well as for consolidation with its pending appeal of the trial court fees, arguing that the court's affirmance of the award had the effect of cutting off the payor's separate appeal of the appellate fees award.[355]

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344. *Id.* at 85. The court went on to discuss some of the reasons why cases might be affirmed without opinion. *Id.* See section XIX of this article.

345. 678 So. 2d 508 (Fla. 1st Dist. Ct. App. 1996).

346. *Id.* at 508.

347. *Id.*

348. *Id.* at 509.

349. 695 So. 2d 373 (Fla. 4th Dist. Ct. App. 1997).

350. U.S.B. Acquisition Co., v. Stamm, 660 So. 2d 1075 (Fla. 4th Dist. Ct. App. 1995).

351. *U.S.B. Acquisition Co.*, 695 So. 2d at 373.

352. *Id.* at 374.

353. *Id.*

354. *Id.*

355. *Id.*

Relying on *Magner v. Merrill Lynch Realty/MCK Inc.*,[356] and *Starcher v. Starcher*,[357] the payor argued that it properly appealed the appellate fees award, as opposed to seeking review by motion in the appellate court under rule 9.400(c).[358] The court disagreed, stating that the principal holding of *Magner* and *Starcher* "is that review of awards of appellate attorney's fees after remand is strictly under rule 9.400(c), rather than by separate appeal."[359] The court went on to indicate:

> Properly read, *Starcher* and *Magner* recognize a very limited exception to the command of rule 9.400(c) that applies only when the same parties are involved in a single judgment after remand that encompasses both an appellate fees issue and another issue, and one party seeks review of both issues at the same time.[360]

This exception to the rule, the court continued, "does not apply when there are multiple and discretely different judgments entered, and the appellate fees issue involves a different party than the other issue determined on remand."[361]

The court also took the opportunity to discuss the purpose of rule 9.400(c):

> There is, after all, an important policy behind rule 9.400(c). Review by simple motion is far more expeditious and less costly than review by plenary appeal. It is obviously the intent of the rule to speed up what may very well be the last court determination in a law suit, especially where it occurs after all trials and appeals have been had, and the issue is the amount of the appellate lawyer's fee. Society has an interest at the point in expediting the closing judicial determination so that at long last finality and the end of litigation are at hand. That is the singular mission of rule 9.400(c).[362]

Also recognizing that review of appellate fee orders should be by motion under Rule 9.400(c) was the decision in *Pellar v. Granger Asphalt*

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356. 585 So. 2d 1040 (Fla. 4th Dist. Ct. App. 1991).
357. 430 So. 2d 991 (Fla. 4th Dist. Ct. App. 1983).
358. *U.S.B. Acquisition Co.*, 695 So. 2d at 374.
359. *Id.* at 375.
360. *Id.*
361. *Id.*
362. *Id.*

Paving, Inc..[363] There, an appeal was taken from such an order.[364] The first district applied the principle set forth in rule 9.040(c) of the *Florida Rules of Appellate Procedure*, which provides that "'[i]f a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought.'"[365] The court then treated the notice of appeal as a motion for review of the order at issue.[366] The court also discussed the nature of review by motion under rule 9.400(c):

> Rule 9.400(c) enables the parties to pursue a one-step method of review that is more practical than an appeal and much less expensive. The procedure does not require the payment of a filing fee or the preparation of a formal record. Testimony and other evidence before the trial court can be presented in an appendix to the motion filed in the appellate court.[367]

XXIII. COSTS

In *Lone Star Industries, Inc. v. Liberty Mutual Insurance Co.*,[368] the court reviewed an order granting costs that were incurred by virtue of the fact that a party's claims department was required to pay a nonrefundable sum of money to its surety department as a premium for a supersedeas bond.[369] The third district noted that the term "cost" is not defined by rule 9.400 of the *Florida Rules of Appellate Procedure*,[370] which deals with appellate costs. The court therefore looked to the term's "plain and ordinary meaning"[371] and pointed out that costs have been defined to mean "'[a]n amount paid or required in payment for a purchase; a price; . . . [t]o cause to lose, suffer or sacrifice . . . .'"[372]

Given this meaning, the court found that "[t]he term taxable 'costs' as utilized in rule 9.400 then presupposes that the prevailing party on appeal has sustained a loss of funds or incurred an expense by virtue of the appellate process for which it is entitled to reimbursement by the losing

363. 687 So. 2d 282 (Fla. 1st Dist. Ct. App. 1997).
364. *Id.* at 283.
365. *Id.* at 284 (quoting FLA. R. APP. P. 9.040(c)).
366. *Id.*
367. *Id.*
368. 688 So. 2d 950 (Fla. 3d Dist. Ct. App. 1997).
369. *Id.* at 951.
370. *Id.* at 952.
371. *Id.*
372. *Id.* (quoting AMERICAN HERITAGE DICTIONARY 424 (3d ed. 1992)).

party."[373] Under the facts of the case, the court concluded that the party had incurred no expenditure for bond premiums.[374] "The fact that one of its department's budgets had to be debited for the benefit of another"[375] did not alter this conclusion because both of those departments were "part and parcel of one company which is the only prevailing party on appeal."[376]

In *Vella v. Vella*,[377] the fourth district denied a motion for costs without prejudice to refile the same motion in the trial court.[378] The court wrote an opinion on the matter because it had seen a large number of similar motions and because of the need to address some inappropriate language in the court's prior opinion in *Anderson v. State*.[379]

The court noted that rule 9.400(a) of the *Florida Rules of Appellate Procedure* "expressly provides that the authority to tax costs in favor of the prevailing party [on appeal] is vested in the trial court."[380] In *Anderson*, however, the court had stated that "'[w]ithout permission from the appellate court, the trial court cannot award appellate costs.'"[381] Clarifying the matter in *Vella*, the court stated that "[w]hat had become a headnote should now be considered a dead note."[382]

The *Vella* court went on to point out that the decision in *Anderson* also quoted accurately from *Boyer v. Boyer*,[383] a portion of that opinion which indicates that rule 9.400(a) provides for taxation of costs on motions heard within thirty days after issuance of the mandate.[384] In so doing, the *Vella* court said, "we perpetuated an error. The word 'heard' should have been 'served.'"[385]

The second district, in *Florida Power & Light Co. v. Polackwich*,[386] addressed the question of which party should pay for transcripts when both

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373. *Lone Star Industries*, 688 So. 2d at 952.

374. *Id.*

375. *Id.*

376. *Id.*

377. 691 So. 2d 612 (Fla. 4th Dist. Ct. App. 1997) (en banc).

378. *Id.* at 612.

379. *Id.* (citing Anderson v. State, 632 So. 2d 132, 133 (Fla. 4th Dist. Ct. App. 1994)).

380. *Id.* (emphasis omitted).

381. *Id.* (quoting Anderson v. State, 632 So. 2d 132, 133 (Fla. 4th Dist. Ct. App. 1994)).

382. *Vella*, 691 So. 2d at 612.

383. 588 So. 2d 615 (Fla. 5th Dist. Ct. App. 1991).

384. *Vella*, 691 So. 2d at 612 (citing Boyer v. Boyer, 588 So. 2d 615, 617 (Fla. 5th Dist. Ct. App. 1991), *superseded by statute as stated in* Swartz v. Swartz, 691 So. 2d 2 (Fla. 3d Dist. Ct. App. 1996)).

385. *Id.*

386. 22 Fla. L. Weekly D626 (2d Dist. Ct. App. March 5, 1997).

parties sought review and both prevailed on significant issues.[387] The case reached the court on review of the trial court's denial of the appellant's motion to tax costs, including a $37,500 cost for preparation of the record, which included a lengthy trial transcript.[388]

The court noted that "[w]hen both parties appeal and the cases are consolidated, one party must be selected by the court to be the appellant . . . [and that the selected party] has the initial responsibility to obtain an adequate record on appeal."[389] Frequently, the court pointed out, the decision as to which party will be designated as the appellant "is based on nothing more than the fact that one notice of appeal was the first to reach the court."[390] Thus, the court indicated that "[t]here would be little sense in a rule that forced that party to bear all the costs when both parties wished to challenge the judgment and both parties prevailed on significant issues."[391] The court, therefore, reversed the order denying costs and remanded with directions that the trial court "use its discretion to apportion the costs between the parties so that each party pays its fair share."[392] The court stated that "[f]airness suggests that the cost of that portion of the record needed by both parties should be shared equally . . . [and that if there were portions] that were necessary for only one of the appeals, the party who lost that appeal should probably bear [those] costs."[393]

XXIV. APPEALS IN CRIMINAL CASES

A. *Orders Reviewable in Criminal Cases*

1. Orders Reviewable by Appeal

Among the orders found to be reviewable by appeal were orders: 1) imposing an unauthorized sentence of incarceration suspended in its entirely on the condition that the defendant successfully complete community control;[394] 2) withholding adjudication of guilt, but not placing a defendant

387. *Id.* at D626.
388. *Id.*
389. *Id.* at D627 (citing FLA. R. APP. P. 9.200(a)(2)(e)).
390. *Id.*
391. *Polackwich*, 22 Fla. L. Weekly at D627.
392. *Id.*
393. *Id.*
394. State v. McEachern, 22 Fla. L. Weekly D323, D324 (Fla. 5th Dist. Ct. App. Jan. 31, 1997).

on probation;[395] 3) striking a restitution requirement from a probation order;[396] and 4) denying a petition for a writ of prohibition alleging the denial of a speedy trial in county court.[397]

2. Orders Not Reviewable by Appeal

Among the orders found not to be reviewable on appeal were orders: 1) denying a motion for postconviction relief as to seven grounds, when the trial court also granted a belated appeal from the challenged conviction;[398] and 2) denying a motion for case reassignment.[399]

3. Orders Reviewable by Certiorari

Among the orders found to be reviewable by certiorari were orders: 1) requiring disclosure of a confidential informant's identity;[400] 2) suppressing evidence of a defendant's medical treatment records for a sexually transmitted disease;[401] 3) dismissing an appeal to a circuit court on the ground that the order in question was not appealable;[402] 4) determining the admissibility of hearsay evidence;[403] and 5) excluding similar fact evidence.[404]

B. *State Appeals after Jeopardy Attaches*

In *State v. Livingston*,[405] the defendant filed pretrial motions to suppress certain evidence and statements. Pursuant to an agreement by all concerned,

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395. Waite v. City of Fort Lauderdale, 681 So. 2d 901, 902 (Fla. 4th Dist. Ct. App. 1996).

396. State v. Hitchmon, 678 So. 2d 460, 461 (Fla. 3d Dist. Ct. App. 1996).

397. Loftis v. State, 682 So. 2d 632, 633 (Fla. 5th Dist. Ct. App. 1996).

398. Gordon v. State, 688 So. 2d 995, 995 (Fla. 5th Dist. Ct. App. 1997).

399. Ortiz v. State, 689 So. 2d 353, 353 (Fla. 2d Dist. Ct. App. 1997).

400. State v. Roberts, 686 So. 2d 722, 722 (Fla. 2d Dist. Ct. App. 1997).

401. State v. Issac, 696 So. 2d 813, 813 (Fla. 2d Dist. Ct. App. 1997).

402. Johnson v. State, 683 So. 2d 607, 608 (Fla. 4th Dist. Ct. App. 1996); Garrepy v. State, 679 So. 2d 353, 353-54 (Fla. 5th Dist. Ct. App. 1996), *cause dismissed*, 687 So. 2d 1303 (Fla. 1997).

403. State v. Skolar, 692 So. 2d 309, 309 (Fla. 5th Dist. Ct. App 1997).

404. State v. Dennis, 696 So. 2d 848, 848 (Fla. 2d Dist. Ct. App. 1997).

405. 681 So. 2d 762 (Fla. 2d Dist. Ct. App. 1996). Although not reflected in the Southern Reporter, the opinion in *Livingston* was issued upon the appellee's motion for rehearing. State v. Livingston, 21 Fla. L. Weekly D2041 (Fla. 2d Dist. Ct. App. Sept. 11, 1996). It was substituted for a prior opinion that had been reported at 21 Fla. L. Weekly

the motions were not heard until after a jury was selected and sworn.[406] The trial court granted the motions and subsequently granted a mistrial, despite the fact that the defendant neither moved for nor consented to the mistrial.[407] The State appealed from the suppression orders and the second district reversed.[408] Rather than remand for further proceedings, however, the court remanded with directions to discharge the defendant.[409] The court pointed out that, in most cases, suppression motions can be easily disposed of prior to trial.[410] "[W]hen the judge rules at trial to suppress evidence," however, the court continued, "the state is foreclosed from appealing that decision unless the defendant moves for a mistrial, consents to one, or by his conduct causes one."[411] Since "jeopardy [had] attached when the jury was sworn, and since none of these circumstances [were] present in the record, [the court concluded that] the state lost its right to prosecute the [defendant] any further [once the mistrial was declared]."[412]

C. *Review of Sentences*

The Supreme Court of Florida, in *Franquiz v. State*,[413] clarified the remedy that appellate courts should apply when trial courts fail to provide written reasons for downward departures from the sentencing guidelines upon revocation of probation or community control in instances in which the initial placement on probation or community control was a downward departure based on a plea agreement.[414] The court concluded that cases in which the sentence was imposed prior to the date of the *Franquiz* decision (October 10, 1996),[415] should be "remanded and the trial court given the option of a downward departure revocation sentence with proper written reasons for the departure."[416] Sentences imposed after the date of the opinion are to be "remand[ed] with direction that the defendant be allowed

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D1237 (Fla. 2d Dist. Ct. App. May 22, 1996), and it contains extensive changes from the earlier opinion. For a discussion of the initial opinion that was withdrawn by the court, see *1996 Survey*, *supra* note 1, at 52–53.

406. *Livingston*, 681 So. 2d at 762.
407. *Id.* at 764.
408. *Id.* at 765.
409. *Id.*
410. *Id.* at 764–65.
411. *Livingston*, 681 So. 2d at 765.
412. *Id.*
413. 682 So. 2d 536 (Fla. 1996).
414. *Id.* at 537.
415. *Id.* at 536.
416. *Id.* at 538.

to withdraw a plea made conditioned upon the departure sentence or be sentenced within the guidelines."[417]

D. *Death Penalty Cases*

In *State v. Fourth District Court of Appeal*,[418] the Supreme Court of Florida dealt with a petition for mandamus that sought to require the Fourth District Court of Appeal to transfer to the supreme court a prohibition petition filed by a death row inmate.[419] The inmate had filed a motion for postconviction relief in the trial court and moved to disqualify the judge.[420] After the motion was denied, the inmate sought prohibition in the fourth district.[421] In granting the State's mandamus request and ordering the case transferred, the supreme court held that "in addition to our appellate jurisdiction over sentences of death, we have exclusive jurisdiction to review all types of collateral proceedings in death penalty cases."[422] The court limited its holding, however, by noting that its jurisdiction in this regard "does not include cases in which the death penalty is sought but not yet imposed . . . or cases in which we have vacated both the conviction and sentence of death and remanded for a new trial."[423]

XXV. APPEALS IN JUVENILE CASES

In *I.T. v. State*,[424] the Supreme Court of Florida dealt with the question of how appellate courts should dispose of cases in which they find that the evidence is insufficient with regard to the offense for which the juvenile was adjudicated, but is sufficient with regard to a permissive lesser included offense.[425] The court found that section 924.34 of the *Florida Statutes*, which requires appellate courts dealing with similar circumstances in criminal cases to direct the trial court to enter judgment for the lesser offense, applies to juvenile delinquency cases.[426] The court went on to reject a contention that the statutory provision should be read to apply only to

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417. *Id.*
418. 697 So. 2d 70 (Fla. 1997).
419. *Id.* at 70.
420. *Id.*
421. *Id.*
422. *Id.* at 71.
423. *Fourth Dist. Court of Appeal*, 697 So. 2d at 71.
424. 694 So. 2d 720 (Fla. 1997).
425. *Id.* at 721.
426. *Id.* at 722 (citing FLA. STAT. § 924.34 (1995)).

necessarily lesser included offenses.[427] Thus, although the adjudications under review in *I.T.* were ordered vacated due to the wording of the charging document,[428] the case demonstrates that in the absence of such unique circumstances, appellate courts finding sufficient evidence as to either a necessary or permissive lesser included offense should remand the case for the entry of an adjudication of delinquency for that lesser offense.

The Fifth District Court of Appeal in *Z.F. v. State,*[429] dealt with a situation in which the parents of a juvenile who had been convicted in the court below were not indigent and decided not to proceed with an appeal.[430] The court noted that section 27.52 (2)(d), *Florida Statutes*, provides:

> A nonindigent parent or legal guardian of a dependent person under the age of 18 years *shall* furnish such person with the necessary legal services and costs incident to a delinquency proceeding in which the person has a right to legal counsel under the Constitution of the United States or the Constitution of the State of Florida.[431]

The court conceded that the statutory provision includes appeals and permits the court to appoint either the Public Defender or a private attorney to appeal and to assess costs of up to $1,250 against the parents.[432] However, the court focused on the question of whether an appeal constitutes "necessary legal services."[433] The court asked "Who should determine what is a necessary legal service?"[434] The court noted that parents may feel, after hearing the testimony, that the child would benefit more by admitting a mistake and getting on with his or her life or that the matter is so unimportant to the child's future that the family would benefit more from using the money it cost to appeal for other purposes.[435]

The court recognized, however, that a conflict could exist if, for example, the parents are the victims of the child's crime, or that the child could be innocent and that [436]under such circumstances it would seem inappropriate to deny the child an appeal, especially if the youth may have a

427. *Id.* at 724.
428. *Id.*
429. 683 So. 2d 1084 (Fla. 5th Dist. Ct. App. 1996).
430. *Id.* at 1084.
431. *Id.* at 1084 (citing FLA. STAT. § 27.52(2)(d) (1995)).
432. *Id.* at 1085.
433. *Id.*
434. *Z.F.*, 683 So. 2d at 1085.
435. *Id.*
436. *Id.*

legitimate appeal on an important issue that may dramatically affect his or her future, but have parents who choose not to appeal solely for financial considerations.[437]

Balancing these factors, the court set forth the appropriate procedure for trial courts to follow in such situations:

> We submit that when the court announces the defendant's right to appeal (or as soon thereafter as practical so that if a guardian ad litem is appointed, he or she can make a recommendation within the 30-day appeal period), it should determine whether the juvenile is entitled to the appointment of an attorney under the statute. If it appears that the parents are nonindigent, the court should solicit the views of the trial attorney and the parents as to whether an appeal would constitute "necessary legal services." If the court has any doubt, it should remove the parents as the decision maker on this issue and appoint a guardian ad litem in their place. If the court determines that an appeal is a "necessary legal service," then an attorney should be appointed for that purpose. If the court finds that an appeal, under the circumstances of the case, is not necessary, then it should decline to appoint an attorney. In that event, no Notice of Appeal will be automatically filed. If an attorney files an appeal without proper appointment, then a recovery of a fee, if a fee is expected, is the attorney's responsibility.[438]

XXVI. APPEALS IN ADMINISTRATIVE LAW CASES

In *Hill v. Division of Retirement*,[439] the first district wrote an opinion "to describe the essential attributes of reviewable final orders entered under the Administrative Procedure Act."[440] The court stated:

> Under Florida Rule of Appellate Procedure 9.190(b), review of final agency action begins with the filing of a notice of appeal, in accordance with Florida Rule of Appellate Procedure 9.110(c), instead of with the filing of a petition for review of a preliminary,

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437. *Id.*
438. *Id.*
439. 687 So. 2d 1376 (Fla. 1st Dist. Ct. App. 1997).
440. *Id.* at 1377.

> procedural, or intermediate order, in accordance with Florida Rule of Appellate Procedure 9.100(b) and (c).[441]

"Review of final agency action taken under the Administrative Procedure Act is, moreover, a matter of right,"[442] the court continued, while "[o]n the other hand, immediate review of a preliminary, procedural, or intermediate agency action or ruling is available only 'if review of the final agency decision would not provide an adequate remedy.'"[443]

The court went on to note that: 1) final orders in proceedings affecting "'substantial interests must be in writing and include findings of fact, if any, and conclusions of law separately stated[;]'"[444] and 2) that an agency has not rendered a final order until the order is "'filed with the agency clerk.'"[445]

The court indicated that "[f]inal agency action may take the form of an order whether 'affirmative, negative, injunctive, or declaratory' in tenor"[446] and that "[a] final agency order may articulate jurisdictional boundaries; require a party to cease or desist; grant, suspend, or revoke a license; impose an administrative penalty; deny an evidentiary hearing; or deny substantive relief of various kinds."[447] Additionally, the court recognized that "[a] final order may or may not dismiss a petition for hearing or some other pleading."[448]

The court summed up its discussion by concluding that the finality of an order "depends on whether it has brought the administrative adjudicative process to a close."[449]

In *W.T. Holding, Inc. v. State*,[450] the fourth district found that the reissuance of a final order by an administrative agency is appropriate when a party does not receive a copy of the order until after the time for appeal has elapsed.[451]

The first district, in *Libby Investigations v. Department of State*,[452] rejected an argument that an appellate court cannot reverse an agency's decision to increase the penalty suggested in a hearing officer's

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441. *Id.*
442. *Id.*
443. *Id.* (quoting FLA. STAT. § 120.68(1) (Supp. 1996)).
444. *Hill*, 687 So. 2d at 1377 (quoting FLA. STAT. § 120.569(2)(j) (Supp. 1996)).
445. *Id.* (quoting FLA. STAT. § 120.52(7) (Supp. 1996)).
446. *Id.* (quoting FLA. STAT. § 120.52(7) (Supp. 1996)).
447. *Id.*
448. *Id.*
449. *Hill*, 687 So. 2d at 1377.
450. 682 So. 2d 1224 (Fla. 4th Dist. Ct. App. 1996).
451. *Id.* at 1225.
452. 685 So. 2d 69 (Fla. 1st Dist. Ct. App. 1996).

recommended order as long as the penalty is within the limits permitted by the applicable statute.[453]

XXVII. APPEALS IN WORKERS' COMPENSATION CASES

In *Hastings v. Demming*,[454] the Supreme Court of Florida answered a certified question by indicating that "[n]onfinal orders denying summary judgment on a claim of workers' compensation immunity are not appealable unless the trial court's order specifically states that, as a matter of law, such a defense is not available to a party."[455] The court stated that "[i]n those limited cases, the party is precluded from having a jury decide whether a plaintiff's remedy is limited to workers' compensation benefits and, therefore, an appeal is proper."[456] In other than those limited cases, the court noted that "the denial of the summary judgment may be based on a factual dispute and the party is still likely able to present an immunity defense to the jury."[457] The court also pointed out that prior to its decision, it had amended the appellate rules to address this matter,[458] and that "the new rule makes clear that the district courts have no jurisdiction to hear an appeal of the nonfinal order."[459]

The change in the appellate rules discussed in *Hastings* was held in *Stucki v. Hopkins*,[460] to apply retroactively to summary judgments entered prior to its effective date.[461]

In *Betancourt v. Sears Roebuck & Co.*,[462] the first district set forth the guidelines for determining whether the court has jurisdiction to consider an appeal in cases in which a judge of compensation claims ("JCC") fails to rule on a claim that is ripe for adjudication and that is properly before the JCC.[463] The court found that "[i]n cases wherein a JCC expressly reserves jurisdiction on a fully tried issue that is ripe for adjudication, such reservation renders the order nonfinal and nonappealable."[464] Therefore,

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453. *Id.* at 71.
454. 694 So. 2d 718 (Fla. 1997).
455. *Id.* at 720.
456. *Id.*
457. *Id.*
458. See section II (E) of this article.
459. *Hastings*, 694 So. 2d at 720.
460. 691 So. 2d 560 (Fla. 5th Dist. Ct. App. 1997).
461. *Id.* at 562.
462. 693 So. 2d 680 (Fla. 1st Dist. Ct. App. 1997).
463. *Id.* at 681.
464. *Id.* at 682.

appeals from such orders will be dismissed for lack of jurisdiction.[465] On the other hand, the court stated:

> In cases in which the JCC fails to enter a ruling on a fully tried issue that is ripe for adjudication and does not reserve jurisdiction on the issue, this court will consider the absence of a ruling to constitute a denial of the claim only for jurisdictional purposes, and the order will, therefore, be deemed final and appealable.[466]

In considering the merits of such cases, the "court will continue to consider the JCC's failure to rule reversible error based on the JCC's noncompliance with the duty to adjudicate all issues that are ripe for adjudication."[467] The court went on to indicate that "in regard to cases involving claims that are ripe for adjudication at the time of the hearing, for which claimant failed to produce evidence or obtain a ruling, this court will consider the claim abandoned and the issue waived, and will consider the order final and appealable."[468] As to such matters, "[a]ny subsequent claim for the same benefits will be barred by the principle of *res judicata*."[469]

In reaching its decision, the court "recognize[d] that motions for rehearing in workers' compensation cases do not toll the time to appeal, unlike those in other classes of cases."[470] Noting that it is "of the firm conviction that much of the uncertainty that attends orders which fail to address mature claims could be remedied by the adoption of an amended rehearing rule that would allow the filing of a timely motion to toll the time for appeal,"[471] the court "therefore commend[ed] to the Workers' Compensation Rules Committee of The Florida Bar the adoption of an amended rehearing rule for the purpose of achieving the above stated goal."[472]

XXVIII. APPEALS IN FAMILY LAW CASES

The fifth district in *In re J.A.*,[473] joined the third and fourth districts[474] in holding that court-appointed counsel in appeals from orders terminating

465. *Id.*
466. *Id.*
467. *Betancourt*, 693 So. 2d at 682.
468. *Id.* at 683.
469. *Id.*
470. *Id.*
471. *Id.*
472. *Betancourt*, 693 So. 2d at 683.
473. 693 So. 2d 723 (Fla. 5th Dist. Ct. App. 1997).

parental rights, who find there to exist no issues of arguable merit, are not required to follow the procedure set forth in *Anders v. California*[475] for use in similar circumstances by court-appointed counsel involved in criminal cases.[476]

XXIX. EXTRAORDINARY WRITS

A. *Prohibition*

The fifth district, in *Rollins v. Baker*,[477] granted a petition for a writ of prohibition that sought the disqualification of a trial judge in a pending case.[478] Although the court found prohibition warranted as to the merits of the petitioner's claim, it also noted the existence of an additional ground for disqualification,[479] the fact the judge had "filed a pro se response to the court's order to show cause" in which he went beyond stating his position as to why the petition was legally insufficient,[480] and commented on facts not alleged in the petition or the underlying motion to disqualify, tried to explain his actions, and attempted to correct or explain allegations in the petition.[481] The court suggested that when judges are "confronted with the dilemma of whether or not to respond to a show cause order in these types of cases[,][482] [p]erhaps the best course of action is to request the attorney general's office to file a response on behalf of the judge limited to the legal sufficiency of the facts set forth by the petitioner."[483]

In *Ellis v. Henning*,[484] a trial judge was represented by the attorney general's office in a prohibition proceeding, but the ultimate result was the same as the result in *Rollins*.[485] In *Ellis*, the fourth district concluded that it was compelled to grant a writ of prohibition "because the responses, filed on behalf of the trial judge by an assistant attorney general in each of the

474. *See* Jimenez v. Department of Health and Rehabilitative Servs., 669 So. 2d 340, 341 (Fla. 3d Dist. Ct. App. 1996); Ostrum v. Department of Health and Rehabilitative Servs., 663 So. 2d 1359, 1361 (Fla. 4th Dist. Ct. App. 1995). For a discussion of the opinions in *Jimenez* and *Ostrum*, see *1996 Survey*, *supra* note 1, at 59-61.

475. 386 U.S. 738 (1967).

476. *J.A.*, 693 So. 2d at 724.

477. 683 So. 2d 1138 (Fla. 5th Dist. Ct. App. 1996).

478. *Id.* at 1139.

479. *Id.* at 1139-40.

480. *Id.* at 1140.

481. *Id.*

482. *Rollins*, 683 So. 2d at 1140.

483. *Id.*

484. 678 So. 2d 825 (Fla. 4th Dist. Ct. App. 1996).

485. *Id.* at 827.

consolidated cases, impermissibly took issue with the accuracy of the allegations in the petition.'"[486]

The court "recognize[d] that the trial judge may have merely referred this case to the attorney general's office for a response as judges frequently do[,]"[487] and indicated that "[i]t is thus also the responsibility of the office of the attorney general as the judge's representative not to file a response on the judge's behalf, which, as in this case, requires the judge's disqualification."[488] The court reiterated a warning it had expressed in *Fabber v. Wessel*,[489] "that it is the safer practice 'for the judge to remain silent and let the adversarial party supply the response.'"[490]

The *Ellis* court granted the trial judge's motion for clarification to address the concern "that a failure to respond could result in the issuance of a writ of prohibition if a respondent judge follows [the court's] advice and remains silent."[491] The court pointed out that "[t]his concern arises only in those cases where the adversarial party—for whatever reason—also does not respond[,]"[492] and that "[i]n practical terms, there may be those times that both parties desire that another judge hear the case or where an adversarial party simply fails to respond."[493]

Also, the court on clarification discussed its caution to the assistant attorney general, indicating that its "concern was that a response, which contests the accuracy of the facts alleged by a petitioner, impermissibly places the trial judge in an adversarial posture."[494] The court noted that, "[o]n the other hand, nothing prevents the assistant attorney general, on behalf of the trial judge, from limiting a response to the legal sufficiency of the facts set forth by the petitioner."[495] The court went on to state that "[t]he respondent simply must avoid the temptation to dispute the facts if a response is filed"[496] and that "[i]n the overwhelming majority of the cases, the office of the attorney general has struck the necessary balance."[497]

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486. *Id.*
487. *Id.*
488. *Id.* at 827-28.
489. 604 So. 2d 533, 534 (Fla. 4th Dist. Ct. App. 1992).
490. *Ellis*, 678 So. 2d at 828 (quoting Fabber v. Wessel, 604 So. 2d 533, 534 (Fla. 4th Dist. Ct. App. 1992)).
491. *Id.*
492. *Id.*
493. *Id.*
494. *Id.*
495. *Ellis*, 678 So. 2d at 828.
496. *Id.*
497. *Id.*

B. *The Effect on Appeals of Prior Denials of Prohibition*

In *Hobbs v. State*,[498] a criminal defendant appealed to the fourth district from his conviction asserting that he was improperly denied discharge on speedy trial grounds.[499] The defendant had raised the speedy trial issue in a pretrial petition for a writ of prohibition which the fourth district had denied without opinion.[500] The State asserted that the denial of prohibition constituted the law of the case and that relitigation of the issue on appeal was therefore barred.[501]

The court noted that in *Petrullo v. Petrullo*,[502] it had stated that a "denial of a writ without opinion cannot be the law of the case."[503] The court recognized that *Petrullo* dealt with a petition for prohibition, but pointed out that the only authority it had cited for its statement was *Bing v. A.G. Edwards & Sons, Inc.*,[504] a case that involved the denial without opinion of a petition for certiorari.[505]

The court then discussed the difference between the two extraordinary writs by noting that the vast majority of petitions for certiorari are dismissed because the petitioner has an adequate remedy on appeal and that no matter how clear the error of a trial judge may be, an appellate court has no jurisdiction so long as an adequate remedy existed on appeal.[506] The court continued, "[t]here is no similar jurisdictional hurdle, separate and apart from the propriety of the action of the trial court, when an appellate court reviews a petition for writ of prohibition."[507]

The court went on to cite the specially concurring opinion of Judge Anstead[508] in *DeGennaro v. Janie Dean Chevrolet, Inc.*,[509] which asserted that unless an order on opinion denying prohibition indicates to the contrary, such a ruling should constitute the law of the case because "[j]udicial

498. 689 So. 2d 1249 (Fla. 4th Dist. Ct. App. 1997) (en banc).
499. *Id.* at 1249.
500. *Id.*
501. *Id.*
502. 604 So. 2d 536 (Fla. 4th Dist. Ct. App. 1992).
503. *Id.* at 538.
504. 498 So. 2d 1279 (Fla. 4th Dist. Ct. App. 1987).
505. *Hobbs*, 689 So. 2d at 1250.
506. *Id.*
507. *Id.*
508. Judge Anstead is currently a Supreme Court of Florida Justice.
509. 600 So. 2d 44 (Fla. 4th Dist. Ct. App. 1992).

resources, already heavily taxed, are hardly efficiently allocated when they are used to twice review the same issue."[510]

Opting to follow the approach adopted by the third district in *Obanion v. State*,[511] the *Hobbs* court concluded that "[h]enceforth a denial of a petition for writ of prohibition will be a ruling on the merits, unless we state otherwise."[512]

The court adopted this approach despite recognizing that the supreme court, in *Barwick v. State*,[513] "although approving the procedure which we adopt from *Obanion*, adopted the opposite approach for itself, announcing that if a denial of a petition for writ of prohibition is intended to foreclose further review on direct appeal, the order will state that it is with prejudice."[514]

The court did not, however, discuss its previous decision in *Thomason v. State*,[515] in which Judge Farmer, who joined in the unanimous en banc *Hobbs* decision, wrote a dissenting opinion that expressed disagreement with the *Obanion* approach.[516]

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510. *Hobbs*, 689 So. 2d at 1250 (quoting DeGennaro v. Janie Dean Chevrolet, Inc., 600 So. 2d 44, 45 (Fla. 4th Dist. Ct. App. 1992) (Anstead, J., specially concurring)).

511. 496 So. 2d 977 (Fla. 3d Dist. Ct. App. 1986).

512. *Hobbs*, 689 So. 2d at 1251.

513. 660 So. 2d 685 (Fla. 1995), *cert. denied*, 116 S. Ct. 823 (1996). For a discussion of the opinion in *Barwick*, see *1996 Survey*, *supra* note 1, at 40-42.

514. *Hobbs*, 689 So. 2d at 1250, n.2.

515. 594 So. 2d 310 (Fla. 4th Dist. Ct. App. 1992), *quashed on other grounds*, 620 So. 2d 1234 (Fla. 1993).

516. In *Thomason*, the defendant, who was appealing from an order withholding adjudication and placing him on probation, raised a double jeopardy claim that he had previously asserted in a petition for prohibition that had been denied without opinion. *Id.* The court affirmed without opinion, but Judge Farmer, who wrote primarily to dissent on the merits, discussed the question of whether consideration of the double jeopardy claim was proper in light of the prior petition. *Id.* at 312 (Farmer, J., dissenting). He noted that such consideration was appropriate because prohibition is an extraordinarily prerogative writ that is sometimes denied for "good reasons having nothing to do with the underlying merits of [a petitioner's] position . . . ." *Id.* at 312 n.2. He recognized that his view was contrary to *Obanion*, but stated that the fourth district had never adopted the *Obanion* approach and that he hoped it never would, "at least as long as prohibition is deemed a matter of mere grace." *Id.* Although disagreeing with Judge Farmer on the merits of the case, it appears that the other members of the panel agreed with him on the jurisdictional issue because the case was affirmed, rather than dismissed, *Thomason*, 594 So. 2d at 310, because Judge Stone wrote a specially concurring opinion that set forth the reasons why he felt the case should be affirmed on the merits, and because the court, on rehearing, certified a question that dealt only with the merits of the case. *Id.* at 318.

C. *Mandamus*

In *Van Meter v. Singletary*,[517] an inmate sought review of a circuit court order dismissing his petition for writ of mandamus, which had challenged a loss of gain time imposed upon a finding that the inmate had committed a disciplinary infraction.[518] The petition had been dismissed because it was filed some six months after his administrative appeal was affirmed[519] and because section 95.11(8), of the *Florida Statutes*, states that any court action challenging prisoner disciplinary proceedings must be commenced within thirty days after final disposition of the proceeding.[520] Finding the statutory provision to be an unconstitutional violation of the doctrine of separation of powers,[521] the first district reversed the order of dismissal.[522] Relying on a long line of precedent from the Supreme Court of Florida, the first district held that the Florida Constitution vested in the courts the complete power to issue extraordinary writs and "that the legislature was prohibited from interfering with that power in any way."[523] The court recognized that rule 1.630(c) of the *Florida Rules of Civil Procedure* provides that requests for extraordinary writs "other than common law certiorari must be filed within the time provided by law,"[524] but was "unwilling to presume that the supreme court," in enacting the rule "intended so cavalierly to surrender to the legislature a power which it had zealously guarded for so long."[525] The court thus interpreted the rule "to refer to the judicially developed law regarding the time within which such relief must be sought—i.e., the concept of laches."[526]

D. *Certiorari*

In *Stilson v. Allstate Insurance Co.*,[527] the second district denied a petition for a writ of certiorari that sought review of a circuit court appellate decision, "reluctantly conclud[ing] that [it was] faced with an error that [it]

517. 682 So. 2d 1162 (Fla. 1st Dist. Ct. App. 1996), *review granted*, 696 So. 2d 342 (Fla. 1997).
518. *Id.* at 1163.
519. *Id.*
520. *Id.*
521. *Id.* at 1164.
522. *Van Meter*, 682 So. 2d at 1165.
523. *Id.* at 1164.
524. *Id.* at 1164-65.
525. *Id.* at 1165.
526. *Id.*
527. 692 So. 2d 979 (Fla. 2d Dist. Ct. App. 1997).

lack[ed] the discretion to correct."[528] The court found that the county court had improperly granted summary judgment, but declined to disturb the affirmance without written opinion by the circuit court.[529] The district court's determination was based on the limited standard of review that applies when district courts review decisions of circuit courts acting in their appellate capacity.[530]

The court noted that "certiorari should not be used as a vehicle for a second appeal in a typical case tried in county court."[531] Rather, the court continued, district courts must be guided by decisions of the supreme court[532] that "[i]n essence . . . cautioned the district courts to be prudent and deliberate when deciding to exercise this extraordinary power, but not so wary as to deprive litigants and the public of essential justice."[533]

The second district recognized that "the departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error"[534] and that district courts should use their discretion to correct an error "only when there has been a violation of [a] clearly established principle of law resulting in a miscarriage of justice."[535] The court stated that the error in the case before it was "[a]t worst"[536] a misapplication of the correct law and "not sufficient by itself to be a miscarriage of justice."[537]

The court noted that there may never be clearly established principles of law governing a wide range of county court issues because "[i]t is difficult for the law to evolve in unreported decisions issued in circuit court appeals."[538]Therefore, the court admitted to "a great temptation in a case like this one to announce a 'miscarriage of justice' simply to provide precedent where precedent is needed."[539] However, the court resisted the temptation because it did not interpret *Heggs* as giving it that degree of discretion and

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528. *Id.* at 983.

529. *Id.* at 980.

530. *Id.* at 982.

531. *Id.*

532. *Stilson*, 692 So. 2d at 982 (citing Haines City Community Dev. v. Heggs, 658 So. 2d 523 (Fla. 1995); Combs v. State, 436 So. 2d 93 (Fla. 1983)). For a discussion of the decision in *Heggs*, see *1995: Survey, supra* note 1, at 31-2.

533. *Stilson*, 692 So. 2d at 982.

534. *Id.*

535. *Id.* (quoting Haines City Community Dev. v. Heggs, 658 So. 2d 523, 528 (Fla. 1995) (quoting Combs v. State, 436 So. 2d 93, 95-96 (Fla. 1983))).

536. *Id.*

537. *Id.*

538. *Stilson*, 692 So. 2d at 982.

539. *Id.* at 983.

because "[s]uch an interpretation would invite certiorari review of a large number of appellate decisions issued by circuit courts."[540]

As a possible solution to the problem, the court pointed to section 34.017(1) of the *Florida Statutes*,[541] which permits county court's to certify to district courts of appeal questions that may have statewide application and that either are of "great public importance" or will "affect the uniform administration of justice."[542] The second district indicated that "[c]ounty court judges should understand that this provision can be used to create precedent needed for the orderly administration of justice in their courts,"[543] and that the district court "rel[ies] upon them to screen their cases so that the district courts may receive an occasional appeal rather than numerous petitions for certiorari."[544]

The first district in *Department of Highway Safety & Motor Vehicles v. Smith*,[545] reviewed a circuit court order that had granted certiorari and reversed an order suspending a driver's license.[546] The appendix to the petition in the circuit court did not include a conformed copy of the order to be reviewed.[547] The first district found that this fact alone demonstrated that the circuit court could not have applied the correct law, and that it could not have determined whether the findings of the order under review were supported by competent substantial evidence.[548] Relying both on those conclusions and a finding that the circuit court reweighed the evidence in its ruling on the merits, the district court granted certiorari and quashed the circuit court's order.[549]

E. *Habeas Corpus*

The Supreme Court of Florida, in *Alachua Regional Juvenile Detention Center v. T.O.*,[550] dealt with a situation in which a juvenile was detained pursuant to a detention order issued by a circuit court located within the territorial jurisdiction of the fifth district.[551] The place of detention,

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540. *Id.*
541. FLA. STAT. § 34.017(1) (1995).
542. *Stilson*, 692 So. 2d at 983 (quoting FLA. STAT. § 34.017(1) (1995)).
543. *Id.*
544. *Id.*
545. 687 So. 2d 30 (Fla. 1st Dist. Ct. App. 1997).
546. *Id.* at 31.
547. *Id.* at 32.
548. *Id.*
549. *Id.* at 33.
550. 684 So. 2d 814 (Fla. 1996) [hereinafter *Alachua II*].
551. *Id.* at 815.

however, was located within the territorial jurisdiction of the first district.[552] After the juvenile's motion for release was denied by the circuit court, he filed a petition for a writ of habeas corpus in the first district.[553] In granting relief, the first district certified to the supreme court as a question of great public importance the question of whether, in light of the fact that the order detaining the juvenile was entered by a circuit court located in another district, it was the proper court to consider the petition.[554]

The court said that "it appears that a district court of appeal does not have the constitutional power to issue a writ directed to a person outside the district court's territorial jurisdiction."[555] Further, "the proper respondent in a habeas corpus petition is the party that has actual custody and is in a position to physically produce the petitioner."[556] The supreme court concluded that "the Fifth District Court could not have issued the writ."[557]

The Supreme Court of Florida went on to consider the question of whether the first district, "not having supervisory or appellate jurisdiction over the . . . court" that issued the detention order, "had the authority to review its detention order."[558] In concluding that the first district did have such jurisdiction, the supreme court pointed out certain restrictions apply under such circumstances.[559] When a court entertaining a habeas corpus petition does not have supervisory or appellate jurisdiction over the court that entered the order or other process under challenge, the supreme court concluded that "the scope of the reviewing court's inquiry is limited to whether the court that entered the order was without jurisdiction to do so or whether the order is void or illegal."[560] The supreme court further found that "[t]he reviewing court may not discharge the detainee if the detention order is merely defective, irregular, or insufficient in form or substance."[561]

XXX. A LOOK TO THE FUTURE

In May of 1997, the Supreme Court of Florida Judicial Management Council ("JMC") Committee on Appellate Court Workload & Jurisdiction

552. *Id.*
553. *Id.*
554. T.O. v. Alachua Reg'l Juvenile Detention Ctr., 668 So. 2d 243, 245 (Fla. 1st Dist. Ct. App. 1996), *decision approved*, 684 So. 2d 814 (Fla. 1996) [hereinafter *Alachua I*].
555. *Alachua II*, 684 So. 2d at 816.
556. *Id.*
557. *Id.*
558. *Id.*
559. *Id.*
560. *Alachua II*, 684 So. 2d at 816.
561. *Id.*

produced a draft report that may well impact on the future of appellate practice in Florida. "The JMC asked the committee to review the jurisdiction, workload, resources, and case management practices of the district courts of appeal, and make recommendations on alternative approaches that allow the courts to meet anticipated workload levels."[562]

The committee summarized its recommendations as follows:

> Adopt a new appellate court workload standard of 225 dispositions after submission on the merits per judge (committee voted 8 in favor, 2 opposed);
>
> In combination with the above, adopt an additional appellate court workload standard of 385 case filings per judge (committee voted 6 in favor, 2 opposed, 2 abstaining);
>
> This committee should develop, for court approval, a uniform method of counting cases prior to, or concurrent with, efforts to develop performance-based budgeting (committee voted 9 in favor, 0 opposed, 0 abstaining);
>
> Redistribute administrative appeals and workers' compensation cases to the district courts of appeal in which the matters arose, with the exception of broad rule-making activities by state agencies (committee voted 8 in favor, 0 opposed, 2 abstaining);
>
> Move the 8th Judicial Circuit from the 1st District Court of Appeal to the 5th District Court of Appeal and move the 20th Judicial Circuit from the 2nd District Court of Appeal to the 3rd District Court of Appeal (committee voted 7 in favor, 2 opposed, 0 abstaining);
>
> Balancing district court of appeal workload by combining the recommendations concerning redistributing administrative appeals and workers' compensation jurisdiction with geographic changes (committee voted 9 in favor, 1 opposed, 0 abstaining);
>
> Do not create an additional district court of appeal at this time but revisit this issue in five years (committee voted 5 in favor, 4 opposed, 0 abstaining);
>
> Do not create specialized appellate courts (committee voted 7 in favor, 0 opposed, 3 abstaining);

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562. Report of the JMC Committee on Appellate Court Workload & Jurisdiction, May, 1997, at 1.

> Subject-matter divisions should remain an option available to each district court of appeal to establish as it sees fit (committed voted 7 in favor, 1 opposed, 1 abstaining);
>
> Severely limit the availability of appeals from non-final orders (committee voted 6 in favor, 3 opposed, 1 abstaining);
>
> The use of senior judges as additional appellate resources, not just as replacements in individual cases, should be encouraged and funded (committee voted 9 in favor, 0 opposed, 0 abstaining); and
>
> The use of central staff attorneys should be within the discretion of each district court of appeal, but they are not the alternative to additional judges (committee voted 9 in favor, 0 opposed, 0 abstaining).[563]

The Florida Courts Technology Commission is presently considering recommending to the supreme court the adoption of a vendor neutral citation system that would include the sequential numbering and paragraph numbering of opinions from the supreme court and the district courts of appeal. Clearly, the adoption of such a system would significantly affect all Florida lawyers, particularly appellate practitioners.

Of course, the courts over the coming year will provide answers to many of the questions raised by the cases discussed in this article. These answers, as they frequently do, will likely generate new questions. These questions, and others, will continue to provide the large number of court decisions that shape the field of appellate practice.

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563. Report at 1-2.