Nova Law Review

Volume 20, *Issue* 1 1995 *Article* 2

Appellate Practice

Anthony C. Musto*

*

Appellate Practice: 1995 Survey of Florida Law

Anthony C. Musto*

TABLE OF CONTENTS

* Assistant County Attorney, Broward County, Florida, and chief of the appellate section. B.G.S., 1972, University of Miami; J.D., 1975, Catholic University of America. Mr. Musto is a board certified appellate attorney, and is the Chair of the Appellate Practice and Advocacy Section of The Florida Bar and a past chair of the Florida Criminal Procedure Rules Committee and the Florida Rules of Judicial Administration Committee.

I. INTRODUCTION

This article will discuss recent developments in the field of appellate practice in Florida. Although the article is focused primarily on cases decided between July 1, 1994, and June 30, 1995, 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 will deal with substantive areas only with regard to appellate considerations unique to 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. AMENDMENTS TO THE *FLORIDA RULES OF APPELLATE PROCEDURE*

The Supreme Court of Florida adopted three amendments to the *Florida Rules of Appellate Procedure*. Two of those amendments will be discussed in this section of this article, while the third will be discussed in section III (B), *infra*.[1]

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

The court amended rule 9.600(c) to provide that when an appeal is taken in a dissolution of marriage action, the lower tribunal shall retain jurisdiction to enter and enforce orders awarding *"temporary attorneys' fees and costs reasonably necessary to prosecute or defend an appeal."*[2] The 1994 Committee Note indicates that the rule was amended "to conform to and implement section 61.16(1), *Florida Statutes* (1994 Supp.), authorizing the lower tribunal to award temporary appellate attorneys' fees, suit money,

1. The amendment not discussed here arose from the fact that the First District Court of Appeal has split into two autonomous divisions of court. That split is discussed in section III (A) of this article. Discussion of the amendment, which currently impacts only on the First District, has thus been deferred until after discussion of the split.

2. Amendments to Florida Rules of Appellate Procedure 9.140 and 9.600, 657 So. 2d 897, 898 (Fla. 1995).

and costs."[3] The amendment also makes some changes in the wording of the rule with regard to attorney's fees and costs for services rendered in the lower tribunal, but it continues to allow the lower tribunal to retain jurisdiction to enter and enforce orders relating to such matters, as well as "orders awarding separate maintenance, child support, alimony . . . or other awards necessary to protect the welfare and rights of any party pending appeal."[4]

B. *Rule 9.800: Uniform Citation System*

Rule 9.800(n) was amended to include a sentence that states: "When referring to specific material within a Florida court's opinion, pinpoint citation to the page of the Southern Reporter where that material occurs is optional, although preferred."[5] This amendment is the result of problems that have arisen from the increasing use of electronic databases that do not utilize the page numbering system employed by the West Publishing Company in the *Southern Reporter*.[6]

III. COURT DIVISIONS

A. *The First District*

In *In re Court Divisions*,[7] the First District Court of Appeal[8] became the first Florida district court to create two autonomous divisions of court. The Administrative Division, to which five judges were initially assigned,[9] will consider administrative appeals arising under specifically enumerated provisions of the *Florida Statutes*,[10] and original proceedings arising out

3. *Id.* at 898 app. A (citing the 1994 committee note to FLA. R. APP. P. 9.600).

4. FLA. R. APP. P. 9.600(c).

5. *In re* Florida Rule of Appellate Procedure 9.800(n), 20 Fla. L. Weekly S524 (October 12, 1995).

6. It is interesting to note that the amendment refers only to "material within a Florida court's opinion." *Id.* Presumably, the use of such limiting language means that the rule does require specific page citations to West, or other official, reporters when references are made to material within opinions of courts from other jurisdictions.

7. 648 So. 2d 761 (Fla. 1st Dist. Ct. App. 1994).

8. Florida's district courts of appeal will hereinafter be referred to as the First District, the Second District, the Third District, the Fourth District and the Fifth District.

9. *In re* Assignment of Judges to Divisions, 648 So. 2d 764, 764 (Fla. 1st Dist. Ct. App. 1994).

10. The specific provisions are set forth in *Court Divisions*, 648 So. 2d at 761-62.

of or involving proceedings under those provisions.[11] The General Division, to which the court's other ten judges were assigned,[12] will consider all matters not assigned to the Administrative Division.[13]

B. *En Banc Determination*

Subsequent to the division of the First District, the supreme court amended Florida Rule of Appellate Procedure 9.331 by creating a new subparagraph (b).[14] The new provision states that if a district court chooses to sit in subject matter divisions, "en banc determinations shall be limited to those regular active judges within the division to which the case is assigned, unless the chief judge determines that the case involves matters of general application and that en banc determination should be made by all regular active judges."[15] It goes on to provide that "in the absence of such a determination by the chief judge, the full court may determine by an affirmative vote of three-fifths of the active judges that the case involves matters that should be heard and decided by the full court . . . ."[16]

The supreme court adopted this rule amendment by a 4-3 vote.[17] In a dissenting opinion, in which Justices Shaw and Kogan concurred, Justice Anstead pointed out that three judges in a five-judge division of a fifteen-judge court[18] will have the authority to control an en banc decision.[19] Justice Anstead further stated that since three judges will be able to overturn a prior decision, and since the chances of overturning a decision will be increased as judges regularly rotate into and out of the five-judge division, "the consistency and stability provided by the required participation of the entire court will be lost."[20]

Justice Overton, in a specially concurring opinion with which Chief Justice Grimes concurred, responded to the dissenters' concerns. He stated,

---

11. *Id.* at 762.

12. *Assignment of Judges*, 648 So. 2d at 764.

13. *Court Divisions*, 648 So. 2d at 761.

14. *In re* Amendment to Florida Rule of Appellate Procedure 9.331(b), 646 So. 2d 730 (Fla. 1994).

15. *Id.* at 731.

16. *Id.*

17. *Id.* at 730.

18. Although not specifically noted by Justice Anstead, the numbers to which he refers reflect the size of the First District as a whole and of its Administrative Division. *Assignment of Judges*, 648 So. 2d at 764.

19. *Amendment to Florida Rule of Appellate Procedure 9.331(b)*, 646 So. 2d at 731 (Anstead, J., dissenting).

20. *Id.*

"I disagree with the anticipated horribles of the dissent. We need to allow new ideas an opportunity to be tested to see if they will work in a way that will improve efficiency and consistency in the appellate decision-making process."[21]

C. *Appellate Division of the Circuit Court*

In *Melkonian v. Goldman*,[22] the petitioner sought certiorari review, in the Circuit Court in and for the Eleventh Judicial Circuit, of an administrative decision to suspend his driver's license.[23] An individual judge denied the petition, concluding that it failed to demonstrate a prima facie case.[24] The Third District granted certiorari and quashed the order, finding that the failure to assign the case to a three-judge panel, and the delegation instead to an individual judge, of the task of deciding the petition on its merits, constituted a departure from the essential requirements of law.[25]

The Third District pointed out that the supreme court promulgated a local rule for the Eleventh Judicial Circuit that establishes an Appellate Division of that court.[26] That rule provides that certiorari petitions are to be heard on their merits by three-judge panels of the Appellate Division.[27] Through a memorandum, however, the administrative judge of the Appellate Division implemented a procedure by which individual judges rule on the motions.[28] The memorandum provided for petitions for writs of certiorari to be assigned to an individual judge for determination of "'whether a Prima Facie case has been raised requiring a panel's review.'"[29]

The Third District found the portion of the administrative order that allowed an individual judge to rule on the merits of a petition for writ of certiorari to be inconsistent with the local rule and therefore void.[30] The court relied on Florida Rule of Judicial Administration 2.020(c), which indicates that administrative orders must not be inconsistent with "'court rules and administrative orders entered by the supreme court.'"[31] The court

21. *Id.* at 730 (Overton, J., concurring specially).
22. 647 So. 2d 1008 (Fla. 3d Dist. Ct. App. 1994).
23. *Id.* at 1009.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Melkonian*, 647 So. 2d at 1009.
28. *Id.*
29. *Id.*
30. *Id.* at 1009-10.
31. *Id.* at 1009 (emphasis omitted).

did indicate, however, that its opinion should not be read to invalidate the remaining portions of the administrative order.[32]

IV. JURISDICTION

A. *Jurisdiction on Discretionary Review*

In both *Gee v. Seidman & Seidman*[33] and *Salgat v. State*,[34] the supreme court declined to reach the merits of the case because the district courts certified to be of great public importance questions upon which they did not first pass.[35] The court noted in *Gee* that under article V, section 3(b)(4) of the *Florida Constitution*, the court only "has jurisdiction to review 'any decision of a district court on appeal that *passes upon* a question certified by it to be of great public importance.'"[36]

B. *Jurisdiction When a Notice of Voluntary Dismissal Is Filed*

In *State v. Schopp*,[37] the supreme court addressed a respondent's claim that the court lacked jurisdiction because the respondent had filed a notice of voluntary dismissal in the district court prior to the final disposition of his appeal.[38] After the district court's decision was issued, the respondent, Schopp, who was the appellant in the district court, timely filed a motion for rehearing.[39] Before the district court ruled on that motion, the State, the appellee in the district court, timely sought review in the supreme court.[40] While the motion for rehearing was still pending, Schopp filed a notice of voluntary dismissal pursuant to Florida Rule of Appellate Procedure 9.350(b).[41]

The State moved to strike the notice.[42] Schopp then sought a writ of mandamus from the supreme court to compel the district court to dismiss the appeal. The district court granted the motion to strike and denied the

32. *Melkonian*, 647 So. 2d at 1010 n.2.
33. 653 So. 2d 384 (Fla. 1995).
34. 652 So. 2d 815 (Fla. 1995).
35. *Gee*, 653 So. 2d at 385; *Salgat*, 652 So. 2d at 815.
36. *Gee*, 653 So. 2d at 385 (quoting FLA. CONST. art. V, § 3(b)(4)).
37. 653 So. 2d 1016 (Fla. 1995).
38. *Id.* at 1018.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Schopp*, 653 So. 2d at 1018.

motion for rehearing.[43] Schopp then moved to dismiss the supreme court proceeding, alleging that he had a right to have the district court proceeding dismissed and that the supreme court therefore lacked subject matter jurisdiction.[44]

The supreme court rejected Schopp's claim, stating that "[e]ven where a notice of voluntary dismissal is timely filed, a reviewing court has discretion to retain jurisdiction and proceed with the appeal."[45] The court noted that it is particularly true that the court retains such discretion when, as in the case under review, a case presents a question of public importance[46] and when substantial judicial labor has been expended, as evidenced by the issuance of an initial opinion.[47]

C. *Jurisdiction of a District Court When Discretionary Review Has Been Sought*

In *Portu v. State*,[48] nine days after the issuance of an opinion, the State filed a notice to invoke the discretionary jurisdiction of the supreme court.[49] Six days thereafter, the defendant filed a timely motion for clarification of the opinion in the district court.[50] In response to the motion, the State argued that its notice to invoke discretionary jurisdiction stripped the district court of the power to act on the defendant's motion.[51] The court granted the defendant's motion for clarification,[52] and the State then filed a motion to reinstate the original opinion, continuing to assert that the court lacked jurisdiction.[53]

The Third District disagreed, concluding that its jurisdiction to rule on timely filed motion does not expire until it renders an order disposing of such motions.[54] The court noted that Florida Rule of Appellate Procedure 9.020(g)(1) states that when a motion for rehearing or clarification of an

---

43. *Id.*
44. *Id.*
45. *Id.*
46. The district court had certified the existence of a question of great public importance. *Id.* at 1018 n.1.
47. *Schopp*, 653 So. 2d at 1018.
48. 654 So. 2d 169 (Fla. 3d Dist. Ct. App. 1995).
49. *Id.* at 169.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Portu*, 654 So. 2d at 169.
54. *Id.*

order has been filed, the order is not deemed rendered "'until the filing of a signed, written order disposing of all such motions between such parties.'"[55] The court went on to find that since rule 9.120(b) provides that the discretionary jurisdiction of the supreme court is invoked by the filing of a notice within thirty days of rendition of the order to be reviewed,[56] the State's time for filing a notice did not even begin until the court rendered a written order disposing of the defendant's motion for clarification.[57] Accordingly, the court found the State's notice to be premature, and denied the motion to reinstate.[58]

V. ORDERS REVIEWABLE

A. *Appeals from Denials of Summary Judgment Motions Based on Claims of Qualified Immunity*

Although the *Florida Rules of Appellate Procedure* do not provide for appeals from orders denying motions for summary judgment, the supreme court, in *Tucker v. Resha*,[59] concluded that when a public official asserts qualified immunity in response to a federal civil rights claim in a Florida court, an order denying such a motion is subject to interlocutory review to the extent that the order turns on an issue of law.[60] The court's conclusion was based primarily on the reasoning of *Mitchell v. Forsyth*.[61] In that case, the Supreme Court of the United States stated that the qualified immunity of public officials involves immunity from suit rather than a mere defense to liability; that this is effectively lost if a case is erroneously permitted to go to trial; and that an order denying qualified immunity is effectively unreviewable on appeal from a final judgment, as the public official cannot be "re-immunized" if erroneously required to stand trial or face other burdens of litigation.[62]

In its opinion, the *Tucker* court specifically noted that Florida's appellate rules do not provide for interlocutory review of orders of the sort addressed by the case.[63] The court therefore requested the Florida Bar

55. *Id.* (quoting FLA. R. APP. P. 9.020(g)(1)).
56. *Id.* at 170.
57. *Id.* at 169.
58. *Portu*, 654 So. 2d at 170.
59. 648 So. 2d 1187 (Fla. 1994).
60. *Id.* at 1190.
61. 472 U.S. 511 (1985).
62. *Tucker*, 648 So. 2d at 1189 (citing *Mitchell*, 472 U.S. at 526-27).
63. *Id.* at 1189.

Appellate Court Rules Committee to submit a proposed amendment that will address the rule change mandated by this decision.[64]

Subsequently, the First District, in *Department of Education v. Roe*,[65] concluded that it would not extend *Tucker* beyond its specific facts, and thus declined to review a denial of a motion to dismiss that asserted a claim of sovereign immunity regarding a cause of action under state law.[66]

B. *Certiorari Review of Orders Permitting Plaintiffs to Amend Complaints to Include Claims for Punitive Damages*

In *Globe Newspaper Co. v. King*,[67] the supreme court resolved a conflict among the districts regarding the question of whether it is appropriate for an appellate court to review by certiorari an order of a trial court permitting a plaintiff to amend a complaint to include a punitive damages claim under section 768.72 of the *Florida Statutes*.[68]

The statute provides that "no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages."[69] The statute goes on to state that "[n]o discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted."[70]

The court indicated that it read the statute to "create a substantive legal right not to be subject to a punitive damages claim and ensuing financial worth discovery until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages."[71]

The court then noted that the Fourth District, in *Kraft General Foods, Inc. v. Rosenblum*,[72] *Henn v. Sadler*,[73] and *Sports Products, Inc. v. Estate of Inalien*,[74] ruled that the procedure established by the statute must be followed, and that the failure to adhere to that procedure is a departure from

64. *Id.* at 1190.
65. 656 So. 2d 507 (Fla. 1st Dist. Ct. App. 1995).
66. *Id.* at 507.
67. 658 So. 2d 518 (Fla. 1995).
68. *Id.* at 519.
69. FLA. STAT. § 768.72 (1993).
70. *Id.*
71. *Globe Newspaper*, 658 So. 2d at 519.
72. 635 So. 2d 106 (Fla. 4th Dist. Ct. App.), *review denied*, 642 So. 2d 1363 (Fla. 1994).
73. 589 So. 2d 1334 (Fla. 4th Dist. Ct. App. 1991) (en banc).
74. 658 So. 2d 1010 (Fla. 4th Dist. Ct. App. 1994).

the essential requirements of law. The court expressed its agreement with the Fourth District and held "that appellate courts should grant certiorari in instances in which there is a demonstration by a petitioner that the procedures of section 768.72 have not been followed."[75]

The court declined the petitioner's invitation "to take a further step . . . and hold that certiorari may also be granted to review the sufficiency of the evidence considered by a trial judge in a section 768.72 determination."[76] The court thus disapproved of the Third District's decision in *Commercial Carrier Corp. v. Rockhead*,[77] which had taken such an approach.[78] The court summed up its holding by stating:

> We specifically agree with the reasoning of the Fourth District in its decision in Sports Products, Inc., that certiorari review is appropriate to determine whether a court has conducted the evidentiary inquiry required by section 768.72, Florida Statutes, but not so broad as to encompass review of the sufficiency of the evidence considered in that inquiry.[79]

C. *Issues Certified to the Supreme Court*

In *Canal Insurance Co. v. Reed*,[80] the First District held that review is not available, either by appeal or certiorari, of an order deciding an insurance coverage issue in a third party declaratory judgment action between an insurer and its insured, prior to a final determination of liability in the underlying action, that results in the insurer having to provide liability coverage for the insured in the underlying action.[81] The court certified to the supreme court, however, as a question of great public importance, the issue of whether, under such circumstances, the insurer may seek immediate review of the order and, if so, whether such review should be by certiorari, appeal of a non-final order, or appeal of a final order.[82]

---

75. *Globe Newspaper*, 658 So. 2d at 520.

76. *Id.*

77. 639 So. 2d 660 (Fla. 3d Dist. Ct. App. 1994).

78. In a humorous aside to the legal issues involved, Chief Judge Schwartz, the author of the majority opinion in *Commercial Carrier*, noting the fact that both the petitioner and the respondent were represented by attorneys with the last name of "Schwartz," stated, "[l]ike a pride of lions, and an exaltation of larks, this case involves an intelligence of (unrelated) Schwartzes." *Id.* at 661 n.*.

79. *Globe Newspaper*, 658 So. 2d at 520.

80. 653 So. 2d 1085 (Fla. 1st Dist. Ct. App. 1995).

81. *Id.* at 1090.

82. *Id.* at 1090-91.

In *Maryland Casualty Co. v. Century Construction Corp.*,[83] the First District found that a non-final order denying motions to dismiss a third-party complaint, which was entered after the entry of judgment in the main action was not appealable.[84] The court certified conflict with the decision in *Mogul v. Fodiman*,[85] which concluded that Florida Rule of Appellate Procedure 9.130(a)(4), which allows for appeals from non-final orders entered after a final order, appear "'broad enough to permit an appeal from' an order denying a motion seeking a protective order to prevent certain discovery in a supplementary proceeding."[86] The First District reasoned that "the rule was intended to apply only to orders entered after a final order which would otherwise be unreviewable."[87] The court stated: "To hold that the order sought to be appealed here is immediately reviewable pursuant to rule 9.130(a)(4) would lead inevitably to the result that *all* interlocutory orders entered in third-party actions following the entry of judgment in the main action would, likewise, be immediately reviewable."[88] The court pointed out that since such a conclusion would result in an enormous waste of scarce judicial resources, it must presume that the drafters of the rule intended no such consequence.[89]

D. *Other Cases*

As usual, the appellate courts decided a large number of cases dealing with the question of whether particular orders were subject to review. A sampling of those cases includes:

Hernando County v. Leisure Hills, Inc.[90] A partial final judgment determining that the appellee was entitled to have a plat recorded was not appealable because the trial court had reserved jurisdiction to specifically order the clerk of court at some future time to record the plat and to determine whether damages were appropriate and, if so, the amount of damages.[91]

83. 656 So. 2d 611 (Fla. 1st Dist. Ct. App. 1995).
84. *Id.* at 612.
85. 406 So. 2d 1225 (Fla. 5th Dist. Ct. App. 1981).
86. *Maryland Casualty*, 656 So. 2d at 612 (quoting *Mogul*, 406 So. 2d at 1226).
87. *Id.*
88. *Id.*
89. *Id.*
90. 648 So. 2d 257 (Fla. 5th Dist. Ct. App. 1994).
91. *Id.* at 258.

Cohen, Scherer & Cohen, P.A. v. Pacific Employers Insurance Co.[92] Found to be nonappealable was an order dismissing a counterclaim with prejudice, but leaving the main claim pending.[93] The court relied on the fact that the main claim and the counterclaim both arose out of a malpractice claim and the obligations of the parties under the insurance policy in regard to the malpractice claim.[94]

Arthur v. Gibson.[95] Certiorari was deemed an appropriate method to review a non-final order denying a motion to disqualify counsel.[96]

Waller v. Waller.[97] Not appealable was an order granting a motion to amend a complaint to add a defendant who had previously obtained a dismissal based on an allegation that the defendant had not been served with the initial complaint within the time required by the *Florida Rules of Civil Procedure*.[98]

Polo v. Polo.[99] A non-final order denying a motion to dismiss based on a claim that the initial process and pleading were not served within the time required by the *Florida Rules of Civil Procedure* was nonappealable.[100]

Gregg v. State.[101] The court stated that it had no jurisdiction to review an oral order.[102]

Valenzuela v. Valenzuela.[103] A non-final order directing a party to pay an expert witness fee prior to taking the expert's deposition was found not to be subject to review, either by appeal or by certiorari.[104]

Ramseyer v. Williamson.[105] A trial court's order denying a motion to dissolve a writ of garnishment was not appealable.[106]

---

92. 654 So. 2d 282 (Fla. 4th Dist. Ct. App. 1995).
93. *Id.* at 283.
94. *Id.*
95. 654 So. 2d 983 (Fla. 5th Dist. Ct. App. 1995).
96. *Id.* at 984.
97. 650 So. 2d 193 (Fla. 2d Dist. Ct. App. 1995).
98. *Id.* at 194.
99. 643 So. 2d 55 (Fla. 3d Dist. Ct. App. 1994).
100. *Id.* at 56.
101. 643 So. 2d 106 (Fla. 1st Dist. Ct. App. 1994).
102. *Id.* at 107.
103. 648 So. 2d 741 (Fla. 3d Dist. Ct. App. 1994).
104. *Id.* at 741.
105. 639 So. 2d 205 (Fla. 5th Dist. Ct. App. 1994).
106. *Id.* at 206.

City of Dania v. Broward County.[107] Orders denying motions to intervene in eminent domain proceedings were held to be appealable, final orders.[108]

Stufflebean v. Ohio Casualty Insurance Co.[109] An order granting a defendant's motion for partial summary judgment, and holding that under the doctrine of collateral estoppel, a jury verdict in another case was determinative of the negligence and comparative negligence of the parties, was held not to be appealable by the plaintiff.[110] The plaintiff argued that the order was appealable under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv), which allows for review of orders that determine the issue of liability in favor of a party seeking affirmative relief. The court relied on the fact that the jury verdict had found the plaintiff sixty-five percent at fault in causing the accident and the fact that the plaintiff had opposed the application of collateral estoppel. Under these circumstances, the court found that the order was not one in favor of the plaintiff, who was the only party seeking affirmative relief, and thus was not appealable.[111]

Ownby v. Ownby.[112] The court reviewed by certiorari an order in a dissolution of marriage action requiring the husband to comply with a stipulation in which he agreed to submit to a blood test to determine paternity.[113]

Bierman v. Miller.[114] Certiorari was employed to review an order vacating a stay in a legal malpractice action.[115]

Robert v. W.R. Grace & Co.[116] The court concluded that the denial of a request to perpetuate testimony by a terminally ill person is a matter which may be entertained by petition for writ of certiorari.[117]

---

107. 658 So. 2d 163 (Fla. 4th Dist. Ct. App. 1995).
108. *Id.* at 164.
109. 645 So. 2d 136 (Fla. 4th Dist. Ct. App. 1994).
110. *Id.* at 137.
111. *Id.*
112. 639 So. 2d 135 (Fla. 5th Dist. Ct. App. 1994).
113. *Id.* at 136.
114. 639 So. 2d 627 (Fla. 3d Dist. Ct. App. 1994).
115. *Id.* at 627.
116. 639 So. 2d 1056 (Fla. 3d Dist. Ct. App. 1994).
117. *Id.* at 1057.

Oenbrink, D.O. v. Schiegner.[118] The court recognized that certiorari review may be used to challenge an order that denies a motion to dismiss for failure to comply with the statutory presuit notice requirements.[119]

Hickey v. Pompano K of C, Inc.[120] Certiorari was deemed appropriate to review an order severing a plaintiff's trial against one defendant from her trial against a codefendant.[121]

Medero v. Florida Power & Light Co.[122] The court reviewed by certiorari an order denying the plaintiff's motion to compel the deposition of an executive employed by the defendant.[123]

Pevsner v. Frederick.[124] A non-party witness was found to have the right to certiorari review of an order imposing sanctions against him for discovery violations.[125]

Becker & Poliakoff v. King.[126] Certiorari was deemed the proper method of reviewing an order denying a law firm's motion to withdraw as counsel.[127]

Randall v. Guenther.[128] A non-final discovery order compelling a party to testify after she invoked her privilege against self-incrimination was a proper subject of certiorari review.[129]

VI. RENDITION

A. *Rubber-Stamped Form Orders*

The Second District dealt with a series of cases[130] that concerned the issue of whether orders were rendered when trial judges ruled on them by using a form order rubber stamp on motions, filling in blanks to indicate the

---

118. 645 So. 2d 167 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 654 So. 2d 131 (Fla. 1995).

119. *Id.* at 167.

120. 647 So. 2d 270 (Fla. 4th Dist. Ct. App. 1994).

121. *Id.* at 271.

122. 658 So. 2d 566 (Fla. 3d Dist. Ct. App. 1995).

123. *Id.* at 567.

124. 656 So. 2d 262 (Fla. 4th Dist. Ct. App. 1995).

125. *Id.* at 263.

126. 642 So. 2d 821 (Fla. 4th Dist. Ct. App. 1994).

127. *Id.* at 822.

128. 650 So. 2d 1070 (Fla. 5th Dist. Ct. App. 1995).

129. *Id.* at 1072-73.

130. Parnell v. State, 642 So. 2d 1092 (Fla. 2d Dist. Ct. App. 1994); Gibson v. State, 642 So. 2d 43 (Fla. 2d Dist. Ct. App. 1994); Davenport v. State, 640 So. 2d 1225 (Fla. 2d Dist. Ct. App. 1994); State v. Sullivan, 640 So. 2d 77 (Fla. 2d Dist. Ct. App. 1994).

date and whether the motions were granted or denied and signing beneath the stamp.[131] The court indicated that while it did "not discourage the use of a short form order stamped on the face of a motion[,] . . . such an order should not be used when it is essential to fix a point from which crucial time periods are to be calculated for purposes of rendition."[132] The court's primary problem with the use of such orders was the fact that there was no indication that the orders were ever filed with the clerk of the circuit court,[133] a requirement for rendition, as that term is defined by Florida Rule of Appellate Procedure 9.020(g).[134] In light of the fact that a trial court's order "is not appealable until it is rendered,"[135] the Second District dismissed each of the appeals as premature and remanded the matters with directions to the trial courts to render appropriate orders.[136]

In *Parnell*, however, the court may have given an indication as to how such form orders could be used in a manner that would result in rendition. In finding that there was no indication that the order there was filed, the court stated: "When the document does not receive a second date stamp from the clerk, there is nothing on the face of the appellate record to establish that the order has ever been rendered."[137] This language would seem to imply that rendition would occur if, after a trial court enters a rubber-stamped order, the clerk would place a date stamp on the motion indicating that the motion was refiled after the order was entered.

B. *Court Status Forms*

In *State v. Tremblay*,[138] the Fourth District addressed a contention that an order was rendered when the trial court signed and filed a court status form reflecting that a charge was dismissed.[139] The court denied a motion

---

131. The use of such stamps was apparently widespread by the judges of one particular circuit, since the four appeals cited in the preceding footnote were from orders entered by four different judges in the same circuit.

132. *Sullivan*, 640 So. 2d at 78.

133. *Parnell*, 642 So. 2d at 1093; *Gibson*, 642 So. 2d at 44; *Davenport*, 640 So. 2d at 1225; *Sullivan*, 640 So. 2d at 78.

134. In pertinent part, rule 9.020(g) provides that "[a]n order is rendered when a signed, written order is filed with the clerk of the lower tribunal." FLA. R. APP. P. 9.020(g).

135. *Sullivan*, 640 So. 2d at 78 (quoting Billie v. State, 473 So. 2d 34, 34 (Fla. 2d Dist. Ct. App. 1985)).

136. *Parnell*, 642 So. 2d at 1093; *Gibson*, 642 So. 2d at 44; *Davenport*, 640 So. 2d at 1225-26; *Sullivan*, 640 So. 2d at 78.

137. *Parnell*, 642 So. 2d at 1093.

138. 642 So. 2d 64 (Fla. 4th Dist. Ct. App. 1994).

139. *Id.* at 65.

to dismiss that was based on this contention, finding no authority to the effect that a status form constituted a final, appealable order.[140] The court went on to warn, however, that "although that day has not arrived, we can envision an occasion when a peculiar set of circumstances might lead us to conclude that a court status form might be found appealable."[141] Thus, the court felt "compelled to comment that it would behoove the bench and bar to take precautionary measures in this regard,"[142] such as "for the trial judge to make it clear on the record that a subsequent written order will be prepared, and that any sheet of paper the judge signs which records a particular ruling as a docket entry, is not intended to be the order subject to be appealed."[143]

VII. VENUE

In *Vasilinda v. Lozano*,[144] the supreme court adopted the following principles to be applied to determine in which court appellate jurisdiction lies when the trial court has granted a change of venue to a circuit located within another district:

> (1) Changes of venue in criminal cases do not become effective until the court file has been received in the transferee court. Changes of venue in civil cases do not become effective until the court file has been received in the transferee court and costs and service charges required by section 47.191, Florida Statutes (1991), and Florida Rule of Civil Procedure 1.060 which are applicable to the case are paid.
>
> (2) Appellate jurisdiction is determined at the time the notice of appeal or petition for extraordinary writ is filed. If the change of venue has not yet become effective when the notice or petition is filed, appellate jurisdiction lies in the district court of appeal which serves as the appellate court for the transferor court. That district court of appeal shall retain jurisdiction of the matter before it even though the change of venue is later effected. Once the change of venue has become effective, appellate jurisdiction shall be in the district court of appeal which serves as the district court of appeal for the transferee court, even if the challenged order was entered before the change of venue. Of

140. *Id.* at 66.
141. *Id.* (footnotes omitted).
142. *Id.*
143. *Tremblay*, 642 So. 2d at 66.
144. 631 So. 2d 1082 (Fla. 1994).

course, the time for filing appeals and petitions for certiorari shall run from the date of the challenged order.[145]

The First District was called upon to interpret one aspect of *Vasilinda* in *Cottingham v. State*.[146] In that case, an inverse condemnation matter, a circuit judge in Hernando County, which is located within the Fifth District, entered an order transferring venue to Leon County, which is located within the First District.[147] The order provided that the plaintiffs should pay the service charge to the clerk of court of Hernando County and directed the clerk to effect the transfer to Leon County upon proof of payment of the service charge.[148] Before the service charge was paid, the clerk mailed the file to Leon County.[149] The clerk of court in Leon County advised the appellants by telephone that the file had been received and that payment of a transfer fee was required.[150] The following day, counsel for appellants sent a notice of appeal by overnight mail to the clerk for Hernando County.[151] Later that day, counsel mailed the transfer fee to the clerk for Leon County.[152] The fee was accompanied by a letter explaining that a notice of appeal had been filed in the circuit court of Hernando County, appealing the case to the Fifth District.[153] The notice of appeal was received by the clerk in Hernando County, and four days later, the transfer fee was received by the clerk in Leon County.[154]

The State filed a motion to dismiss in the Fifth District, erroneously asserting that the required fee had been paid four days before the notice of appeal was mailed.[155] The Fifth District denied the motion, but transferred the appeal to the First District.[156] The First District concluded that because the notice of appeal was filed in the circuit court in Hernando County before the transfer fee was received in Leon County, jurisdiction of

145. *Id.* at 1087 (footnotes omitted).
146. 656 So. 2d 597 (Fla. 1st Dist. Ct. App. 1995).
147. *Id.* at 598.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Cottingham*, 656 So. 2d at 598.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Cottingham*, 656 So. 2d at 598.

the appeal lay solely in the Fifth District,[157] and transferred the case back to that court.[158]

The court rejected the argument that the transfer was complete when the transfer fee was mailed,[159] but certified the following question as one of great public importance:

> FOR PURPOSES OF THE RULE ANNOUNCED IN *VASILINDA V. LOZANO*, 631 SO.2D 1082 (FLA. 1994), IS THE DATE OF PAYMENT OF THE TRANSFER FEES AND CHARGES THE DATE OF RECEIPT OF SUCH CHARGES BY THE TRANSFEREE COURT OR THE DATE OF MAILING BY THE PARTY RESPONSIBLE FOR PAYMENT?[160]

VIII. NOTICE OF APPEAL

A. *Impact of a Notice of Appeal on Pending Motions in the Trial Court*

The Fourth District, in *Kennedy v. Alberto*,[161] addressed the question of whether pending post-judgment motions which do not delay rendition of the judgment, pursuant to Florida Rule of Appellate Procedure 9.020(g)(3), are deemed abandoned by the filing of a notice of appeal directed to the judgment.[162] The court initially recognized that the post-judgment motions named in rule 9.020(g) that suspend rendition of the judgment to which they are directed are considered abandoned by the filing of a notice of appeal before their disposition.[163] These motions are timely and authorized "for new trial or rehearing, clarification, or certification; motions to alter or amend; for judgment notwithstanding verdict or in accordance with prior motion for directed verdict, or in arrest of judgment; or a challenge to the verdict."[164]

157. *Id.* at 599.
158. *Id.* at 597.
159. *Id.* at 599.
160. *Id.*
161. 649 So. 2d 286 (Fla. 4th Dist. Ct. App. 1995).
162. *Id.* at 287.
163. *Id.*
164. FLA. R. APP. P. 9.020(g).

Noting that the case under review was not concerned with one of the orders set forth in the rule, but with a motion for relief from judgment under Florida Rule of Civil Procedure 1.540(b),[165] the court stated:

> We do not believe, therefore, that motions filed after final judgment which are not named in rule 9.020(g) and do not suspend rendition are deemed abandoned by a later filed notice of appeal directed to the judgment itself. Among this class of motions are motions for writ of garnishment, motions to tax costs or award attorney's fees, motions for proceedings supplementary, and motions for relief from judgment under rule 1.540(b).[166]

The Second District also dealt with the impact of a notice of appeal on a pending motion. In *Rice v. Brown*,[167] the court concluded that the filing of a notice of appeal from a final judgment and the denial of a motion for new trial constituted an abandonment of a motion for remittitur and divested the trial court of jurisdiction to rule on that motion.[168]

B. *Filing in the Proper Court*

In *Upshaw v. State*,[169] the appellant sought to appeal an order entered by the Circuit Court for Eighth Judicial Circuit in Baker County.[170] A notice of appeal was filed with the court clerk in Alachua County, which is also located in the Eighth Circuit.[171] Although efforts to do so may have been made by the appellant and by the Alachua County court clerk, no notice was ever filed with the Baker County court clerk.[172] The First District refused to consider the appeal, holding "that when a party initiates an appeal . . . by filing a notice of appeal in circuit court, the notice must be filed in the circuit court in the county where the original proceeding was

---

165. *Kennedy*, 649 So. 2d at 288. As the court noted, not only is such a motion not set forth in the appellate rule as one which delays rendition of a judgment, but rule 1.540(b) expressly states that "[a] motion under this sub-division does not affect the finality of a judgment or decree or suspend its operation." *Id.* (quoting FLA. R. CIV. P. 1.540(b)).

166. *Kennedy*, 649 So. 2d at 288.

167. 645 So. 2d 1020 (Fla. 2d Dist. Ct. App. 1994), *review denied*, 658 So. 2d 992 (Fla. 1995).

168. *Id.* at 1021.

169. 641 So. 2d 451 (Fla. 1st Dist Ct. App. 1994).

170. *Id.* at 452.

171. *Id.*

172. *Id.*

pending to validly invoke appellate jurisdiction."[173] The court recognized that the supreme court has liberally construed the appellate rules "to allow valid invocation of appellate jurisdiction when an appellant or petitioner has not strictly filed the notice in the correct court,"[174] but pointed out that those supreme court cases involved situations in which the party invoking appellate jurisdiction filed a timely notice either with the district court of appeal or with the correct lower tribunal.[175] "In this case," the court concluded, "petitioner did neither, so we are without jurisdiction of the appeal."[176]

C. *Timeliness*

In *Metropolitan Dade County v. Vasquez*,[177] the appellant, on the last day for filing a timely notice of appeal, forwarded its notice to a private carrier with directions to deliver it that day to the Judge of Compensation Claims.[178] The courier did not reach the building housing the judge's office until 5:05 p.m. and the security guard would not permit her to enter the building or leave the package at the building site.[179] The appellee then moved to dismiss, arguing that the notice, which was filed on the next business day, three days later, was not timely filed.[180] The appellant maintained that because the notice was delivered for filing within the required period, it should be treated as timely.[181]

The First District dismissed the appeal, finding that the "attempt to deliver a notice of appeal" under the circumstances of the case was not sufficient to invoke the jurisdiction of the court.[182] In doing so, the court stated: "A party who waits until the last available day to file its notice of appeal, and who fails to assure that the notice is delivered prior to the close of the business day bears the risk that it will be denied access to file the notice 'after hours.'"[183]

---

173. *Id.*

174. *Upshaw*, 641 So. 2d at 453 (citing Alfonso v. Department of Envtl. Regulation, 616 So. 2d 44 (Fla. 1993); Skinner v. Skinner, 561 So. 2d 260 (Fla. 1990); Johnson v. Citizens State Bank, 537 So. 2d 96 (Fla. 1989)).

175. *Upshaw*, 641 So. 2d at 453.

176. *Id.*

177. 659 So. 2d 355 (Fla. 1st Dist. Ct. App. 1995).

178. *Id.* at 355.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Vasquez*, 659 So. 2d at 356.

183. *Id.*

D. *Amended Judgments*

In *Wetherington v. Minch*,[184] the appellant did not timely appeal from a final judgment of foreclosure, but attempted to appeal from an amended final judgment which changed the sale date and awarded additional interest.[185] The Fifth District first noted that the amendment of a final judgment which does not change matters of substance or resolve a genuine ambiguity does not toll the time within which the parties must seek review.[186] The court then pointed out that an appeal from an amended final judgment is "'limited to the party adversely affected by the amendment and should involve only those issues affected by the amendment.'"[187] Since the appellant raised no challenges involving the amendments, and failed to timely appeal the original judgment, the court dismissed the appeal.[188]

E. *Amendment of Notice of Appeal*

The Third District, in *Ashraf v. Smith*,[189] denied a motion to amend a notice of appeal to include the appellant's insurer.[190] Although the court found the amendment "entirely unnecessary" under the facts of the case, the denial of the motion was based on the court's determination that it "lack[ed] the jurisdiction to permit such an amendment."[191]

IX. INDIGENCY

In *Schwab v. Brevard County School Board*,[192] the Fifth District dealt with a contention that a 1994 amendment to section 57.081(1) of the *Florida Statutes* lifted the burden of determining indigency for purposes of appeal from the circuit court and allows individuals to proceed as indigents upon the filing by counsel of a certificate of indigency in the appellate court.[193] Prior to the amendment, the statute required an indigent person to submit an

184. 637 So. 2d 967 (Fla. 5th Dist. Ct. App. 1994).
185. *Id.* at 967.
186. *Id.*
187. *Id.* (quoting First Continental Corp. v. Khan, 605 So. 2d 126, 130 (Fla. 5th Dist. Ct. App.), *review denied*, 613 So. 2d 3 (Fla. 1992)).
188. *Id.*
189. 647 So. 2d 892 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 658 So. 2d 989 (Fla. 1995).
190. *Id.* at 893.
191. *Id.*
192. 650 So. 2d 1099 (Fla. 5th Dist. Ct. App. 1995).
193. *Id.* at 1101.

affidavit of indigency and, if represented by counsel, a certificate from counsel indicating, among other things, that counsel had made an investigation to ascertain the truth of the affidavit and believed it to be true.[194] The amended statute eliminates the requirement of an affidavit if the attorney files a certificate certifying that the attorney has made an investigation to ascertain the financial condition of the client and has found the client to be indigent.[195]

The court rejected the contention that in light of the change, the trial court was no longer required to make a determination of indigency.[196] The court pointed out that although the old version of the statute did not specify where the determination of indigency should be made, the court in *Chappell v. Department of Health & Rehabilitative Services*,[197] had concluded that a party seeking to obtain a waiver of appellate court fees must file a motion in the lower tribunal, along with the affidavit and certificate required by the statute.[198] The court then stated that "[t]he amendments to the statute reflect a change in the requirements an indigent person must meet in order to be exempt from payment of charges,"[199] not the question of "where such a determination must be made."[200]

This determination, the court continued, is procedural in nature and is therefore governed by the procedural rules promulgated by the supreme court.[201] Among those rules, the court noted, are Florida Rule of Appellate Procedure 9.430, which requires a party who has the right to seek review without the payment of costs to file a motion in the lower tribunal, and Florida Rule of Judicial Administration 2.040(b)(3), which states that fees will be paid as provided by law except when a party has been

194. FLA. STAT. § 57.081(1) (1980). Counsel was also required to certify that he or she had investigated the nature of the applicant's position, that, in counsel's opinion, the position was meritorious as a matter of law, that counsel had not been paid or promised payment of any remuneration for services, and that counsel intended to act as attorney for the applicant without compensation.

195. *Schwab*, 650 So. 2d at 1101-02 (citing FLA. STAT. § 57.081 (Supp. 1994)). The revised statute retains the additional requirements for the certificate that are set forth in the preceding footnote.

196. *Id.* at 1102.

197. 391 So. 2d 358 (Fla. 5th Dist. Ct. App. 1980).

198. *Schwab*, 650 So. 2d at 1101.

199. *Id.* at 1102.

200. *Id.*

201. *Id.*

"adjudicated insolvent."[202] Each of these rules, the court concluded, contemplates some action being taken by the lower tribunal.[203]

Citing to *Schwab* and to the two above-noted rules, the Fourth District, in *McFadden v. West Palm Beach Police Officer*,[204] indicated that it found no authority for appellate courts to sua sponte determine the issue of indigency in direct appeals.[205] The court contrasted this fact with the its authority in original proceedings to issue orders of indigency.[206] The court then stated:

> A welcome change in the rule to allow the clerks of the appellate court to determine indigency from the affidavit, providing for a remand to the trial court for a hearing on indigency where indicated by the circumstances of the case or the affidavit, would allow indigents more expeditious access to the court without a significant burden.[207]

In *Keene v. Nudera*,[208] the Second District set forth the "procedures for filing appeals and original proceedings for indigent clients in civil cases."[209] With regard to appeals, the court stated:

> An attorney who plans to appeal an order for an indigent client must timely file a motion in the trial court requesting an order of indigency for purposes of appeal. That order must be obtained either before filing the notice of appeal or shortly thereafter. If the indigency order is not obtained prior to the commencement of the appeal, the attorney should advise this court in writing concerning the status of that order. Attorneys should be aware the rules of appellate procedure do not require the lower tribunal to automatically send this court a copy of such an order. It is the appellant's responsibility to provide this court with a copy of the order of indigency. This court will normally dismiss an appeal after thirty days' notice if the filing fee is not paid or an order of indigency is not filed.[210]

---

202. *Id.*
203. *Schwab*, 650 So. 2d at 1102.
204. 658 So. 2d 1047 (Fla. 4th Dist. Ct. App. 1995).
205. *Id.* at 1048.
206. *Id.*
207. *Id.*
208. 20 Fla. L. Weekly D1232 (2d Dist. Ct. App. May 19, 1995).
209. *Id.* at D1232.
210. *Id.* at D1233.

With regard to original proceedings, the court noted that the great majority of such cases "seek review of orders entered by circuit courts, as 'lower tribunals.'"[211] In light of the language of Florida Rule of Appellate Procedure 9.430, which states that a party who has a right to "seek review" without payment of costs shall file a motion in the lower tribunal, the court concluded that "a circuit court, as the lower tribunal, is authorized to enter an order of indigency for an original proceeding, just as it must resolve that issue for a direct appeal of a final or nonfinal order."[212]

The court pointed out, however, that there are situations, such as cases in which mandamus or prohibition is sought, in which it may not be feasible to obtain an order from the lower tribunal.[213] Additionally, the court recognized that in some instances, an original proceeding is filed to challenge the decision of a governmental entity that is defined as a "lower tribunal," but is not a typical judicial forum.[214] In light of situations such as these, the court stated: "To assure access to this court, we allow petitioners to file their motion for an order of indigency, along with a sufficient affidavit, in this court even when a 'lower tribunal' may exist."[215]

The court indicated that a motion filed in the appellate court should accompany the petition and that, as with direct appeals, an original proceeding will normally be dismissed after thirty days' notice if the filing fee is not paid or if a sufficient motion and affidavit is not filed with the court.[216] The court also noted that neither the *Florida Rules of Appellate Procedure* nor the most frequently used Florida practice manuals contain forms useful in obtaining an order of indigency for appeal.[217] Therefore, the court appended to its opinion a form affidavit[218] and a form order[219] for use in such situations.

---

211. *Id.*
212. *Id.*
213. *Keene*, 20 Fla. L. Weekly at D1234.
214. *Id.* at D1233-34.
215. *Id.* at D1234.
216. *Id.*
217. *Id.*
218. *Keene*, 20 Fla. L. Weekly at D1234-35.
219. *Id.* at D1234.

X. MOTIONS

In *Sarasota County v. Ex*,[220] the Second District prefaced its discussion of the merits of the case with some comments about the "tendency for motions to proliferate because lawyers simply will not permit an adversary to have the last word."[221] The court's concern grew from a series of pleadings that included a motion to strike two notices of supplemental authority, a reply to that motion, a motion to strike the reply, and a response to the motion to strike the reply.[222] The court pointed out that none of the filings were necessary or helpful to the court,[223] and stated: "Lawyers need to realize that appellate motion practice is not a game of ping-pong in which the last lawyer to serve wins."[224] The court went on to say: "In most cases, motions to strike motions and other similar pleadings are simply unauthorized responses that demonstrate an attorney's lack of self-discipline."[225]

XI. TRANSCRIPTS

A number of cases dealt with the absence of a transcript as a part of the record on appeal. The manner in which such absences were dealt with varied depending upon the facts of the case and the nature of the issues raised. In some instances, courts relied upon the principle that when an error is apparent on the face of the judgment, reversal is appropriate despite the lack of a transcript.[226] Similarly, other cases concluded that when the record provided was sufficient to review a legal issue on the merits, the absence of a trial transcript,[227] or a portion of the transcript, did not require affirmance.[228] Other factual situations, however, led to conclusions that cases should be affirmed because of the lack of a transcript. Such conclusions were reached in cases in which appellants failed to provide

220. 645 So. 2d 7 (Fla. 2d Dist. Ct. App. 1994), *review denied*, 654 So. 2d 918 (Fla. 1995).

221. *Id.* at 7.

222. *Id.* at 8.

223. *Id.*

224. *Id.* at 7-8.

225. *Sarasota County*, 645 So. 2d at 8.

226. Sugrim v. Sugrim, 649 So. 2d 936, 937 (Fla. 1st Dist. Ct. App. 1995); Hirsch v. Hirsch, 642 So. 2d 20, 21 (Fla. 5th Dist. Ct. App. 1994).

227. *In re* Estate of Smith, 644 So. 2d 158 (Fla. 4th Dist. Ct. App. 1994).

228. Velez v. State, 645 So. 2d 42, 43 (Fla. 4th Dist. Ct. App. 1994).

transcripts of evidentiary hearings that formed the basis for factual findings by a trial court[229] or an appeals referee.[230]

In *Selig v. Sandler*,[231] the Third District affirmed trial court orders striking a complaint as a sham pleading when the appellant failed to provide the court "with a transcript of the evidentiary hearing or a proper substitute."[232]

In two other cases, courts found that items offered by appellants in lieu of transcripts did not constitute substitutes that were sufficiently proper to allow for review of either the entire case or of certain issues. In *All American Soup and Salad, Inc. v. Colonial Promenade*,[233] the Fifth District found to be without merit the appellant's contention that its written closing argument was a "proper substitute" for a transcript of a non-jury trial.[234] In *Travieso v. Golden*,[235] the appellant submitted nine videotapes of deposition testimony as a substitute for a transcript. The Fourth District noted its "disapproval of this procedure,"[236] and stated:

> The use of videotapes on appeal in lieu of a written transcript is not authorized by any rule and would be counterproductive to efficient review by the court. We judges can digest a transcript covering a day's worth of trial with far more dispatch than we can watch the same events unfold on eight hours of videotape. While video may eventually provide useful *supplements* to a written record, efficient use of appellate court time requires the submission of a written transcript of trial proceedings.[237]

XII. BRIEFS

A. *Cross-References*

In its consideration of two separate death penalty appeals taken by the same defendant, the supreme court discussed issues relating to the practice

---

229. Huey v. Huey, 643 So. 2d 1141, 1143 (Fla. 4th Dist. Ct. App. 1994).

230. Wolfson v. Unemployment Appeals Comm'n, 649 So. 2d 363, 363 (Fla. 5th Dist. Ct. App. 1995).

231. 642 So. 2d 766 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1196 (Fla. 1995).

232. *Id.* at 766.

233. 652 So. 2d 911 (Fla. 5th Dist. Ct. App. 1995).

234. *Id.* at 912.

235. 643 So. 2d 1134 (Fla. 4th Dist. Ct. App. 1994).

236. *Id.* at 1136.

237. *Id.*

of referring in a brief to briefs and records in other cases. In *Johnson v. State*,[238] the court stated that "cross-referenc[ing] a brief from a separate case is impermissible under any circumstances because it may confuse factually inapposite cases, it leaves appellate courts the task of determining which issues are relevant (which is counsel's role), and it circumvents the page-limit requirements."[239] The court went on to hold that the proper method of bringing before the court matters that are contained in separate records of pending cases is by way of a motion to supplement the record, not by a request for the taking of judicial notice.[240] The court stated that "any attempt to cross-reference separate records of pending cases will constitute grounds for the opposing party to move to strike the cross-reference."[241] Further, the court indicated that "[a]ny order striking a cross reference shall constitute automatic notice to counsel that the record must be supplemented" and that the failure to supplement under such circumstances will work a procedural bar as to the matters at issue in the improperly cross-referenced material.[242]

In the same defendant's companion appeal, *Johnson v. State*,[243] the court addressed the defendant's request that the court consider issues raised in his other case.[244] Concluding that "it clearly is not proper for counsel to attempt to cross-reference issues from a *brief* in a distinct case pending in the same court," the court found that all available issues not raised in the briefs filed in the case were barred.[245]

B. *Cross-Reply Briefs*

In *The Katz Family Partnership v. Placenti*,[246] the Third District acknowledged that Florida Rule of Appellate Procedure 9.130 on its face gives the impression that a cross-reply brief may be filed as a matter of course in an appellate proceeding,[247] but concluded that such briefs may only be filed if there is a cross-appeal.[248] The issue apparently arose from

238. 20 Fla. L. Weekly S347 (July 13, 1995).
239. *Id.* at S348.
240. *Id.*
241. *Id.*
242. *Id.*
243. 20 Fla. L. Weekly S343 (July 13, 1995).
244. *Id.* at S345.
245. *Id.*
246. 648 So. 2d 296 (Fla. 3d Dist. Ct. App. 1995).
247. *Id.* at 296.
248. *Id.* at 297 n.1.

the wording of rule 9.130(e), which establishes the time for the filing of appellants' initial briefs in appeals from non-final orders, but which goes on to state that "[a]dditional briefs shall be served as prescribed by rule 9.210."[249] Rule 9.210 establishes the general time requirements for serving briefs and includes such a requirement for the service of cross-reply briefs.[250] As noted and relied upon by the Third District,[251] however, the 1977 committee note to rule 9.210 refers to the fact that a cross-reply brief may be filed "if a cross-appeal or petition has been filed."[252]

XIII. ORAL ARGUMENT BY VIDEO TELECONFERENCE NETWORK

The First District broke new ground by establishing a procedure to conduct oral arguments by the use of a video teleconferencing network.[253] In its administrative order governing such arguments, the court indicated that video teleconferencing equipment was being installed in Jacksonville, Orlando, West Palm Beach, Miami, Ft. Myers, and Tampa.[254] The court stated that "all requests for oral argument from attorneys located in or near these cities will be deemed to request oral argument by use of the video teleconference network unless the request explicitly specifies that the oral argument be held in the courtroom at Tallahassee, Florida,"[255] where the court is located. The court further indicated that, "[i]nitially, argument by video teleconference network will be granted only when all the attorneys expected to present argument are located near a single remote facility," but that, in the future, "the court expects to schedule attorneys at two or more remote facilities."[256] The administrative order requires the party requesting argument to submit to the clerk of the court, within ten days of the order granting oral argument, a fee in the amount specified in the order to cover the costs of the video teleconference for that argument.[257] Failure to submit the fee, which will be taxable as costs in favor of the prevailing party, will be deemed a waiver of the request for oral argument.[258] Fees

249. FLA. R. APP. P. 9.130(e).
250. FLA. R. APP. P. 9.210(f).
251. *Katz Family Partnership*, 648 So. 2d at 297 n.1.
252. FLA. R. APP. P. 9.210 (1977 comm. notes).
253. *In re* Oral Argument By Video Teleconference Network, 648 So. 2d 763 (Fla. 1st Dist. Ct. App. 1994).
254. *Id.* at 763.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Oral Argument*, 648 So. 2d at 763.

will be nonrefundable if oral argument is canceled at the request of the parties, but they will be refunded if oral argument is canceled by the court.[259] The court also noted that it may, on its own motion, require that oral argument be conducted in Tallahassee,[260] and that it will also continue to schedule oral arguments throughout the district as provided in section 35.11 of the *Florida Statutes*.[261]

XIV. CERTIORARI REVIEW OF A DECISION OF A CIRCUIT COURT ACTING IN ITS APPELLATE CAPACITY

The supreme court, in *Haines City Community Development v. Heggs*,[262] clarified the standard of review for a district court to apply when reviewing a decision of a circuit court acting in its appellate capacity. After discussing the history of the common law writ of certiorari in Florida,[263] the court focused its attention on two of its previous decisions that had used different language in setting forth the appropriate standard.[264]

In *Combs v. State*,[265] a case in which the circuit court had reviewed by appeal a county court conviction for driving while intoxicated, the supreme court had concluded that "a district court's review of an appellate circuit court decision should determine whether there was a 'departure from the essential requirements of law.'"[266] The court "emphasized that there must be 'a violation of a clearly established principle of law resulting in a miscarriage of justice.'"[267]

Subsequently, in *Educational Development Center v. City of West Palm Beach*,[268] a case in which the circuit court had reviewed by certiorari a decision of an administrative agency, the supreme court, relying on *City of Deerfield Beach v. Vaillant*,[269] concluded that "a district court's review of an appellate circuit court's decision which reviewed an administrative

259. *Id.*
260. *Id.*
261. *Id.*
262. 658 So. 2d 523 (Fla. 1995).
263. *Id.* at 525.
264. *Id.* at 528-29.
265. 436 So. 2d 93 (Fla. 1983).
266. *Haines City*, 658 So. 2d at 529 (quoting *Combs*, 436 So. 2d at 95).
267. *Id.* (quoting *Combs*, 436 So. 2d at 96).
268. 541 So. 2d 106 (Fla. 1989).
269. 419 So. 2d 624 (Fla. 1982).

agency decision should consider whether the 'circuit court afforded procedural due process and applied the correct law.'"[270]

The question the court addressed in *Haines City* was "whether these two standards are different, and, if so, whether a difference is justified."[271] The court answered by indicating that "'appl[ying] the correct law' is synonymous with 'observing the essential requirements of law'" and that, "[t]herefore, when the *Combs* and *EDC* standards are reduced to their core, they appear to be the same."[272] Thus, the court found that the standard for a district court is the same regardless of whether the circuit court reviewed a matter by appeal or by certiorari. As set forth in *Haines City*, the standard is as follows: "The inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law. As explained above, these two components are merely expressions of ways in which the circuit court decision may have departed from the essential requirements of the law."[273] The court went on to give some insight into the nature of the standard:

> This standard, while narrow, also contains a degree of flexibility and discretion. For example, a reviewing court is drawing new lines and setting judicial policy as it individually determines those errors sufficiently egregious or fundamental to merit the extra review and safeguard provided by certiorari. This may not always be easy since the errors in question must be viewed in the context of the individual case. It may also be true that review of administrative decisions may be more difficult, since care must be exercised to determine the nature of the administrative proceeding under review, and to distinguish between quasi-judicial proceedings and those legislative in nature. There is no complete catalog that the court can turn to in resolving a particular case.[274]

XV. STANDING

Lack of standing has caused the appellate courts to refuse to reach the merits in several cases. In *Department of Health & Rehabilitative Services v. B.S.*,[275] the Department of Health and Rehabilitative Services sought

---

270. *Haines City*, 658 So. 2d at 529.
271. *Id.* at 529-30 (footnote omitted).
272. *Id.* at 530.
273. *Id.*
274. *Id.* at 530-31 (footnote omitted).
275. 640 So. 2d 1174 (Fla. 5th Dist. Ct. App. 1994).

certiorari review of an order adjudicating a minor delinquent and detaining him pending disposition.[276] The minor neither appealed nor sought release by way of habeas corpus.[277] The court denied certiorari[278] because it concluded that the claimed procedural problems and statutory violations "would have to be raised by someone with standing to argue on the minor's behalf."[279]

In *O'Neal v. Sun Bank*,[280] the court concluded that individuals against whom a foreclosure action was brought lacked standing to appeal an order allowing settlement between two creditors of a dispute as to the priority of certain portions of receivership funds, when the individuals claimed no entitlement of those funds.[281]

In *Bodenstab v. Department of Professional Regulation*,[282] the court dismissed an appeal from an order reconsidering an earlier negative determination and finding the appellant, a physician, eligible for licensure by endorsement in Florida.[283] On appeal, the appellant argued that the Board of Medicine had repudiated a stipulation by failing to incorporate in its order certain new evidence that was favorable to him.[284] The court concluded that since the appellant had been granted licensure, he was not "adversely affected" by the Board's order,[285] and therefore, not entitled to seek review pursuant to section 120.68(1) of the *Florida Statutes*,[286] which governs appeals of the sort presented by the case.

XVI. IMPACT OF PRIOR DETERMINATIONS

A. *Law of the Case*

In *State v. Owen*,[287] the Fourth District dealt with a situation in which a criminal defendant faced a retrial after the Supreme Court of Florida

276. *Id.* at 1175.
277. *Id.*
278. *Id.* at 1176.
279. *Id.* at 1175.
280. 644 So. 2d 177 (Fla. 5th Dist. Ct. App. 1994).
281. *Id.* at 178.
282. 648 So. 2d 742 (Fla. 1st Dist. Ct. App. 1994), *review denied*, 659 So. 2d 1085 (Fla. 1995).
283. *Id.* at 742.
284. *Id.* at 743.
285. *Id.*
286. *Id.*
287. 654 So. 2d 200 (Fla. 4th Dist. Ct. App. 1995).

reversed his conviction due to its conclusion that the defendant's confession was improperly admitted into evidence.[288] After the reversal, but before the retrial, the Supreme Court of the United States issued a decision that demonstrated that the confession was admissible as a matter of federal constitutional law.[289] The trial court refused a request by the State to reconsider the admissibility of the confession in light of the new precedent[290] and the State sought certiorari review.[291]

After noting concern about whether certain precedent might compel the conclusion that the confession would be inadmissible under the *Florida Constitution*, the court found that it was the law of the case that the confession was inadmissible.[292] The court pointed out that the Supreme Court of Florida could revisit the issue because appellate courts have "the power to reconsider and correct erroneous rulings notwithstanding that such rulings have become the law of the case."[293] The court therefore denied certiorari,[294] but provided an opportunity for the issue to be reopened by certifying a question of great public importance that asked whether the principles of the federal case were applicable in light of the precedent dealing with the question under the *Florida Constitution*.[295]

The law of the case doctrine was also applied in *White v. State*,[296] when a criminal defendant attempted to raise on a motion to correct an illegal sentence, an issue that had been previously raised in a direct appeal that had been decided without an opinion by a per curiam affirmance.[297] The Fifth District stated: "A per curiam decision even without opinion establishes the law of the case on the same issues and facts which were raised or which could have been raised."[298]

B. *Res Judicata*

In *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*,[299] which, for reasons which will soon become apparent, will hereinafter be

288. Owen v. State, 560 So. 2d 207 (Fla.), *cert. denied*, 498 U.S. 855 (1990).
289. *State v. Owen*, 654 So. 2d at 201.
290. *Id.*
291. *Id.*
292. *Id.* at 202.
293. *Id.* (quoting Preston v. State, 444 So. 2d 939, 942 (Fla. 1984)).
294. *State v. Owen*, 654 So. 2d at 201.
295. *Id.*
296. 651 So. 2d 726 (Fla. 5th Dist. Ct. App. 1995).
297. *Id.* at 726.
298. *Id.*
299. 643 So. 2d 16 (Fla. 1st Dist. Ct. App. 1994), *cert. denied*, 115 S. Ct. 1795 (1995).

referred to as *McKesson IV*, the court wrote the latest, and possibly final, chapter to a saga that began when two alcoholic beverage distributors, McKesson and Tampa Crown, separately challenged certain statutory provisions that provided for preferential tax treatment to distributors of alcoholic beverages made from products grown in Florida.[300]

In each case, the trial court entered a final and partial summary judgment invalidating the taxing scheme on Commerce Clause grounds, but made its ruling prospective in nature and thus denied each distributor's request for a tax refund.[301] In each case, the Division of Alcoholic Beverages and Tobacco appealed the Commerce Clause ruling and the distributor cross-appealed the prospective application ruling.[302] The First District consolidated the two appeals and certified the case to the Supreme Court of Florida,[303] which affirmed the trial court's rulings in *Division of Alcoholic Beverages and Tobacco v. McKesson Corp. ("McKesson I").*[304]

McKesson alone sought review in the Supreme Court of the United States, which, in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco ("McKesson II")*,[305] struck that portion of *McKesson I* which had granted only prospective relief.[306]

Following remand to the Supreme Court of Florida, the division announced a proposed remedy and the court, in *Division of Alcoholic Beverages & Tobacco v. McKesson Corp. ("McKesson III")*,[307] remanded the case to the trial court to determine whether the chosen remedy satisfied minimum constitutional requirements.[308]

Tampa Crown then filed a petition before the trial court seeking to appear in the proceeding.[309] The division opposed the petition, asserting, among other grounds, that because Tampa Crown had not pursued the case to the Supreme Court of the United States, *McKesson I* was res judicata insofar as Tampa Crown's claim for relief.[310] The trial court granted

---

300. *Id.* at 18.
301. *Id.*
302. *Id.*
303. *Id.*
304. 524 So. 2d 1000 (Fla. 1988), *rev'd*, 496 U.S. 18 (1990), *on remand to* 574 So. 2d 114 (Fla. 1991), *on remand to* 643 So. 2d 16 (Fla. 1st Dist. Ct. App. 1994).
305. 496 U.S. 18 (1990).
306. *Id.* at 31.
307. 574 So. 2d 114 (Fla. 1991).
308. *McKesson IV*, 643 So. 2d at 18.
309. *Id.*
310. *Id.*

Tampa Crown's petition, and the First District was called upon to review the propriety of that ruling.[311]

The court concluded that because Tampa Crown did not seek review of the Supreme Court of Florida's decision in *McKesson I* in the Supreme Court of the United States, Tampa Crown "must be considered to have accepted that decision and, therefore, to have no interest in any remaining litigation."[312] Given that fact, the court found the decision in *McKesson I* to be res judicata as to Tampa Crown.[313]

The court rejected Tampa Crown's contention that it continued to have an interest in the case because United States Supreme Court Rule 12.4 provides that all parties to the proceeding in a lower court are deemed parties in the Supreme Court unless the petitioner notifies the clerk of the Supreme Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition.[314]

The court acknowledged that rule 12.4 offered "superficial support"[315] to Tampa Crown's position and that it had found no cases directly on point.[316] The court nonetheless concluded that Tampa Crown "was required to take some affirmative act before the United States Supreme Court,"[317] such as "filing either a notice informing the clerk of its continuing interest in the case or a brief adopting McKesson's brief"[318] for its refund request to survive.

XVII. MOOTNESS

Cases deemed moot by the appellate courts included the following:

James Mitchell & Co. v. Gallagher.[319] The court found that statements made by an individual, as the state insurance commissioner, could have served as the basis for the issuance of a writ of prohibition to disqualify him from issuing a final order, but went on to hold that the issue

311. *Id.*
312. *Id.* at 20.
313. *McKesson IV*, 643 So. 2d at 20.
314. *Id.* at 18-19.
315. *Id.* at 19.
316. *Id.*
317. *Id.*
318. *McKesson IV*, 643 So. 2d at 19.
319. 651 So. 2d 700 (Fla. 1st Dist. Ct. App.), *review denied*, 659 So. 2d 1087 (Fla. 1995).

was rendered moot by the fact that the individual involved no longer held that office.[320]

Future Medical Technologies International, Inc. v. Sanders.[321] A case seeking certiorari review of an order requiring production of information claimed to be privileged was deemed moot when the trial court stayed its order of production to allow for appellate review, but before such review was completed, the case went to trial without the information being provided.[322] The court found that by proceeding to trial without production, the respondent had waived the right to have the information produced.[323]

Metropolitan Dade County v. Knight.[324] An appeal from an order to a county to pay costs in a criminal case was considered moot, because the county had paid the costs at issue.[325]

XVIII. PER CURIAM AFFIRMANCE WITHOUT OPINION

In *Elliott v. Elliott*,[326] the court entered a per curiam affirmance without opinion.[327] The appellant's counsel filed a motion for rehearing that the court characterized as "rearguing the merits of the case in an effort to persuade the court to change its mind,"[328] and as "express[ing] displeasure with and chastis[ing] the lower court, the appellee and this court."[329] The court indicated that the tone and tenor of the motion was perhaps best reflected by the following language in the initial statement made by the appellant:

> After a Judgement (sic) that was a travesty; an Answer Brief filled with hyperbole and falsehood; and this Court's superficial and shallow review, the appellant can now only pray for simple fairness and equity.[330]

320. *Id.* at 701.
321. 651 So. 2d 250 (Fla. 4th Dist. Ct. App. 1995).
322. *Id.* at 250.
323. *Id.*
324. 640 So. 2d 90 (Fla. 3d Dist. Ct. App. 1994).
325. *Id.* at 90.
326. 648 So. 2d 135 (Fla. 4th Dist Ct. App. 1994).
327. *Id.* at 135.
328. *Id.*
329. *Id.*
330. *Id.*

Noting that Florida Rule of Appellate Procedure 9.330 commands that motions for rehearing not reargue the merits of the court's order,[331] the court found the motion to be "a personification of the very conduct found by the appellate courts to constitute a flagrant violation of the rule."[332] The court thus denied the motion for rehearing and ordered counsel to show cause why sanctions should not be imposed.[333]

In his response to the order to show cause, appellant's counsel expressed his apologies, and indicated that he intended no disrespect to the court, the lower court or opposing counsel.[334] The court indicated that "[h]ad counsel simply ended there (leaving well enough alone), the matter would have been adequately addressed and put to rest."[335] Counsel went on, however, "to explain what prompted his argumentative and overzealous motion for rehearing, namely, the fact that the court's opinion 'was a simple *per curiam* affirmance of the trial court's Final Judgment, and the undersigned attorney found it impossible to discern the Court's reasoning.'"[336] The response also stated that "'the undersigned attorney was extremely surprised at this Court's *per curiam* affirmance and presumed that his argument had been overlooked by this Court.'"[337]

The court found this to be "a most disturbing revelation,"[338] and stated: "The notion that an appellate practitioner would view a per curiam disposition, without opinion, as lacking in meaningful review is absolutely astounding."[339] The court opined that "[p]erhaps appellate counsel should not be faulted for this misconceived view of a per curiam affirmance, without opinion."[340] Rather, the court stated:

> Perhaps the fault lies with the law school curriculum, the continuing legal education programs offered by the Florida Bar, or by the appellate courts themselves, in not engendering a sense of confidence that the absence of a written opinion is not akin to a superficial treatment, and

331. *Elliot*, 648 So. 2d at 135.
332. *Id.* at 136.
333. *Id.*
334. Elliot v. Elliot, 648 So. 2d 137, 138 (Fla. 4th Dist. Ct. App. 1994).
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.*
339. *Elliot II*, 648 So. 2d at 138.
340. *Id.*

> in leaving the bar with the unfounded notion that the court "did not read the briefs."[341]

"Perhaps," the opinion went on to say, "the court needs simply to restate the fundamental proposition that each and every appeal receives the same degree of attention and that a per curiam affirmance without opinion is not an indication of any kind of lesser treatment."[342] The court concluded its discussion by accepting counsel's apology and declining to impose sanctions.[343]

XIX. REHEARING

In *3299 N. Federal Highway, Inc. v. Board of County Commissioners*,[344] the Fourth District dealt with the issue of whether an opinion denying a motion for rehearing becomes effective immediately or whether there is some period of time provided for the filing of a second motion for rehearing or clarification.[345] The issue arose after the court entered an initial opinion and the appellants filed motions for rehearing. The court denied the motions in an opinion that certified a question of great public importance on the court's own motion and that corrected a factual error from the original opinion.[346] The second opinion "did not change the substance or effect" of the original opinion.[347]

The finality of the second opinion became an issue in two respects. First, two days after the second opinion was filed, arrests were made under the ordinance at issue in the case.[348] A stay of enforcement had precluded such arrests during the pendency of the case, but the initial opinion had vacated that stay.[349] Second, the appellants filed a motion for clarification directed to the second opinion.[350]

The court noted that Florida Rule of Appellate Procedure 9.330(b) allows a party to file just one motion for rehearing or for clarification of a

---

341. *Id.*
342. *Id.* at 139.
343. *Id.*
344. 646 So. 2d 215 (Fla. 4th Dist. Ct. App. 1994).
345. *Id.* at 215.
346. *Id.* at 227-28.
347. *Id.* at 228.
348. *Id.*
349. *3299*, 646 So. 2d at 228.
350. *Id.*

decision,[351] and stated that "[a]n exception to the rule has been recognized where on the first motion for rehearing, the court changes its previous ruling."[352] The court found that since it did not change the result or reasoning of its initial opinion, the portion of the initial opinion vacating the stay became final and enforcement of the ordinance became appropriate.[353] The court did consider the motion for clarification, but only because the second opinion was erroneously rubber stamped by the clerk with a standard indication that the opinion was not final until the expiration of the time to seek rehearing or until the disposition of any such motion.[354] Clearly, the lesson of *3299* is that absent such a stamp, a motion for rehearing or clarification under similar circumstances would be inappropriate.

XX. ADMINISTRATIVE APPELLATE PRACTICE

A. *Review of Non-Final Administrative Orders*

In *Florida Leisure Acquisition Corp. v. Florida Commission on Human Relations*,[355] the appellant sought review of a non-final order rejecting a recommendation of a hearing officer who had concluded that the appellant had not engaged in a racially discriminatory employment practice.[356] The order in question remanded the matter to the hearing officer for a hearing on damages.[357] The court recognized that "jurisdiction lies in the district court to immediately review a non-final administrative order if review of the final agency action would not provide an adequate remedy."[358] It concluded, however, that the appellant in the case under consideration would not be deprived of an adequate remedy if appellate review was delayed until after the final order determining all issues.[359] The court stated: "The necessity of trying a case to conclusion before obtaining redress on appeal from an erroneous interlocutory ruling of the lower court does not make the remedy inadequate."[360]

---

351. *Id.*

352. *Id.* at 228-29 (citing Dade Fed. Sav. & Loan v. Smith, 403 So. 2d 995, 999 (Fla. 1st Dist. Ct. App. 1981)).

353. *Id.* at 229.

354. *3299*, 646 So. 2d at 229.

355. 639 So. 2d 1028 (Fla. 5th Dist. Ct. App. 1994).

356. *Id.* at 1028.

357. *Id.*

358. *Id.* (citing FLA. CONST. art. V, § 4(b)(2); FLA. R. APP. P. 9.100(a),(c)); FLA. STAT. § 120.68(1) (1993).

359. *Id.* at 1029.

360. *Florida Leisure*, 639 So. 2d at 1029.

The court was not swayed by the fact that interlocutory appeals can be taken in civil cases from orders determining liability. The court pointed out that the supreme court interpreted such appeals as being specifically authorized by Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv), and that non-final administrative orders are not reviewable under that rule.[361]

B. *Exhaustion of Administrative Remedies*

In *Berkowitz v. City of Tamarac*,[362] the City sold to the appellant property on which it was operating some of its public works.[363] The property was leased back to the City until it could move the public works into a new facility, which was not yet completed.[364] The lease provided that the City would repurchase the property if, during the term of the lease, the City effectuated either an adverse change in zoning to the premises, the imposition of any additional governmental restrictions, or requirements which would prohibit or materially and adversely affect the appellant's intended development so that such development would become economically unfeasible.[365]

The appellant filed a complaint which alleged that the City adopted a comprehensive land use plan that contained restrictions that made his intended development economically unfeasible.[366] He sought money damages and rescission.[367] The trial court dismissed the case because the appellant had failed to exhaust his administrative remedies by not seeking relief from the restrictions.[368]

The Fourth District reversed, concluding that because the appellant was seeking money damages and rescission, which could not be obtained in an administrative proceeding, he was not required to exhaust administrative remedies.[369]

361. *Id.*
362. 654 So. 2d 982 (Fla. 4th Dist. Ct. App. 1995).
363. *Id.* at 982.
364. *Id.*
365. *Id.*
366. *Id.*
367. *Berkowitz*, 654 So. 2d at 982.
368. *Id.*
369. *Id.* at 983.

C. *Timeliness of Notice of Appeal*

In *Allen v. Live Oak Ford Mercury*,[370] the court rejected a claim that Florida Administrative Code Rule 38E-2.003(3), which states that appeals filed by mail shall be considered to have been filed when postmarked by the United States Postal Service, could be relied upon to breathe life into a case in which the notice of appeal that was mailed to the court was received after the expiration of the time within which an appeal could be instituted.[371]

The court stated: "The administrative rule to which the appellants refer concerns an administrative appeal in an unemployment compensation proceeding and [this] rule is clearly not applicable in appeals taken to this court."[372]

D. *Water Management District Emergency Orders*

In *West Coast Regional Water Supply Authority v. Southwest Florida Water Management District*,[373] the Fifth District found that it had no jurisdiction to review emergency orders of a water management district that were issued pursuant to the emergency powers authority of section 373.119(2) of the *Florida Statutes*. The court noted that under the statute, any person to whom an emergency order is directed is required to comply immediately, but may also obtain a hearing before the district's governing board "'as soon as possible.'"[374] The court held that only after the evidence adduced at such a hearing provides the record to support the emergency order or cause it to be quashed is the administrative action subject to review.[375]

XXI. WORKERS' COMPENSATION APPELLATE PRACTICE

A. *Appeals from Non-Final Orders Which Determine That a Party Is Not Entitled to Workers' Compensation Immunity as a Matter of Law*

In *Breakers Palm Beach, Inc. v. Gloger*,[376] the defendant appealed an order denying its motion for summary judgment which was grounded on

370. 647 So. 2d 1060 (Fla. 1st Dist. Ct. App. 1994).
371. *Id.* at 1060.
372. *Id.* at 1061.
373. 646 So. 2d 765 (Fla. 5th Dist. Ct. App. 1994).
374. *Id.* at 766.
375. *Id.*
376. 646 So. 2d 237 (Fla. 4th Dist. Ct. App. 1994).

workers' compensation immunity. The trial court had denied the motion because it concluded that there were issues of fact to be resolved.[377] The appeal was taken pursuant to the Florida Rule of Appellate Procedure 9.130(a)(3)(C)(vi), which permits appeals from non-final orders which determine "that a party is not entitled to workers' compensation immunity as a matter of law."[378]

The appellee moved to dismiss the appeal, arguing that the rule permits review only of orders determining once and for all that there is no workers' compensation immunity,[379] and does not permit review of orders merely determining, as did the order in the case, that the issue of workers' compensation immunity is an issue of fact.[380]

The Fourth District employed a grammatical analysis in denying the motion to dismiss. It found that if the words "as a matter of law" had been placed at the beginning of the above-cited rule provision, the appellee's argument would have been persuasive.[381] Under that scenario, the court concluded, the rule would permit review of non-final orders which determine "'as a matter of law that a party is not entitled to workers' compensation immunity.'"[382] The words "'as a matter of law,'" the court continued, would modify "'determine.'"[383] Since the key words were placed at the end of the rule provision, however, the court found that they modified the word "entitled" and that the provision therefore had a broader meaning.[384] That meaning, the court determined, encompassed the order under review.[385]

B. *Emergency Matters*

In *Bradley v. Hurricane Restaurant*,[386] an appeal was taken from an order of a judge of compensation claims granting in part and denying in part a claim for benefits found to involve an emergency.[387] The appellees moved to dismiss, asserting that the order was not a non-final order that can

377. *Id.* at 238.
378. FLA. R. APP. P. 9.130(a)(3)(C)(vi).
379. *Id.*
380. *Id.*
381. *Breakers*, 646 So. 2d at 237-38.
382. *Id.*
383. *Id.* at 237.
384. *Id.* at 238.
385. *Id.*
386. 652 So. 2d 443 (Fla. 1st Dist. Ct. App. 1995).
387. *Id.* at 443.

be appealed under Florida Rule of Workers' Compensation Procedure 4.160, and that the order was not appealable as a final order because a claim for post-surgical attendant care alleged in the original claim remained pending and undisposed of by the appealed order.[388]

The court pointed to the fact that section 440.25(4)(h), *Florida Statutes*, as amended by the legislature in its 1993 special session, provides that a judge of compensation claims may have an "emergency conference when there is a 'bona fide emergency involving the health, safety, or welfare of an employee,'" and that "[a]n emergency conference . . . may result in the entry of an order or the rendering of an adjudication by the judge of compensation claims."[389] Given the "direct and unambiguous language"[390] of this statutory provision, and the fact that the judge of compensation claims found a bona fide emergency to exist, the court concluded that the order under review was "a final order subject to appellate review in this court."[391]

C. *Orders Taxing Costs*

In *Employer's Overload of Dade County v. Robinson*,[392] the court dismissed an appeal from an order taxing costs, but reserved jurisdiction to determine entitlement to attorney's fees. The court stated: "As long as any other matter is pending before a judge of compensation claims, an order taxing costs is not reviewable, unless appealed as part of an adjudication on the merits."[393] In dismissing the case, however, the court noted that it did not "in any way depart from the rule that a judge of compensation claims may, in an order adjudicating the merits of a claim for benefits, reserve jurisdiction to award attorney's fees, without affecting the finality of the order adjudicating the merits (which may include an award of costs)."[394]

388. *Id.*
389. *Id.* at 444 (quoting FLA. STAT. § 440.25(4)(h) (Supp. 1994)).
390. *Id.*
391. *Bradley*, 652 So. 2d at 444.
392. 642 So. 2d 72 (Fla. 1st Dist. Ct. App. 1994).
393. *Id.* at 73.
394. *Id.*

XXII. CRIMINAL APPELLATE PRACTICE

A. *Custody during State Appeal of Order of Dismissal*

In *Fontana v. Rice*,[395] the supreme court dealt with a certified question that asked whether a trial court is authorized, upon a showing of good cause, to continue a defendant on bond pending a state appeal from an order dismissing criminal charges, or whether such a defendant must be released on recognizance.[396] The court held that defendants must be discharged from custody when a trial court has dismissed all criminal charges and no new indictment or information is filed against the defendant.[397] The court stated that this rule applies even if the State appeals the dismissal unless some other charge justifies a continuation of custody.[398]

The court found the issue to be controlled by Florida Rule of Criminal Procedure 3.190(e), which states in pertinent part:

> If the motion to dismiss is sustained, the court may order that the defendant be held in custody or admitted to bail for a reasonable specified time pending the filing of a new indictment or information. If a new indictment or information is not filed within the time specified in the order, or within such additional time as the court may allow for good cause shown, the defendant, if in custody, shall be discharged therefrom, unless some other charge justifies a continuation in custody.[399]

B. *Self-Representation on Appeal in Capital Cases*

In *Hill v. State*,[400] the public defender was appointed to represent the defendant on the appeal of his conviction for first-degree murder and sentence of death.[401] The defendant moved for leave to discharge the public defender and to represent himself on appeal.[402] Pursuant to appointment by the supreme court, a circuit judge conducted a hearing on the motion and determined that the defendant comprehended his constitutional right to assistance of counsel in the appeal process and that he

395. 644 So. 2d 502 (Fla. 1994).
396. *Id.* at 502.
397. *Id.* at 503.
398. *Id.*
399. FLA. R. CRIM. P. 3.190(e).
400. 656 So. 2d 1271 (Fla. 1995).
401. *Id.* at 1272.
402. *Id.*

knowingly and voluntarily waived that right.[403] The circuit judge recommended that the defendant be allowed to represent himself, but that the public defender continue in the case as "'next friend of the court.'"[404]

The supreme court noted that the right to self-representation at trial, as recognized by *Faretta v. California*,[405] is not applicable to appeals.[406] The court pointed to the fact that the case was a capital appeal and indicated that it was "concerned that it cannot properly carry out its statutory responsibility to review Hill's conviction and sentence of death without the skilled adversarial assistance of a lawyer acting on Hill's behalf, particularly as it concerns the sufficiency of the evidence to convict and the proportionality of the death sentence."[407] Accordingly, the court denied the appellant's motion but stated that because the case was a capital case, it would allow the appellant to file a pro se supplemental brief.[408]

C. *Death of Defendant during Pendency of Appeal*

In *Clements v. State*,[409] the defendant's criminal conviction was affirmed.[410] Prior to the expiration of the time for filing a motion for rehearing, the defendant's counsel filed a motion for abatement of the appeal ab initio on the ground that the defendant had died.[411] A subsequently filed death certificate indicated that the defendant was found dead on a date subsequent to the affirmance and prior to the filing of the motion.[412]

The State responded to the motion, acknowledging the line of cases entitling the defendant to the relief requested,[413] but representing that the supreme court, in a recent case presenting similar circumstances, *Rodriguez v. State*,[414] denied a motion to abate an appeal ab initio and instead dismissed the appeal.[415] The court in *Clements* did abate the appeal ab

403. *Id.*
404. *Id.*
405. 422 U.S. 806 (1975).
406. *Hill*, 656 So. 2d at 1272.
407. *Id.*
408. *Id.*
409. 652 So. 2d 1294 (Fla. 1st Dist. Ct. App. 1995).
410. *Id.* at 1295.
411. *Id.*
412. *Id.*
413. *Id. See, e.g.*, Williams v. State, 648 So. 2d 313 (Fla. 1st Dist. Ct. App. 1995); Bagley v. State, 122 So. 2d 789 (Fla. 1st Dist. Ct. App. 1960).
414. 645 So. 2d 454 (Fla. 1994).
415. *Clements*, 652 So. 2d at 1295.

initio,[416] but it went on to certify to the supreme court the following question as one of great public importance:

> DOES THE DEATH OF A CRIMINAL DEFENDANT AFTER JUDGMENT AND SENTENCE, BUT DURING THE PENDENCY OF THE APPEAL THEREFROM, REQUIRE THE PROSECUTION TO BE PERMANENTLY ABATED AB INITIO IN THE TRIAL AND APPELLATE COURTS?[417]

The court also certified the same question in *Thomas v. State*,[418] a case in which it appears that the defendant died prior to the court reaching a determination of the case.

D. *Absence of Defendant*

In *Jarrett v. State*,[419] the defendant failed to appear for a pretrial conference and a capias for his arrest was issued.[420] Several days later, with the defendant still missing, a jury was selected and sworn and the case proceeded to trial in the absence of the defendant.[421] After a conviction on one of two charges, the defendant's counsel filed a motion for a new trial.[422] While the motion was pending, the defendant was apprehended.[423]

After the motion was denied, an appeal followed and the First District addressed the issue of whether it should decide the case. The court found that unlike a situation in which an escape is from restraint after a conviction, the defendant's absence "did not delay judgment, sentence, or time for appeal."[424] The court thus concluded that the escape did not burden the court system in a manner that would justify dismissal.[425]

---

416. *Id.*
417. *Id.*
418. 654 So. 2d 635 (Fla. 1st Dist. Ct. App. 1995).
419. 654 So. 2d 973 (Fla. 1st Dist. Ct. App. 1995).
420. *Id.* at 973.
421. *Id.*
422. *Id.* at 973-74.
423. *Id.* at 974.
424. *Jarrett*, 654 So. 2d at 974.
425. *Id.*

E. *Appeals from Rulings on Motions to Correct Illegal Sentences*

In *Wright v. State*,[426] the Fourth District dismissed an appeal as untimely, applying a well-settled line of precedent[427] concluding that the pendency of a motion for rehearing does not toll the time for appealing from a trial court's ruling on a motion filed under Florida Rule of Criminal Procedure 3.800(a) for correction of an illegal sentence.[428]

Judge Farmer wrote a specially concurring opinion. He noted that he concurred because he was bound to do so by stare decisis, but stated that if he "were writing on a clean slate in this court," he did not think he would join in a dismissal of the case.[429] Judge Farmer pointed out that rule 3.800(a) is unique in that it allows a court "to correct an illegal sentence *at any time*," and that its purpose is to provide any convicted person who "is suffering under a sentence that is illegal" to have a "ready, expeditious and effective tool at hand to test the illegality."[430] He then stated, "I do not understand why the circuit court's denial of rehearing should not be treated as itself an order denying relief from an illegal sentence, which is fully appealable to us if the notice of appeal is filed, as here, within 30 days of the court's order."[431]

Judge Farmer went on to indicate that he did not believe that the court "should shrink from considering whether a sentence may be illegal merely because the prisoner made two attempts to persuade the trial judge, one of them by motion for rehearing."[432] "The alternative," he said, "is for the prisoner to continue serving a putatively illegal sentence while being barred from having appellate review of the trial court's decision to deny such relief."[433] Judge Farmer concluded his thoughts by stating, "This alternative is so directly antagonistic to the plain meaning and purpose of rule 3.800(a) that I cannot believe this is what the drafters truly intended."[434]

---

426. 643 So. 2d 1157 (Fla. 4th Dist. Ct. App. 1994).

427. *See* Campbell v. State, 637 So. 2d 80 (Fla. 4th Dist. Ct. App. 1994); Jones v. State, 635 So. 2d 989 (Fla. 1st Dist. Ct. App. 1994); Newman v. State, 610 So. 2d 455 (Fla. 4th Dist. Ct. App. 1992).

428. *Wright*, 643 So. 2d at 1157.

429. *Id.* at 1157 (Farmer, J., concurring specially).

430. *Id.* at 1158 (footnote omitted).

431. *Wright*, 643 So. 2d at 1158 (Farmer, J., concurring specially) (footnote omitted).

432. *Id.*

433. *Id.* at 1158-59.

434. *Id.* at 1159 (footnote omitted).

F. *Special Assistant Public Defenders*

Several cases addressed the issue of whether special assistant appellate public defenders would be required to provide their clients with the records and transcripts from their cases at the conclusion of their appeals.

In *Pearce v. Sheffey*,[435] the Second District reaffirmed the conclusion it reached in *Thompson v. Unterberger*,[436] that "an indigent defendant is entitled to possession of a transcript which was provided at public expense to his court-appointed counsel, without being required to pay for photocopying the transcript."[437]

The Third District, in *Coates v. McWilliams*,[438] however, refused to require a special assistant public defender to furnish his client with copies of requested documents. The court pointed to the fact that no funds were provided to reimburse the attorney for the cost of duplicating and forwarding the copies to the client[439] and the fact the attorney was required by an administrative order to maintain the original documents for a period of three years from the closing of the case.[440] The court stated, "[b]y accepting an appointment as special assistant public defender, counsel does not become obligated to bear the cost of furnishing documents to an indigent defendant, even though a duly constituted public defender's office, which is properly funded for such cost items, may be so required."[441]

The Third District did require a special assistant public defender to furnish his client with documents and transcripts in *Beaubrum v. Rolle*.[442] There, despite the court's request, the attorney failed to respond to the client's petition for a writ of mandamus, which sought production of the items.[443] The court noted the failure to respond and stated that "it appears that there is no impediment in granting the relief sought."[444]

---

435. 647 So. 2d 333 (Fla. 2d Dist. Ct. App. 1994).
436. 577 So. 2d 684 (Fla. 2d Dist. Ct. App. 1991).
437. *Pearce*, 647 So. 2d at 333.
438. 650 So. 2d 695 (Fla. 3d Dist. Ct. App. 1995).
439. *Id.* at 695.
440. *Id.* at 696.
441. *Id.*
442. 654 So. 2d 560 (Fla. 3d Dist. Ct. App. 1994).
443. *Id.* at 560.
444. *Id.*

G. *Attorney's Fees and Costs in Criminal Cases*

1. Attorney's Fees

In *Zelman v. Metropolitan Dade County*,[445] the Third District addressed the issue of what hourly fee should be paid to an attorney for his successful court-appointed representation of a defendant in a capital appeal.[446] The court had previously quashed an initial award upon a holding, in part, that the hourly rate was not limited to the $40 per hour for out-of-court services and $50 per hour for in-court services established by a trial court administrative order.[447] After a hearing for the purpose of establishing a reasonable hourly rate, the trial court fixed the rate at the same level, $40 per hour for out-of-court services and $50 per hour for in-court services.[448] The Third District also quashed this order, remanding for a new hearing to set a reasonable rate using the factors contained in Rule of Professional Conduct 4-1.5.[449] That hearing resulted in an identical award.[450]

On review of that order, the Third District concluded that based upon the record and the court's own expertise, it was apparent that the award was "not close to a reasonable fee for the difficult and uncommonly burdensome services Zelman performed so well."[451] The court went on to say: "In view of the prior unfortunate history of this case, in which we seem to have been so unsuccessful in making ourselves understood, we decline to require still another hearing on the issue in the court below."[452] Rather, the court determined that the attorney would be awarded $100 per hour for out-of-court services and $125 per hour for in-court services rendered.[453]

---

445. 645 So. 2d 57 (Fla. 3d Dist. Ct. App. 1994).

446. The appeal had resulted in the reversal of the defendant's two first-degree murder convictions and the vacation of his two death sentences. Garcia v. State, 564 So. 2d 124 (Fla. 1990).

447. Zelman v. Metropolitan Dade County, 586 So. 2d 1286 (Fla. 3d Dist. Ct. App. 1991), *appeal after remand*, 622 So. 2d 6 (Fla. 3d Dist. Ct. App. 1993), *appeal after remand*, 645 So. 2d 57 (Fla. 3d Dist. Ct. App. 1994).

448. *Zelman*, 645 So. 2d at 57.

449. *Id.*

450. *Id.* at 57-58.

451. *Id.* at 58.

452. *Id.*

453. *Zelman*, 645 So. 2d at 58.

2. Costs

In a series of cases, the Fourth District found that it was improper to include, either as a provision in a judgment of conviction, or as a condition of probation, the prospective imposition of appellate costs.[454] As noted by the court in *Anderson v. State*,[455] such costs "may be taxed in favor of the prevailing party, pursuant to Florida Rule of Appellate Procedure 9.400(a), which 'explicitly provides for taxation of costs by the lower tribunal on motions heard within 30 days *after* issuance of the mandate—but not before.'"[456]

H. *Transcripts in Criminal Cases*

In *Brown v. State*,[457] following the procedure set forth in Florida Rule of Appellate Procedure 9.200(b)(2), the appellant's attorney served a photocopy of the certified trial transcript on the office of the Attorney General.[458] The Attorney General's office refused to accept the uncertified photocopy, explaining in a letter that it would not accept any transcript unless it was prepared and certified by an official court reporter because doing so would place upon that office the burden of checking the photocopy pages against a certified copy filed with the appellate court.[459] The Attorney General relied upon Florida Rule of Appellate Procedure 9.140(d), which states that in criminal cases the clerk of the lower court shall provide the trial transcript and the record on appeal to the Attorney General.[460]

The Fifth District found that rule 9.200(b)(2), which set forth the procedure utilized by the appellant's counsel, "is applicable to criminal appeals only to the extent that it does not conflict with rule 9.140(d),"[461] the rule relied upon by the Attorney General. Therefore, the court found that the procedure employed by the appellant's counsel could not be used

---

454. *See* McDonald v. State, 649 So. 2d 943 (Fla. 4th Dist. Ct. App. 1995); Davis v. State, 641 So. 2d 972 (Fla. 4th Dist. Ct. App. 1994); Anderson v. State, 632 So. 2d 132 (Fla. 4th Dist. Ct. App. 1994).

455. 632 So. 2d at 132.

456. *Id.* at 133 (quoting Boyer v. Boyer, 588 So. 2d 615, 617 (Fla. 5th Dist. Ct. App. 1991), *review denied*, 599 So. 2d 654 (Fla. 1992)).

457. 639 So. 2d 634 (Fla. 5th Dist. Ct. App. 1994).

458. *Id.* at 634-35.

459. *Id.* at 635.

460. *Id.* In pertinent part, the rule states, "The clerk shall retain the original of the record and shall forthwith transmit copies thereof to the court, to the attorney general, and to the office of a public defender appointed to represent an indigent defendant." FLA. R. APP. P. 9.140(d).

461. *Brown*, 639 So. 2d at 635.

in criminal cases and held "that appellants in criminal cases must file a certified copy of the trial transcript with the clerk of the lower court for transmittal to the office of the Attorney General."[462]

I. *Belated Appeals in Criminal Cases*

1. Procedure for Obtaining Belated Appeals

In *Stephenson v. State*,[463] the supreme court declined an invitation to change the procedure it established in *State v. District Court of Appeal, First District*[464] for obtaining a belated appeal. In *District Court of Appeal*, the court had concluded that a claim for a belated appeal based on ineffective assistance of trial counsel for failing to file a timely notice of appeal must be raised in the trial court in a motion filed pursuant to Florida Rule of Criminal Procedure 3.850.[465] In *Stephenson*, the court addressed the certified question of whether the district courts of appeal have the authority to grant belated appeals when the record on appeal indisputably reflects that trial counsel, through neglect, inadvertence or error, filed an untimely notice of appeal and thus rendered ineffective assistance as a matter of law.[466]

The question arose in a case in which the Second District dismissed an appeal as untimely, but directed the trial court to grant a belated appeal if one was sought by a legally sufficient motion.[467] The court found it "incongruous for us to dismiss Stephenson's direct appeal while at the same time providing him with the remedy of a belated appeal, thereby delaying a review of the merits of his case at the expense of judicial economy."[468] Nonetheless, the court recognized that it was not at liberty to cast aside the process established by *District Court of Appeal*.[469] The court indicated that it would prefer to "dispense with the cumbersome procedure we have fashioned, treat the notice of appeal as a petition for writ of habeas corpus, and grant Stephenson belated review of the merits of his appeal."[470]

---

462. *Id.*
463. 655 So. 2d 86 (Fla. 1995).
464. 569 So. 2d 439 (Fla. 1990).
465. *Id.* at 442.
466. 655 So. 2d at 86.
467. Stephenson v. State, 640 So. 2d 117, 118 (Fla. 2d Dist. Ct. App. 1994), *aff'd*, 655 So. 2d 86 (Fla. 1995).
468. *Id.*
469. *Id.* at 119.
470. *Id.*

After discussing the proceedings in the lower courts and its decision in *District Court of Appeal*, the Supreme Court of Florida, in approving the Second District's decision, concluded that the district courts of appeal do not have the authority to grant belated appeals resulting from ineffective assistance of trial counsel.[471] The court did give some indication that it might be willing to revisit this question at some point in the future. The court stated that "[f]or now,"[472] it was adhering to the principle established in *District Court of Appeal*, and noted that the issue was "currently under review by this Court and the Committee on Rules of Appellate Procedure."[473]

The decision in *Stephenson* does not appear to have any effect on that portion of *District Court of Appeal* which indicates that claims of ineffective assistance of appellate counsel should be raised by petition for writ of habeas corpus filed in the appellate court.[474]

2. Due Process and Right to Counsel

In *Moment v. State*,[475] the Fourth District, in one opinion, both granted a belated appeal and reversed the order belatedly reviewed. The case involved a situation in which, at a hearing on the defendant's motion for post-conviction relief, filed about a month after sentencing, the trial court ordered the defendant to pay $12,800 in restitution.[476] The appellate court found several problems with the proceedings at the trial level. The defendant was not given notice of the hearing. [477] The defendant was not represented by counsel at the hearing.[478] No evidence was presented as to restitution, the trial court relying instead on the prosecutor's statement that she had received a phone call from the victim telling her the amount of damages.[479] Finally, the defendant was not informed of his right to appeal.[480]

The defendant did not appeal from the restitution order. Instead, he moved to vacate restitution and appealed from the order denying that

471. *Stephenson*, 655 So. 2d at 87.
472. *Id.*
473. *Id.* at 87 n.1.
474. 569 So. 2d at 442 n.1.
475. 645 So. 2d 502 (Fla. 4th Dist. Ct. App. 1994).
476. *Id.* at 503.
477. *Id.*
478. *Id.*
479. *Id.*
480. *Moment*, 645 So. 2d at 503.

motion.[481] The State argued that all of the defects could have and should have been raised in a direct appeal from the order of restitution.[482] The court found that "because this case is so fundamentally and thoroughly flawed in its most basic constitutional guarantees of due process and right to counsel, we consider this an exceptional case and treat this as a petition for a belated appeal of the restitution order, which we grant."[483]

3. Belated Institution of a Belated Appeal

In *Lofton v. State*,[484] the trial court granted the defendant's motion for post-conviction relief that sought a belated appeal, and appointed a public defender to pursue the appeal.[485] Inexplicably, the appeal was not instituted until twenty months after the entry of the trial court's order.[486] Noting that under *Mack v. State*,[487] a belated appeal must be instituted by the filing of a notice of appeal within thirty days of rendition of the order allowing the proceeding, the Fifth District dismissed the appeal.[488] The court concluded that the defendant would have to return to the trial court with another motion for post-conviction relief, showing, if he could, that the last delay was due to a legally cognizable excuse, such as ineffective assistance of counsel, for failing to pursue the belated appeal.[489]

4. Other Cases

In *Love v. State*,[490] the First District concluded that a defendant was not precluded from obtaining a belated appeal by the fact that he had pled guilty.[491]

In *Nava v. State*,[492] the Fourth District found that in the absence of specific prejudice, the doctrine of laches does not bar a claim of entitlement to a belated appeal.[493]

---

481. *Id.*
482. *Id.*
483. *Id.*
484. 639 So. 2d 1134 (Fla. 5th Dist. Ct. App. 1994).
485. *Id.* at 1134.
486. *Id.*
487. 586 So. 2d 1266 (Fla. 1st Dist. Ct. App. 1991).
488. *Lofton*, 639 So. 2d at 1134.
489. *Id.*
490. 638 So. 2d 1062 (Fla. 1st Dist. Ct. App. 1994).
491. *Id.* at 1063.
492. 652 So. 2d 1264 (Fla. 4th Dist. Ct. App. 1995).
493. *Id.* at 1265.

In *Keller v. State*,[494] the Fifth District granted a belated appeal to a defendant who had already had an unsuccessful pro se appeal. The defendant had requested counsel for his initial appeal and had been found insolvent for purposes of appeal at that time.[495] Despite that fact, no appointment was made and the defendant consequently instituted his own appeal and filed a brief, in which he again requested counsel. Categorizing the defendant's efforts as "a futile attempt to muster an effective appeal," the court found that a belated appeal was appropriate.[496]

J. *Review of Orders Waiving Juvenile Jurisdiction*

In *State v. Del Rey*,[497] the State appealed from, and sought certiorari review of, a non-final order waiving juvenile jurisdiction over the respondent and authorizing the State to prosecute the respondent as an adult.[498] The challenged portion of the order: 1) reduced the three filed charges of manslaughter by culpable negligence with a weapon to manslaughter by culpable negligence, and 2) precluded the State from filing an information charging the respondent as an adult with an offense other than the offenses on which the court waived juvenile jurisdiction or any lesser included offenses thereof.[499]

The Third District dismissed the appeal, finding that "[t]here is no Florida Supreme Court rule of procedure which authorizes the State to appeal from a non-final order in a juvenile delinquency case, as here, and, accordingly, this court has no jurisdiction to entertain the State's appeal."[500]

The court also dismissed the certiorari proceeding, finding that, under the facts of the case, the State had failed to establish irreparable injury.[501] The court noted that despite the existence of the challenged order, the State had filed an information charging the respondent as an adult with three counts of manslaughter by culpable negligence with a weapon and that the respondent had moved to dismiss those counts.[502] The court reasoned that, if the circuit court denied the motion to dismiss, the issue would become

494. 652 So. 2d 1278 (Fla. 5th Dist. Ct. App. 1995).
495. *Id.* at 1278.
496. *Id.*
497. 643 So. 2d 1146 (Fla. 3d Dist. Ct. App. 1994).
498. *Id.* at 1147.
499. *Id.*
500. *Id.*
501. *Id.* at 1148.
502. *Del Rey*, 643 So. 2d at 1148.

moot, and that if the circuit court granted the motion, the State would have the right to appeal from that order pursuant to Florida Rule of Appellate Procedure 9.140(c)(1)(A).[503]

K. *Orders Reviewable in Criminal Cases*

Numerous cases dealt with the question of whether certain orders were reviewable and, if so, what type of proceeding was appropriate. These cases included:

State v. Lewek.[504] An order severing charges is neither appealable nor an appropriate subject for certiorari.[505]

State v. Riley.[506] A sentence within the guidelines is not illegal even if the trial court commits error by refusing to make habitual offender findings on timely request by the State.[507] Such a sentence therefore cannot be appealed,[508] nor can the State obtain relief by mandamus or certiorari.[509]

Kolker v. State.[510] "Certiorari is the appropriate means by which to seek review of an order disqualifying a defendant's attorney."[511]

State v. Fudge.[512] The State may not appeal from a directed verdict of acquittal as to a particular charge when the directed verdict is entered after a jury deadlock on the charge.[513] Because of the deadlock, there is no verdict, and section 924.07(1)(j) of the *Florida Statutes*, which allows the State to appeal from a ruling granting a motion for judgment of acquittal after a jury verdict, does not apply.[514]

State v. Bradford.[515] Certiorari is appropriate to review a trial court's order excluding testimony as to the victim's state of mind before her murder

503. *Id.*
504. 656 So. 2d 268 (Fla. 4th Dist. Ct. App. 1995).
505. *Id.* at 269.
506. 648 So. 2d 825 (Fla. 3d Dist. Ct. App. 1995).
507. *Id.* at 826.
508. *Id.*
509. *Id.* at 826-27.
510. 649 So. 2d 250 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 658 So. 2d 991 (Fla. 1995).
511. *Id.* at 251 n.1.
512. 645 So. 2d 23 (Fla. 2d Dist. Ct. App. 1994).
513. *Id.* at 24.
514. *Id. See* FLA. STAT. § 924.07(1)(j) (1993).
515. 658 So. 2d 572 (Fla. 5th Dist. Ct. App. 1995).

when the evidence is "crucial evidence" and thus, "there would be a miscarriage of justice"[516] if the evidence is not admissible.

XXIII. FAMILY LAW APPELLATE PRACTICE

A. *Belated Appeals from Orders Terminating Parental Rights*

In *T.D. v. Department of Health & Rehabilitative Services*,[517] the First District discussed the procedure to be used in obtaining belated appeals from orders terminating parental rights.[518] When the case first reached the appellate court, it was dismissed because the notice of appeal was not timely filed.[519] The dismissal was without prejudice to the appellant's right to file a petition for writ of habeas corpus in the trial court pursuant to the procedure outlined by the supreme court in *In the interest of E.H.*[520] In *E.H.*, the supreme court had concluded that when there is a claim that an attorney's error precluded a parent from appealing an order terminating parental rights, the parent, in a petition for writ of habeas corpus in the trial court, may seek a belated appeal.[521]

Subsequent to the First District's dismissal in *In the interest of T.D.*, a petition for writ of habeas corpus was filed in the trial court. The petition, however, was directed to the merits of the termination order containing a brief explanation of the circumstances which occasioned the late filing of the notice of appeal.[522] The order denying the petition set forth no findings relating to the question of whether a belated appeal was appropriate, but was instead a reaffirmation of the merits of the order terminating parental rights.[523]

On appeal from that order, the First District pointed out that "the trial court and respective counsel misconstrued the remedy authorized by the supreme court in *E.H.*"[524] That remedy, the court stated, "is analogous to that available to a defendant in a criminal proceeding to seek a belated appeal predicated on ineffective assistance of counsel."[525]

---

516. *Id.* at 574.
517. 639 So. 2d 704 (Fla. 1st Dist. Ct. App. 1994).
518. *Id.* at 705.
519. In the interest of T.D., 623 So. 2d 851 (Fla. 1st Dist. Ct. App. 1993).
520. *Id.* at 852-53. *See* In the interest of E.H., 609 So. 2d 1289 (Fla. 1992).
521. *E.H.*, 609 So. 2d at 1290-91.
522. *T.D.*, 639 So. 2d at 705.
523. *Id.*
524. *Id.*
525. *Id.* n.1.

Accordingly, the court reversed and remanded the cause with directions to the appellant to file a petition setting forth the grounds which demonstrate the entitlement to a belated appeal.[526] The court further stated that the "trial court's order should set forth such findings of fact as are necessary to support the grant or denial of a belated appeal."[527]

B. *Premature Appeals*

In *State, Department of Health & Rehabilitative Services v. Skinner*,[528] the trial court entered three orders limiting the amount of retroactive child support collectible in three proceedings in which the Department of Health & Rehabilitative Services and the mothers sought a determination of paternity and child support.[529] The court determined that the orders were non-final and not subject to review, and stated that in similar situations, it would normally dismiss the appeals.[530] The court indicated, however, that it had discovered that while the appeals were pending, final orders had been entered in the cases and that the time for appealing from those orders had expired.[531] Noting that if it dismissed the appeals, the department and the mothers would lose all chance for review, the court treated the notices of appeal as premature appeals of the final orders,[532] and considered the merits of the case.

C. *Contempt for Failing to Pay Child Support*

In *Rodriguez v. Rodriguez*,[533] the appellant was found in contempt of court for failing to meet his child support obligations. He then failed to either pay the purge amount established by the court or to surrender himself to serve the alternative sentence imposed by the court.[534] On appeal from the contempt order, the Third District pointed out that when an "appellant has disobeyed an order of the trial court, the appellate court may, in its discretion, either entertain or dismiss an appeal."[535] The court noted that although an appellate court should ordinarily provide a grace period prior

526. *Id.*
527. *T.D.*, 639 So. 2d at 705.
528. 649 So. 2d 280 (Fla. 2d Dist. Ct. App. 1995).
529. *Id.* at 281.
530. *Id.* at 282.
531. *Id.*
532. *Id.*
533. 640 So. 2d 133 (Fla. 3d Dist. Ct. App. 1994).
534. *Id.* at 134.
535. *Id.* (quoting Gazil v. Gazil, 343 So. 2d 595, 597 (Fla. 1977)).

to dismissing the appeal within which the appellant may comply with the violated order and prevent dismissal, such a grace period is not necessary when the appellant has absconded from the court's jurisdiction.[536] Since the appellant in *Rodriguez* had failed to surrender himself, the court applied this principle and dismissed the appeal.[537]

XXIV. SANCTIONS

A. *Parties*

In *Lowery v. Kaplan*,[538] the Fourth District dealt with a pro se petitioner who was proceeding in forma pauperis.[539] The petitioner had filed twenty-eight petitions for extraordinary relief and twenty-one final and non-final appeals within the preceding three years.[540] None had met with success.[541] Noting that it has the "inherent authority to prevent abuse of the judicial system,"[542] the court dismissed the pending petition as a sanction for abusive filings[543] and ordered the prospective denial of in forma pauperis status for the petitioner's future petitions unless they are presented by a member of The Florida Bar who represents the petitioner.[544]

The Fourth District imposed similar sanctions in *Martin v. Marko*.[545] There, as in *Lowery*,[546] the court acted on its inherent authority.[547] It noted, however, that the Supreme Court of the United States had adopted a specific rule authorizing the denial of a motion for leave to proceed in forma pauperis when the Court is satisfied that a case is "frivolous or malicious."[548] The court went on to suggest that "[a]lthough Florida does not presently have a similar rule, it would be prudent for our supreme court to consider adopting a similar provision."[549]

---

536. *Id.*
537. *Id.*
538. 650 So. 2d 114 (Fla. 4th Dist. Ct. App. 1995).
539. *Id.* at 114.
540. *Id.*
541. *Id.*
542. *Id.* at 115.
543. *Lowery*, 650 So. 2d at 116.
544. *Id.*
545. 651 So. 2d 819 (Fla. 4th Dist. Ct. App. 1995).
546. 650 So. 2d at 114.
547. *Martin*, 651 So. 2d at 820.
548. *Id.* (quoting U.S. SUP. CT. R. 39.8).
549. *Id.*

In *Isley v. State*,[550] the Fifth District indicated its frustration with a petitioner who had come before the court nine times since 1990, when the court affirmed his conviction and sentence for second degree murder. Judge Sharp's opinion begins with the following statement: "This case reminds me of my grandmother's final warning and admonition to me and my siblings as children, when we had exhausted her patience with our doings. 'Enough is enough,' she would say. And that was the end of it."[551]

The opinion goes on to prohibit the petitioner from filing any further pro se pleadings with the court concerning the conviction and sentence in question, and concludes by echoing the words of Judge Sharp's grandmother: "Enough is enough."[552]

In *Scott v. State*,[553] a case described by the Fifth District as "another successive and repetitive proceeding," the court stopped short of imposing the sanction it imposed in *Isley*, but warned that the appellant was "approaching an abuse of process and an exhaustion of this court's patience."[554]

Likewise, in *Skinner v. State*,[555] a per curiam affirmance without opinion, Judge Sharp wrote a specially concurring opinion to state her belief that while the petition for habeas corpus filed by the petitioner lacked substantive merit, the primary reason why it should be denied was that it constituted "an abuse of process."[556] She noted that the petitioner's claims could have been raised in a previous petition he had filed, and that the petitioner had made no showing that the second set of claims were not known or could not have been discovered when the first petition was filed.[557] Writing in the hope to "forestall such petitions Skinner may contemplate filing in the future," she stated that the failure to make such a showing made the second petition, "and any future ones similarly drafted, an abuse of process."[558]

550. 652 So. 2d 409 (Fla. 5th Dist. Ct. App. 1995).
551. *Id.* at 410.
552. *Id.* at 441.
553. 656 So. 2d 204 (Fla. 5th Dist. Ct. App. 1995).
554. *Id.* at 204.
555. 656 So. 2d 282 (Fla. 5th Dist. Ct. App. 1995).
556. *Id.* at 282.
557. *Id.*
558. *Id.*

B. *Attorneys*

In *Keene v. Nudera*,[559] a petition requesting certiorari review was filed with the Second District, and neither a filing fee nor an order of indigency accompanied the petition.[560] The court gave the petitioner's counsel an opportunity to prove his client's indigency status, but counsel failed to either obtain an order from the trial court or to file a sufficient motion and affidavit with the district court.[561] The court noted that on at least ten occasions in the preceding twenty-five months, the attorney had filed appellate proceedings in the Second District without a fee or an order of indigency.[562] The court stated that it was apparent from the attorney's presentation at the hearing on the order to show cause that the attorney was not willfully disobeying the court's orders, but that he did not understand the basic procedures for establishing indigency status in an appellate proceeding.[563] Accordingly, the court concluded that a fine would not be the most productive solution to the problem.[564] Instead, the court ordered the attorney to obtain, within twelve months, a minimum of ten hours of continuing legal education in appellate practice or procedure, in addition to the continuing legal education required of attorneys by rule 6-10.3 of the *Rules Regulating The Florida Bar*.[565]

In *Beaubrum v. Rolle*,[566] the Third District directed an attorney, who had acted as a special assistant public defender, to deliver to the petitioner all documents and transcripts in his possession that related to the circuit court and appellate proceedings in the case.[567] When he failed to do so, the court appointed a commissioner to take testimony and to make findings and recommendations as to whether the attorney should be disciplined by way of determination that he was in contempt of court.[568] The commissioner concluded that the attorney had been negligent, but noted that some mitigating factors existed.[569] He recommended that the attorney be found in contempt of the Third District, that he be fined an amount to be

559. 20 Fla. L. Weekly D1232 (2d Dist. Ct. App. May 19, 1995).
560. *Id.* at D1232.
561. *Id.*
562. *Id.*
563. *Id.* at D1232-33.
564. *Keene*, 20 Fla. L. Weekly at D1233.
565. *Id. See* R. REGULATING FLA. BAR 6-10.3.
566. 654 So. 2d 560 (Fla. 3d Dist. Ct. App. 1994).
567. *Id.* at 560.
568. *In re* Rolle, 654 So. 2d 560 (Fla. 3d Dist. Ct. App. 1995).
569. *Id.* at 560.

determined by the court and that he be required to pay a court reporter fee of $113.[570] Based upon this recommendation, the court ordered the attorney to show cause why he should not be fined $500 and required to pay the $113 court reporter fee.[571] When the attorney failed to respond to the order, the court found him in contempt and imposed the above-noted sanctions.[572]

In *State v. Davis*,[573] the court "reluctantly" granted a motion to reinstate an appeal that had been dismissed because the appellant's counsel did not timely file a brief or move for an extension of time.[574] The court accepted counsel's grounds for reinstatement, which were not set forth in the opinion, but stated that it was writing the opinion "as a reminder that such noncompliance with the Rules of Appellate Procedure will not be tolerated."[575] The court "further caution[ed] that orderly and timely appellate practice can also be assured by fines, costs, reprimand and contempt against an attorney."[576]

Similar language was used in *Hastings v. State*,[577] when the Second District quashed a circuit court order dismissing an appeal from a county court judgment due to the untimely filing of the appellant's initial brief.[578] In opposing the petition for writ of certiorari filed in the district court, the circuit judge argued that tardiness in prosecuting appeals is a continuing problem in his court and that denying him the right to dismiss the appeal would be "emasculating the appellate rules and destroying the efficiency of his court 'for there is no other sanction that the Circuit Court can impose upon negligent appellate counsel that is as effective.'"[579]

The district court, while expressing its appreciation for the exasperation of the judge, disagreed, concluding that "fines, costs, reprimand, and contempt *against the attorney* will insure an orderly and timely appellate practice in circuit court."[580]

---

570. *Id.* at 560-61.
571. *Id.* at 561.
572. *In re* Beaubrum, 654 So. 2d 561 (Fla. 3d Dist. Ct. App. 1995).
573. 19 Fla. L. Weekly D2399 (4th Dist Ct. App. Nov. 16, 1994).
574. *Id.* at D2399.
575. *Id.*
576. *Id.*
577. 640 So. 2d 115 (Fla. 2d Dist. Ct. App. 1994).
578. *Id.* at 116.
579. *Id.* at 117.
580. *Id.* (emphasis added).

XXV. STAYS

Receding from its prior precedent, the Fourth District, in *Florida Eastern Development Co. v. Len-Hal Realty*,[581] found that Title 11 of the *United States Code*, section 362(a)(1), which provides for an automatic stay of all legal proceedings "against" a debtor who has filed a suggestion of bankruptcy under chapter 11 of the Bankruptcy Code, is applicable to appellants in the district court in cases in which the original trial proceedings were "against them."[582]

The court had previously held, in *Marine Charter & Storage v. Underwriters*,[583] that the provision did not apply to debtors who were appellants because appeals are proceedings brought by, not against, appellants.[584] The court in *Florida Eastern*, however, was swayed by the fact that all federal courts that have considered the issue have found that the stay applies whenever the original proceedings were against the debtor, regardless of whether the debtor was an appellant or appellee on appeal.[585] The court therefore receded from *Marine Charter*,[586] and acknowledged the applicability of the stay to appellants when the trial level proceedings were against them.[587]

XXVI. ATTORNEY'S FEES AND COSTS

A. *Attorney's Fees*

1. Timeliness of Award of Appellate Attorney's Fees

In *Judges of the Eleventh Judicial Circuit v. Janovitz*,[588] the supreme court held that "when a motion for appellate attorney's fees has been timely filed, the court may enter an award of attorney's fees within a reasonable time after the issuance of the mandate."[589] The court further noted that there is no requirement that the award be made in the same term of court so long as it is entered within a reasonable time.[590] The court thus upheld an

581. 636 So. 2d 756 (Fla. 4th Dist. Ct. App. 1994) (en banc).
582. *Id.* at 757. *See* 11 U.S.C. § 362(a)(1) (1994).
583. 568 So. 2d 944 (Fla. 4th Dist. Ct. App. 1990).
584. *Id.* at 946.
585. 636 So. 2d at 757.
586. *Id.* at 758.
587. *Id.* at 757.
588. 635 So. 2d 19 (Fla. 1994).
589. *Id.* at 20.
590. *Id.*

award of appellate attorney's fees that was entered by a circuit court acting in its appellate capacity fifty-four days after it had issued its mandate.[591] The court disapproved of the Third District's decision in *Dyer v. City of Miami Employee's Retirement Board*,[592] which had concluded that the circuit court lacked jurisdiction to enter an order on attorney's fees after its mandate had issued.[593]

2. Application of a Multiplier to Appellate Attorney's Fees

In *Stack v. Lewis*,[594] the trial court applied a multiplier in awarding attorney's fees due to "'the substantial uncertainty of prevailing, the substantial uncertainty of collecting and because the result obtained was the maximum possible result.'"[595] On review, the appellant argued that the multiplier should not apply to the fees earned from the appeal.[596] The appellant reasoned that the appeal process began a new case and that the appellee's likelihood of success on appeal was high since he won in the trial court.[597] The First District disagreed, noting that the moment for determining the likelihood of success is "'at the outset'" or "'at the time the case was initiated,'"[598] and that the appellee employed the same attorneys from the beginning of the litigation through appeal.[599] In light of these factors, and the fact that both the trial and appellate work were governed by a contingency arrangement, the court concluded that there was "no reason to treat the appellate hours differently from the trial hours."[600]

3. Appellate Attorney's Fees Pursuant to Section 768.79 of the *Florida Statutes*

In *Mark C. Arnold Construction Co. v. National Lumber Brokers, Inc.*,[601] the trial court awarded fees and costs pursuant to section 768.79(1) of the *Florida Statutes*, because the judgment was "'at least 25 percent

591. *Id.*
592. 512 So. 2d 338 (Fla. 3d Dist. Ct. App. 1987).
593. *Janovitz*, 635 So. 2d at 20.
594. 641 So. 2d 969 (Fla. 1st Dist. Ct. App. 1994).
595. *Id.* at 970.
596. *Id.*
597. *Id.*
598. *Id.* (citing Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1151 (Fla. 1985)).
599. *Stack*, 641 So. 2d at 970.
600. *Id.*
601. 642 So. 2d 576 (Fla. 1st Dist. Ct. App. 1994).

greater than'" the pretrial demand for judgment.[602] After affirming the judgment per curiam without opinion,[603] the First District aligned itself with the Fourth[604] and Fifth[605] Districts in granting, on the same grounds as the trial court, the appellee's motion for an award of reasonable costs and attorney's fees incurred in successfully defending the judgment on appeal.[606]

4. Appellate Attorney's Fees in Eminent Domain Matters

In *Department of Transportation v. Gefen*,[607] the supreme court held that a landowner claiming inverse condemnation is only entitled to appellate attorney's fees if the claim is ultimately successful.[608] Thus, the court found that a landowner who prevailed in the district court was not entitled to attorney's fees when the supreme court quashed the district court decision.[609]

5. Review of Orders Determining the Right to Attorney's Fees but Not Setting the Amount

Each of the district courts of appeal have recently ruled that orders determining the right to attorney's fees, which do not set the amount of such fees, are not appealable.[610]

B. *Costs*

In *Lee County v. Eaton*,[611] the trial court entered an order requiring Lee County, a nonparty to a civil action between two individuals, to pay the cost of a transcript used on appeal by a successful appellant.[612] The trial

602. *Id.* at 576.
603. *Id.*
604. Schmidt v. Fortner, 629 So. 2d 1036, 1043 n.10 (Fla. 4th Dist. Ct. App. 1993).
605. Williams v. Brochu, 578 So. 2d 491, 495 (Fla. 5th Dist Ct. App. 1991).
606. *Mark C. Arnold Construction*, 642 So. 2d at 576.
607. 636 So. 2d 1345 (Fla. 1994).
608. *Id.* at 1347.
609. *Id.*
610. *See* Wometco Enters. v. Cordoves, 650 So. 2d 1117 (Fla. 1st Dist. Ct. App. 1995); Trans Atlantic Distribs., L.P. v. Whiland & Co., S.A., 646 So. 2d 752 (Fla. 5th Dist. Ct. App. 1994); McIlveen v. McIlveen, 644 So. 2d 612 (Fla. 2d Dist. Ct. App. 1994); Gonzalez Eng'g, Inc. v. Miami Pump & Supply Co., Inc., 641 So. 2d 474 (Fla. 3d Dist. Ct. App. 1994); Winkelman v. Toll, 632 So. 2d 130 (Fla. 4th Dist. Ct. App. 1994).
611. 642 So. 2d 1126 (Fla. 2d Dist. Ct. App. 1994).
612. *Id.* at 1126.

court concluded that because the appellant was indigent, she was entitled to certain court services without charge under section 57.081(1) of the *Florida Statutes* (1993).[613]

The Second District reversed the order, stating: "Although an indigent person is entitled to receive some services of the court system without charge, this statutory right has never been interpreted to require a county to pay for a transcript in a typical civil action filed by an indigent person in that county's circuit court."[614] The court also stated that although section 57.081(1) specifies that an indigent person is entitled to free services from "'the courts, sheriffs, and clerks,'"[615] no reference is made in the statute "'to county-subsidized services from the official court reporter, nor is there any reference to free transcripts in Florida Rule of Appellate Procedure 9.430.'"[616] Further, the court continued: "There is no constitutional right to a free transcript in such an appeal."[617]

XXVII. A LOOK TO THE FUTURE

In the upcoming year, the Florida Appellate Court Rules Committee, pursuant to Florida Rule of Judicial Administration 2.130, will submit its four-year cycle report to the supreme court, recommending changes to the appellate rules. The court will likely ask for comments on the committee's report in the spring of 1996 and adopt such changes as it deems appropriate that fall. Also in the upcoming year, the First District is expected to set up an appellate mediation program. Such programs have the potential to have significant impact on the appellate process. Of course, the courts this coming year will provide answers to many of the questions raised by the cases discussed in this article. The answers, as they usually do, will likely generate new questions. Those questions, and others, will continue to produce the large number of court decisions that shape the field of appellate practice.

613. *Id.*
614. *Id.* at 1126-27.
615. *Id.* at 1127.
616. *Eaton*, 642 So. 2d at 1127.
617. *Id.*