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## Appellate Practice

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# Appellate Practice: 1993 Survey of Florida Law

**Anthony C. Musto\***

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## I. AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE

The most significant development in the field of appellate practice in Florida during the 1992-93 year was the revision of the Florida Rules of Appellate Procedure.

As is the case with each set of Florida court rules, such revisions occur every four years pursuant to the cycle established by Florida Rule of Judicial Administration 2.130(c). Proposals are submitted by the Florida Appellate Court Rules Committee (“the Committee”) to the Supreme Court of Florida, which adopts such portions of the proposals as it deems appropriate. The numerous changes that resulted from this process were adopted by the supreme court on October 22, 1992,<sup>1</sup> and took effect on January 1, 1993.<sup>2</sup>

### A. *Gender-Neutral Language and Compliance With Supreme Court Style Guidelines*

The rules were rewritten in gender-neutral language and in conformance with the standard style guidelines promulgated by the supreme court for court rules. Whenever possible, the rules employed the use of plural instead of singular pronouns to avoid both gender-specific language and awkwardness. This is the approach that was suggested by the supreme court<sup>3</sup> and by the report of the court’s Gender Study Bias Commission.<sup>4</sup>

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1. *In re* Amendments to the Fla. Rules of Appellate Procedure, 609 So. 2d 516, 516 (Fla. 1992) [hereinafter *Appellate Amendments*].

2. *Id.* at 518.

3. See *In re* Amendment to Fla. Rules of Criminal Procedure-Rule 3.133(b)(6) (Pretrial Release), 573 So. 2d 826, 827 (Fla. 1991).

4. THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMM’N, REPORT OF THE FLA. SUPREME COURT GENDER BIAS STUDY COMM’N 239 (March 1990) (on file at Nova

Changes for these purposes were made throughout the rules and will not be detailed in this article. No substantive effect was intended by these changes.

### B. Rule 9.010. *Effective Date and Scope*

This rule was amended to eliminate the statement that the appellate rules supersede all conflicting rules. The Committee noted that other sets of Florida court rules contain provisions applicable to certain appellate proceedings.<sup>5</sup> The Committee felt that, in the absence of a clear mandate from the supreme court that only the appellate rules are to address appellate concerns, the appellate rules should not automatically control in the event of a conflict.<sup>6</sup> The portion of the rule indicating that the appellate rules supersede all conflicting statutes was unchanged.<sup>7</sup>

### C. Rule 9.020. *Definitions*

A change of terminology in subdivision (a) of this rule reflects the fact that workers' compensation matters are now heard by judges of compensation claims, rather than deputy commissioners.<sup>8</sup> Similar references are changed in other rules, but will not be specifically noted in this article.

The court also adopted an extensive rewrite of subdivision (g) of the rule, relating to rendition of orders.<sup>9</sup> The provision was expanded to include motions for clarification among those motions that delay rendition<sup>10</sup> when they are timely and authorized. The provision was also rewritten to make clear that when a rule of procedure specifically provides that a particular motion does not delay rendition, that rule prevails and even a timely and authorized motion that would otherwise delay rendition will not have that effect.<sup>11</sup> This change recognizes the fact that in such instances

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University Law Library).

5. See, e.g., FLA. R. CRIM. P. 3.132(c)(4); FLA. W.C.R.P. 4.160.

6. FLA. R. APP. P. 9.020 Committee Note-1992 Amendments; *Appellate Amendments*, 609 So. 2d at 521.

7. *Appellate Amendments*, 609 So. 2d at 520.

8. FLA. R. APP. P. 9.020 Committee Note-1992 Amendment; *Appellate Amendments*, 609 So. 2d at 521.

9. *Appellate Amendments*, 609 So. 2d at 521.

10. Rendition of an order can be postponed only when a motion, whether it be for clarification or for some other form of relief specified by the rule, is timely and authorized by the rules of procedure governing the proceeding in which the final order is entered. See *Francisco v. Victoria Marine Shipping, Inc.*, 486 So. 2d 1386, 1388-89 (Fla. 3d Dist. Ct. App.), *review denied*, 494 So. 2d 1153 (Fla. 1986).

11. *Appellate Amendments*, 609 So. 2d at 521.

the supreme court has indicated that the rule dealing with the specific motion in question prevails over the general appellate rule.<sup>12</sup>

Subdivisions (g)(1), (g)(2) and (g)(3) replace previous language that simply stated that when an appropriate motion was filed, an order would not be deemed rendered until the disposition of the motion.<sup>13</sup>

Subdivision (g)(1) reflects that in multiple party cases, the rendition of an order is delayed only with respect to any claim between a movant and the party or parties against whom relief is sought by motion.<sup>14</sup> This change incorporates existing case law.<sup>15</sup> It does not affect cases with just one plaintiff and one defendant, as the filing of an appropriate motion in such cases postpones rendition of the entire final order as to all claims between the parties.<sup>16</sup>

Subdivision (g)(2) was added to make clear that an order granting a new trial shall be deemed rendered when filed with the clerk even if other motions remain pending at the time.<sup>17</sup> This change also incorporates existing case law<sup>18</sup> and is intended to insure that subdivision (g)(1) is not read as a modification of this principle.<sup>19</sup>

Subdivision (g)(3) provides that if a notice of appeal is filed before the filing of a signed, written order disposing of all motions, all motions filed by the appealing party that are pending at the time shall be deemed abandoned and the final order shall be deemed rendered upon the filing of the notice of appeal as to all claims between parties who then have no motion pending between them.<sup>20</sup> This provision was added to clarify confusion generated by dicta in *Williams v. State*,<sup>21</sup> which appeared contrary to the settled principle that the rule incorporates.<sup>22</sup> Even when one party files a notice of appeal, however, the order appealed from is still

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12. *In re E.P.*, 544 So. 2d 1000, 1001 (Fla. 1989).

13. *Appellate Amendments*, 609 So. 2d at 521-22.

14. *Id.*

15. *See, e.g.*, *Phillips v. Ostrer*, 442 So. 2d 1084, 1084 (Fla. 3d Dist. Ct. App. 1983).

16. FLA. R. APP. P. 9.020 Committee Note-1992 Amendment; *Appellate Amendments*, 609 So. 2d at 523.

17. *Appellate Amendments*, 609 So. 2d at 522.

18. *Frazier v. Seaboard Sys. R.R.*, 508 So. 2d 345, 346 (Fla. 1987).

19. FLA. RULE R. APP. P. 9.020 Committee Note-1992 Amendment.

20. *Appellate Amendments*, 609 So. 2d at 522.

21. 324 So. 2d 74 (Fla. 1975).

22. *See, e.g.*, *In re Forfeiture of \$104,591 in U.S. Currency*, 578 So. 2d 727, 728 (Fla. 3d Dist. Ct. App. 1991).

not deemed rendered with regard to any other party whose post-judgment motions are still pending.<sup>23</sup>

#### D. Rule 9.030. Jurisdiction of Courts

Subdivision (c)(1)(B) of this rule was amended to correctly indicate that the appellate jurisdiction of circuit courts extends to all non-final orders listed in Rule 9.130,<sup>24</sup> not just those set forth in subdivision (a)(3) of that rule, as the rule had previously stated.

Subdivision (c)(1)(C) was amended to include the jurisdiction conferred on circuit courts by article V, section 5 of the Florida Constitution,<sup>25</sup> which provides for “the power of direct review of administrative action prescribed by general law.”

#### E. Rule 9.040. General Provisions

Subdivision (h) was amended to provide that the failure to file conformed copies of orders designated in notices of appeal, as required by Rules 9.110(d), 9.130(c) and 9.160(c), is not a jurisdictional defect, but that such failure may be the subject of appropriate sanctions.<sup>26</sup>

#### F. Rule 9.100. Original Proceedings

There were two additions to subdivision (b) of this rule. One change is to prohibit the practice of bringing original proceedings to enforce a private right on the relation of the state.<sup>27</sup> Thus, such actions must now be brought in the name of the parties.<sup>28</sup> The other change requires that if a petition seeks review of an order entered by a lower tribunal, all parties to the proceeding in the lower tribunal who are not named as petitioners shall be named as respondents.<sup>29</sup> This change complies with the definitions set forth in Rule 9.020 (f)(3) and (4), which defines “[p]etitioner” as “[a] party who seeks an order under Rule 9.100 or Rule 9.120,” and “[r]espondent” as “[e]very other party in a proceeding brought by a petitioner.”<sup>30</sup>

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23. FLA. R. APP. P. 9.020 Committee Note-1992 Amendments.

24. *Appellate Amendments*, 609 So. 2d at 525.

25. *Id.*

26. *Id.* at 529.

27. FLA. R. APP. P. 9.100 Committee Note-1992 Amendment.

28. *Id.*

29. *Id.*

30. *Appellate Amendments*, 609 So. 2d at 521.

Subdivision (c) was substantially rewritten. Although it retains the substance of its previous text, two significant changes were incorporated. It now states in subdivision (c)(2) that petitions for review of final quasi-judicial actions of agencies, boards and commissions of local government must be filed within thirty days of the rendition of the order to be reviewed, the same time limit that is set forth in subdivisions (c)(1) and (3) for the filing of petitions for common law certiorari and petitions for review of non-final administrative actions.<sup>31</sup> It also prohibits the practice of naming as separate respondents to petitions filed under the rule lower court judges, individual members of agencies, boards and commissions of local governments, and hearing officers.<sup>32</sup> It continues the practice of requiring copies of petitions to be served on such individuals, however.<sup>33</sup> The purpose of the change is to eliminate any suggestion that these individuals are parties or that they are adverse to the petitioner.<sup>34</sup>

Subdivision (e) was amended to require that the caption of a petition designate all parties on each side,<sup>35</sup> rather than at least one party on each side, as had previously been the case. In addition, a requirement was added for petitions seeking orders directed to lower tribunals to contain references to the appropriate pages of the supporting appendix required by Rule 9.220.<sup>36</sup> This requirement was intended to mirror the requirement of Rule 9.210(b)(3), which calls for page references to records or transcripts in briefs.<sup>37</sup>

Subdivision (f) was amended to reflect the existing requirement in the law<sup>38</sup> that a petition for certiorari under this rule must demonstrate not only that there has been a departure from the essential requirements of law, but also that the departure will cause material injury for which there is no adequate remedy by appeal.<sup>39</sup> Previously the rule referred only to the need

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31. *Id.* at 531.

32. *Id.*

33. *Id.*

34. FLA. R. APP. P. 9.100 Committee Note-1992 Amendment.

35. *Appellate Amendments*, 609 So. 2d at 534.

36. *Id.*

37. FLA. R. APP. P. 9.100 Committee Note-1992 Amendment.

38. *All Weather Control, Inc. v. Wawerczyk*, 600 So. 2d 517, 518 (Fla. 1st Dist. Ct. App. 1992); *Eberhardt v. Eberhardt*, 590 So. 2d 1134 (Fla. 4th Dist. Ct. App. 1992); *Young, Stern & Tannenbaum, P.A. v. Smith*, 416 So. 2d 4, 5 (Fla. 3d Dist. Ct. App. 1982); *In re J.S.*, 404 So. 2d 1144 (Fla. 5th Dist. Ct. App. 1981), *dismissed*, 412 So. 2d 467 (Fla. 1982); *Briggs v. Salcines*, 392 So. 2d 263 (Fla. 2d Dist. Ct. App. 1980), *review denied*, 397 So. 2d 779 (Fla. 1981), *review denied*, 454 U.S. 815 (1981).

39. *Appellate Amendments*, 609 So. 2d at 531.



to show a departure from the essential requirements of law and the Committee felt that it therefore established a standard other than that established by decisional law.<sup>40</sup>

Subdivision (h) was amended to extend to responses the requirement adopted for petitions<sup>41</sup> that appropriate page references to appendices be included.<sup>42</sup>

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

Subdivision (d) was amended to impose a requirement that, except in criminal cases, conformed copies of orders designated in notices of appeal be attached to such notices.<sup>43</sup> Copies of orders entered on timely motions postponing rendition of orders from which appeals are taken must also be attached.<sup>44</sup> These requirements are for the purpose of assisting the clerk in determining the nature and type of orders being appealed and the timeliness of appeals,<sup>45</sup> and are not jurisdictional in nature.<sup>46</sup>

Subdivision (m) was created to deal with situations in which notices of appeal are filed before the rendition of final orders. The subdivision provides that in such situations, appeals shall be subject to dismissal as premature,<sup>47</sup> but that if a final order is rendered before dismissal of the premature appeal, the premature notice of appeal will be considered effective to vest jurisdiction in the appellate court to review the final order.<sup>48</sup> It goes on to provide that before dismissal, the court, in its discretion, may permit the lower tribunal to render a final order.<sup>49</sup> This rule would not apply to situations in which the only reason a final order has not been rendered is the pendency of a motion delaying rendition that was filed by the same party that filed the notice of appeal. In such a situation, the pending motion would be deemed abandoned.<sup>50</sup>

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40. FLA. R. APP. P. 9.100 Committee Note-1992 Amendment.

41. FLA. R. APP. P. 9.100(c).

42. *Appellate Amendments*, 609 So. 2d at 532.

43. *Id.* at 535.

44. *Id.*

45. FLA. R. APP. P. 9.110 Committee Note-1992 Amendment.

46. *See supra* part I.E.

47. *Appellate Amendments*, 609 So. 2d at 535.

48. *Id.* at 535-36.

49. *Id.* at 536.

50. *See supra* part I.B.

#### H. *Rule 9.120. Discretionary Proceedings to Review Decisions of District Courts of Appeal*

An amendment to subdivision (d) makes clear that the formal requirements for briefs specified in Rule 9.210 also apply to briefs on jurisdiction.<sup>51</sup>

#### I. *Rule 9.130. Proceedings to Review Non-Final Orders*

This rule was amended to expand the list of non-final orders that may be reviewed. Specifically, subdivision (a)(3)(C)(vii) adds orders that determine that a class should be certified,<sup>52</sup> subdivision (a)(6) adds orders that deny a motion to certify a class and subdivision (a)(3)(D) adds orders that grant or deny the appointment of a receiver,<sup>53</sup> and terminate or refuse to terminate a receivership.<sup>54</sup>

The provisions allowing review from orders relating to the grant or denial of class certification arose from the Committee's belief that such orders determine the nature of an action and the extent of the parties and are analogous to other orders reviewable under the rule.<sup>55</sup> These provisions have been held to apply to orders entered after January 1, 1993, and are therefore not limited just to orders in cases instituted after that date.<sup>56</sup>

The provision relating to receivers and receiverships was added in response to the decision in *Twinjay Chambers Partnership v. Suarez*,<sup>57</sup> in which the court found that an order denying a request to appoint a receiver was not appealable under subdivision (a)(3)(C)(ii), which allows appeals from orders that determine the right to immediate possession of property.<sup>58</sup> The court suggested that the Committee consider whether subdivision (a)(3)(C)(ii) should be amended to set out whether and to what extent orders granting or denying such requests should be appealable.<sup>59</sup> The Committee was of the opinion that orders terminating or refusing to terminate receiverships are of the same quality as those that grant or deny the

51. *Appellate Amendments*, 609 So. 2d at 538.

52. *Id.* at 542.

53. *Id.*

54. *Id.*

55. FLA. R. APP. P. 9.130 Committee Note-1992 Amendment.

56. *See Backus v. Broward County*, 18 Fla. L. Weekly D2075 (Fla. 4th Dist. Ct. App. Sept. 22, 1993).

57. 556 So. 2d 781 (Fla. 2d Dist. Ct. App. 1990).

58. *Id.* at 782.

59. *Id.*

appointment of receivers and that, rather than amending subdivision (a)(3)(C)(ii), it was preferable to create a new provision that specifically identifies those orders with respect to a receivership that are subject to review under this rule.<sup>60</sup>

In this regard, it should be noted that in a case wholly independent of the four-year cycle revisions, the supreme court adopted an amendment that also added a category of orders that may be reviewed. In *Mandico v. Taos Construction, Inc.*,<sup>61</sup> the court adopted subdivision (a)(3)(C)(vi), which allows for review of orders determining that a party is not entitled to workers' compensation immunity as a matter of law.<sup>62</sup> That amendment became effective upon release of the court's opinion<sup>63</sup> on July 9, 1992.<sup>64</sup>

Subdivision (c) was also amended to impose a requirement that, except in criminal cases, conformed copies of orders designated in notices of appeal of non-final orders shall be attached to the notice.<sup>65</sup> This requirement is consistent with the identical requirement added to Rule 9.110(d), dealing with notices of appeal to review final orders, and is clearly for the same purpose.<sup>66</sup> The requirement is not jurisdictional in nature.<sup>67</sup>

#### J. Rule 9.140. Appeal Proceedings in Criminal Cases

Subdivision (b)(3)(A)(v) was added to provide that when an appeal is taken in a criminal proceeding, the attorneys of record shall not be relieved of any professional duties until substitute counsel has been obtained or appointed, or a statement has been filed with the appellate court that the appellant has exercised the right to self-representation.<sup>68</sup> The provision also states that in public-funded cases, the public defender for the local circuit shall initially be appointed until the record is transmitted to the appellate court.<sup>69</sup>

Subdivision (g) was amended to apply the procedure in effect for appeals from summary denials of motions for post-conviction relief under Florida Rule of Criminal Procedure 3.850, to appeals from summary denials

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60. FLA. R. APP. P. 9.130 Committee Note-1992 Amendment.

61. 605 So. 2d 850 (Fla. 1992).

62. *Id.* at 855.

63. *Id.*

64. *Id.* at 850.

65. *Appellate Amendments*, 609 So. 2d at 542.

66. *See supra* part I.G.

67. *See supra* part I.E.

68. *Appellate Amendments*, 609 So. 2d at 545.

69. *Id.*

of motions for correction of sentences under Florida Rule of Criminal Procedure 3.800(a).<sup>70</sup> The provision was also changed to require the clerk of the lower tribunal to include in the record, on an appeal from the summary denial of a Rule 3.800(a) motion, any attachments to the motion, order, motion for rehearing and order thereon.<sup>71</sup> This requirement was added because a motion under Rule 3.800(a) does not have the same detailed requirements as one under Rule 3.850.<sup>72</sup> A proposal by the Committee that would have eliminated briefs, except by court permission, in appeals from motions under both of the criminal rules, was rejected by the court.<sup>73</sup>

K. *Rule 9.160. Discretionary Proceedings to Review Decisions of County Courts*

Subdivision (c) was amended to impose a requirement that, except in criminal cases, conformed copies of orders designated in notices invoking the discretionary jurisdiction of district courts of appeal to review county court orders be attached to such notices.<sup>74</sup> Copies of orders entered on timely motions postponing rendition of orders from which review is sought must also be attached.<sup>75</sup> These requirements are consistent with the identical requirements added to Rule 9.110(d), dealing with notices of appeal from final orders, and are clearly for the same purpose.<sup>76</sup> The requirements are not jurisdictional in nature.<sup>77</sup>

L. *Rule 9.200. The Record*

Subdivision (b)(2) was amended to require the court reporter to bind the transcript of proceedings in consecutively numbered volumes and to number each page consecutively.<sup>78</sup>

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70. *Id.* at 546.

71. *Id.*

72. FLA. R. APP. P. 9.140 Committee Note-1992 Amendment.

73. *Appellate Amendments*, 609 So. 2d at 517.

74. *Id.* at 550.

75. *Id.*

76. *See supra* part I.G.

77. *See supra* part I.E.

78. *Appellate Amendments*, 609 So. 2d at 552.

Subdivision (d)(1)(A) was amended to require the clerk to incorporate the trial transcript at the end of the record and to prohibit the clerk from renumbering that transcript.<sup>79</sup>

Subdivision (d)(1)(B) was amended to include any transcripts other than the trial transcript as part of the remainder of the record that is to be consecutively numbered.<sup>80</sup>

These changes were made to standardize the lower court clerk's procedure with respect to the placement and pagination of the transcript in the record on appeal.<sup>81</sup>

### M. Rule 9.210. Briefs

Significant additions were made to subdivision (a)(2) with regard to the type, size and spacing required for briefs. The provision requires that the text be printed in type of no more than ten characters per inch and that text should be double spaced with no more than twenty-seven lines per page.<sup>82</sup> It further states that, although footnotes may be single spaced, they shall be in the same type size, with the same spacing between the characters, as the text.<sup>83</sup>

These requirements were imposed to bring about uniformity, to preclude efforts to circumvent the length requirements for briefs established by subdivision (a)(5) by the use of smaller type and to eliminate the filing of briefs that are difficult to read because of small type and spacing.<sup>84</sup> It appears that modern technology brought about these changes, as the Committee took into account the fact that "[t]hrough the utilization of various word processing systems, lawyers, if they choose, can reduce the size of print and spacing in footnotes and significantly extend the allowable length of their briefs, while at the same time making the ultimate product more difficult to read."<sup>85</sup>

Subdivision (g) was amended to allow for the filing of notices of supplemental authority that call the court's attention not just to decisions, rules or statutes, but also to other authorities.<sup>86</sup> A provision was also added allowing the notice to identify briefly the points argued on appeal to

79. *Id.* at 553.

80. *Id.*

81. FLA. R. APP. P. 9.200 Committee Note-1992 Amendment.

82. *Appellate Amendments*, 609 So. 2d at 556.

83. *Id.*

84. FLA. R. APP. P. 9.210 Committee Note-1992 Amendment.

85. REPORT OF THE FLA. BAR APPELLATE COURT RULES COMM. 6 (1992).

86. *Appellate Amendments*, 609 So. 2d at 556.

which the supplemental authorities are pertinent, but stating that the notice shall not contain argument.<sup>87</sup>

#### N. *Rule 9.220. Appendix*

This rule was amended to provide that if an appendix includes documents filed before January 1991, on paper measuring 8 1/2 by 14 inches, the documents should be reduced in copying to 8 1/2 by 11 inches, if practicable.<sup>88</sup> If impracticable, the appendix may measure 8 1/2 by 14 inches, but it should be bound separately from the document it accompanies.<sup>89</sup>

These additions to the rule were necessitated by the adoption of Florida Rule of Judicial Administration 2.055, which requires the use of 8 1/2 by 11 inch paper for all documents filed in any court and which became mandatory on January 1, 1991.<sup>90</sup> Problems arose when documents filed prior to that date on the longer paper needed to be included in an appendix filed after that date and the new rules address those problems.<sup>91</sup>

#### O. *Rule 9.300. Motions*

Subdivision (b) was clarified to reflect that an order granting an extension of time for preparation of the record or the index of the record or for filing of the transcript of proceedings automatically extends, for a like period, the time for service of the appellant's initial brief.<sup>92</sup> Although the subdivision already provided, and continues to provide, that an order extending time for any act automatically extends the time for all other acts that bear a relation to it, the briefing schedule is related by time only to the filing of the notice of appeal.<sup>93</sup> Thus, it was felt that the existing rule did not act to automatically extend the time for filing the appellant's brief when there was a delay in preparing or filing the record, index of record or transcript. Accordingly, the specific language was added.<sup>94</sup> The subdivision was also modified to eliminate the reference to an order extending time

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87. *Id.* at 556-57.

88. *Id.* at 558-59.

89. *Id.* at 559.

90. *In re* Amendment to the Fla. Rules of Judicial Admin., Rule 2.055 (Paper Size), 550 So. 2d 457 (Fla. 1989).

91. FLA. R. APP. P. 9.220 Committee Note-1992 Amendment.

92. *Appellate Amendments*, 609 So. 2d at 559.

93. *See* FLA. R. APP. P. 9.110(f).

94. FLA. R. APP. P. 9.300 Committee Note-1992 Amendment.

entered by the lower tribunal.<sup>95</sup> This action was taken to correlate the rule with Rule 9.600(a), which provides that only an appellate court can grant an extension of time for any act under the appellate rules.<sup>96</sup>

#### P. *Rule 9.310. Stay Pending Review*

Subdivision (c)(1) was modified to eliminate the ability of parties posting a bond through the use of two personal sureties, but to allow parties, as an alternative, the use of a surety company, to deposit cash in the circuit court clerk's office.<sup>97</sup> The Committee was of the opinion that a meaningful supersedeas could be obtained only through the use of one of those two methods.<sup>98</sup> Specific language was also added to note that the lower tribunal retains continuing jurisdiction to determine the actual sufficiency of any such bond.<sup>99</sup>

#### Q. *Rule 9.800. Uniform Citation System*

The uniform citation system set forth in this rule underwent significant revision.<sup>100</sup> In citing to the Southern Reporter, Second Series, a space between "So." and "2d" is required.<sup>101</sup> Similarly, spaces are inserted between "S." and "Ct." in citing to the Supreme Court Reporter<sup>102</sup> and between "L." and "Ed." and "2d" in citing to Lawyer's Edition, Second Series.<sup>103</sup> There is no space, however, between "U." and "S." in citing to United States Reports.<sup>104</sup>

When citing to a United States Supreme Court decision, the first citation should include all three of the above reports, while subsequent citations, as well as pinpoint citations, should be to the United States Reports only.<sup>105</sup>

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95. *Appellate Amendments*, 609 So. 2d at 558.

96. FLA. R. APP. P. 9.300 Committee Note-1992 Amendment.

97. *Appellate Amendments*, 609 So. 2d at 561.

98. FLA. R. APP. P. 9.310 Committee Note-1992 Amendment.

99. *Appellate Amendments*, 609 So. 2d at 563.

100. The changes are too numerous for each one to be discussed in this article. Some of the more significant changes will be noted.

101. FLA. R. APP. P. 9.800(a)(2), (3).

102. *Id.* 9.800(k).

103. *Id.*

104. *Id.*

105. *Id.*

The citation for Florida Law Weekly has been changed to “Fla. L. Weekly” from “F.L.W.”<sup>106</sup> Other provisions state that the rule applies to all legal documents, including court opinions,<sup>107</sup> that citations not covered by the rule or by *The Bluebook: A Uniform System of Citation*, shall be in the form prescribed by the *Florida Style Manual* published by Florida State University,<sup>108</sup> and that case names should be underscored or italicized in both text and footnotes.<sup>109</sup>

#### R. Rule 9.900. Forms

Forms 9.900(a), (c) and (e) were revised to remind the practitioner that conformed copies of the order or orders designated in a notice of appeal or a notice to invoke the discretionary jurisdiction of district courts of appeal to review county court orders should be attached to the notice of appeal as provided in Rules 9.110(d), 9.130(c) and 9.160(c).<sup>110</sup>

## II. AMENDMENTS TO THE FLORIDA RULES OF JUDICIAL ADMINISTRATION

Some of the changes to the Florida Rules of Judicial Administration that were made during the same four-year cycle that brought about the revisions to the appellate rules will also impact on appellate practice. The changes to the Rules of Judicial Administration were adopted by the supreme court on October 8, 1992,<sup>111</sup> and took effect on January 1, 1993.<sup>112</sup>

#### A. Rule 2.040. District Courts of Appeal

Changes in terminology were adopted to reflect changes in the appellate rules and in the Florida Constitution. In subdivision (b)(5), the term “petition for rehearing” was changed to “motion pursuant to Florida Rule of

106. FLA. R. APP. P. 9.800(a)(4), (b)(2), (c)(3).

107. *Id.* 9.800.

108. *Id.* 9.800(n); see Florida State University Law Review, *Florida Style Manual*, 19 FLA. ST. U. L. REV. 525 (1991).

109. FLA. R. APP. P. 9.800(o).

110. FLA. R. APP. P. 9.900 Committee Note-1992 Amendment.

111. The Fla. Bar re: Amendment to Fla. Rules of Judicial Admin., 609 So. 2d 465 (Fla. 1992) [hereinafter *Judicial Administration*].

112. *Id.* at 466.



Appellate Procedure 9.330.”<sup>113</sup> This action was taken in recognition of the fact that the appellate rule cited now calls for rehearing by motion, rather than by petition, and the fact that the rule allows a party to seek not just rehearing, but also clarification and certification.<sup>114</sup> In the same subdivision, the references to a “petition for certiorari” being “filed” in the supreme court were changed to “discretionary review proceedings” being “timely commenced” in the supreme court.<sup>115</sup> This substitution was made in recognition of the changes in article V, section 3(b) of the Florida Constitution that gave the supreme court the authority to consider cases on discretionary review rather than by certiorari.<sup>116</sup> The amendments are not intended to impact on the rule in a substantive manner.<sup>117</sup>

### B. Rule 2.055. Paper

The most obvious impact of the changes to the Rules of Judicial Administration will come from the amendments to Rule 2.055, which require the use of recycled paper for all documents filed in any court.<sup>118</sup> The rule defines “recycled paper” as paper containing a minimum content of fifty percent waste paper.<sup>119</sup> The definition was taken from the United States Environmental Protection Agency Recommended Minimum Content Standards of Selected Papers and Paper Products.<sup>120</sup> In an effort to ensure the easy availability of paper that meets the definition, no requirement was included that any of the paper’s content be post-consumer waste materials.<sup>121</sup> This amendment provides the one exception to the effective date of the four-year cycle revisions. Although it took effect on January 1, 1993, like the other rule changes, it does not become mandatory until January 1, 1994.<sup>122</sup>

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113. *Id.* at 472.

114. REPORT OF THE FLA. RULES OF JUDICIAL ADMIN. COMM. 2 (1992).

115. *Judicial Administration*, 609 So. 2d at 472.

116. REPORT OF THE FLA. RULES OF JUDICIAL ADMIN. COMM. 2 (1992).

117. *Id.*

118. *Judicial Administration*, 609 So. 2d at 476.

119. *Id.*

120. See 53 Fed. Reg. 23,546 (1988) (to be codified at 40 C.F.R. pt. 250) (proposed June 22, 1988).

121. REPORT OF THE FLA. RULES OF JUDICIAL ADMIN. COMM. 9 (1992).

122. *Judicial Administration*, 609 So. 2d at 476.

### C. Rule 2.060. Attorneys

Changes to subdivision (b) of this rule require foreign attorneys who seek to appear in particular cases in Florida courts to be active members of the bar of another state.<sup>123</sup> These foreign attorneys are also required to submit verified motions for permission to appear with or before their initial personal appearance, paper, motion or pleading.<sup>124</sup> Moreover, they must also state in the motion all jurisdictions in which they are active members in good standing of the Bar and the number of cases in which they have filed a motion for permission to appear in Florida in the preceding three years.<sup>125</sup>

### D. Rule 2.160. Disqualification of Trial Judges

This is a new rule that deals with the disqualification of trial judges. It embodies the dictates of *Brown v. St. George Island, Ltd.*,<sup>126</sup> which interpreted sections 38.02 and 38.10 of the Florida Statutes, dealing with disqualification. The rule states in subdivision (a) that it applies only to circuit and county court judges.<sup>127</sup> That is because it was held in *In re Carlton*<sup>128</sup> that sections 38.02 and 38.10 do not apply to appellate judges.<sup>129</sup> In adopting this rule, the supreme court stated that it declined “to adopt a review authority”<sup>130</sup> as part of the rule, indicating that authority for review must be in the appellate rules.<sup>131</sup> Accordingly, the court asked that the Appellate Court Rules Committee consider the appropriate authority for reviewing orders of disqualification and whether an amendment to the

123. *Id.* at 477.

124. *Id.*

125. *Id.*

126. 561 So. 2d 253 (Fla. 1990).

127. *Judicial Administration*, 609 So. 2d at 490.

128. 378 So. 2d 1212 (Fla. 1979), *cert. denied*, 447 U.S. 922 (1980).

129. Because subdivision (a) indicates that the rule applies “to county and circuit judges in all matters in all divisions of court”, the question may well arise as to whether the rule applies to circuit judges sitting in their appellate capacity. It appears that the rule was not intended to apply in such a manner. The committee report proposing the change indicates that “[s]ubdivision (a) of the proposed rule limits the scope of the rule to trial judges,” and states that the limitation is in recognition of the fact that in *Carlton*, the supreme court found that the statutory provisions that were later interpreted in *Brown*, the case that formed the basis for the rule, do not apply to appellate judges. REPORT OF THE FLA. RULES OF JUDICIAL ADMIN. COMM. 28 (1992). Moreover, the title of the rule specifically refers to trial judges.

130. *Judicial Administration*, 609 So. 2d at 466.

131. *Id.*

appellate rules is necessary.<sup>132</sup> Thus, it is presently unclear what form of review is appropriate for orders dealing with disqualification. Presumably, this question will be answered by revision of the appellate rules or by case law in the near future.

### III. CASES

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. The article will be limited to appellate practice in the supreme court and the district courts of appeal and will not deal with issues relating to circuit courts sitting in their appellate capacities, except insofar as such issues relate or compare to the district courts or the supreme court. Additionally, this article will not discuss cases relating to the preservation of issues or the question of whether particular errors were harmless.

#### A. *The Appellate Process*

##### 1. Notice of Appeal

In *Alfonso v. Department of Environmental Regulation*,<sup>133</sup> the supreme court dealt with a situation in which an appellant filed a notice of appeal in the district court of appeal, rather than in the circuit court, as required by Florida Rule of Appellate Procedure 9.110(b). Receding from its prior decision in *Lampkin-Asam v. District Court of Appeal*,<sup>134</sup> the court in *Alfonso* held “that an appellate court’s jurisdiction is invoked by a timely filing of a notice of appeal or a petition for certiorari in either the lower court that issued the order to be reviewed or the appellate court which would have jurisdiction to review the order.”<sup>135</sup> It is thus likely that the appellate rules will need to be amended to incorporate this holding.

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132. *Id.*

133. 616 So. 2d 44 (Fla. 1993).

134. 364 So. 2d 469 (Fla. 1978).

135. *Alfonso*, 616 So. 2d at 47.

In *In re E.H.*,<sup>136</sup> the court found that in a case involving the termination of parental rights, parents are entitled to belated appeals based on ineffective assistance of counsel when their attorneys fail to timely file the notices of appeal.<sup>137</sup> The court stated, “[w]e do not believe that the attorney’s mistake should be imputed to the mother when the consequence of the mistake is the mother’s permanent loss of custody of her children.”<sup>138</sup> While such reasoning is routinely employed to grant belated appeals in criminal cases, its application in the civil context is quite unusual. As the court noted, “[w]e did not grant the belated appeal in this case based on precedent, but on the significant policy interest in ensuring that a parent and child are not separated without a thorough review of the merits of the case.”<sup>139</sup> The court also found a petition for writ of habeas corpus in the trial court to be the appropriate remedy for obtaining a belated appeal in this context.<sup>140</sup>

## 2. Captions of Cases and Parties

In *Fink v. Holt*,<sup>141</sup> the Fourth District Court of Appeal disapproved of the widespread practice of identifying appeals in forfeiture cases by reference to the property involved. The notice of appeal and the briefs in the case bore a caption identical to that used in the circuit court proceeding, which read, “In Re: Forfeiture of One 1985 Chevrolet Corvette, Florida Tag No. ACL959, VIN 161YY0785F5100137, Together With All Tangible and Intangible Personal Property Found Therein.”<sup>142</sup> Noting that the rules of appellate procedure<sup>143</sup> require that the caption of cases contain the name and designation of at least one party on each side, the court, on its own motion, amended the caption of the appeal to identify the parties involved.<sup>144</sup>

The Fourth District also questioned the wisdom in the naming of the trial court judge as the only proper respondent in a petition for a writ of

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136. 609 So. 2d 1289 (Fla. 1992).

137. *Id.* at 1290.

138. *Id.*

139. *Id.* at 1291.

140. *Id.*

141. 609 So. 2d 1333 (Fla. 4th Dist. Ct. App. 1992).

142. *Id.* at 1335.

143. See FLA. R. APP. P. 9.110(d), 9.900(a).

144. *Fink*, 609 So. 2d at 1336.

prohibition. In *Fabber v. Wessel*,<sup>145</sup> the court stated that the response filed in the case on behalf of the named respondent judge,<sup>146</sup> which took exception with the accuracy of the petitioner's factual account, created "an intolerable adversary atmosphere between the trial judge and the litigant."<sup>147</sup> Although the court declined to hold that any response filed by a judge in a prohibition-disqualification proceeding is per se disqualifying, the court stated that it is "decidedly dangerous" for the judge to respond and suggested that it is "much the better practice" for the judge to remain silent and let the adversarial party supply the response.<sup>148</sup>

### 3. Record on Appeal

#### a. Contents of Record

Several cases addressed issues relating to the record on appeal. In *Citizens of the State of Florida v. Beard*,<sup>149</sup> the supreme court was called upon to decide whether memoranda of staff and transcripts of agenda conferences are properly included in records of appeals from decisions of the Public Service Commission. The court concluded that such memoranda are properly considered part of the record if they are memoranda of staff who testify or otherwise become involved in the hearing with which the appeal is concerned.<sup>150</sup> On the other hand, when the advisory staff neither testifies nor actively participates in the hearing, such memoranda are not to be considered part of the record.<sup>151</sup> The court recognized that an agenda conference is somewhat akin to the discussion of appellate judges in conference, but concluded that the transcripts of such conferences may be made part of an appellate record because the conferences are public meetings and the transcripts are public records.<sup>152</sup>

An effort to supplement the record with an affidavit of the trial judge, setting forth the judge's recollection of a hearing, was rejected by the First

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145. 604 So. 2d 533 (Fla. 4th Dist. Ct. App. 1992), *review denied*, 617 So. 2d 322 (Fla. 1993).

146. The court indicated that the fact that the response was prepared and signed by a member of the attorney general's staff did not make it any less a response by the judge, for it was submitted expressly in his name. *Id.* at 534 n.1.

147. *Id.* at 534 (quoting *Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978)).

148. *Id.*

149. 613 So. 2d 403 (Fla. 1992).

150. *Id.* at 404.

151. *Id.*

152. *Id.* at 405.

District in *Hadden v. State*.<sup>153</sup> The court noted that such an affidavit is not part of the record as defined by Florida Rule of Appellate Procedure 9.200 and that the affidavit in the case was not the product of the procedure set forth by Rule 9.200(b)(4) for offering a statement of the evidence for use when a transcript is unavailable.<sup>154</sup>

*b. Filing of Record and Transcripts*

Florida Rule of Appellate Procedure 9.200(e) states that “[t]he burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the petitioner or appellant.”<sup>155</sup> In *Kobel v. Schlosser*,<sup>156</sup> the Fourth District indicated that it was placing “everyone” on notice that it was interpreting this provision “to require an appellant to seek an enlargement of time to prepare the record and serve the index, or other appropriate relief where such is necessary, before the expiration of the period prescribed by the rules.”<sup>157</sup> The court allotted the responsibility in this manner, rather than requiring the circuit court appeals clerk to seek enlargements of time when necessary, a process that had apparently been followed at some point in the past.

In *Freeman v. State*,<sup>158</sup> the Fourth District also indicated that it was “not sympathetic to requests for extraordinary extensions of time because the court reporter has too many cases,”<sup>159</sup> particularly in criminal cases. The court went on to state, “[t]his court will not tolerate court reporters delaying criminal appeals, while defendants are incarcerated, because the reporters knowingly take on more work than they can timely perform.”<sup>160</sup> In light of these principles, the court imposed a fine on a court reporter who received a sixty day extension to prepare a transcript of a five day trial, who unsuccessfully sought a second, fifty day extension and who filed the transcript over a month after the date set by the court in denying her second motion.<sup>161</sup>

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153. 616 So. 2d 153 (Fla. 1st Dist. Ct. App. 1993).

154. *Id.* at 154.

155. FLA. R. APP. P. 9.200(e).

156. 601 So. 2d 601 (Fla. 4th Dist. Ct. App. 1992).

157. *Id.* at 602-03.

158. 621 So. 2d 472 (Fla. 4th Dist. Ct. App. 1993).

159. *Id.* at 473.

160. *Id.*

161. *Id.*

#### 4. Motions

In *City of Miami Beach v. Korostishevski*,<sup>162</sup> the First District commented that it is an improper procedure for a party wanting some relief from the court to send a letter to the court or to make a phone call to the clerk.<sup>163</sup> Rather, the court indicated that such parties should file an appropriate motion.<sup>164</sup>

The Fourth District, in *Kobel*, noted that motions for additional time to do something required or permitted by the rules, filed after the expiration of the original period, are required to show some good reason why timely application was not sought.<sup>165</sup>

In *Lurie v. Auto-Owners Insurance Co.*,<sup>166</sup> the First District pointed out that the Florida Rules of Appellate Procedure do not authorize a reply to a response to a motion and that such unauthorized pleadings are ordinarily ignored or sua sponte stricken by the court.<sup>167</sup>

In *In re C.G.*,<sup>168</sup> the Second District published an order granting a short extension of time “as notice that parental termination appeals should be expedited by all persons involved in the process.”<sup>169</sup> The court noted that in the future it will grant extensions in such cases only for extraordinary reasons and will impose sanctions, if necessary, to assure that the cases are expedited.<sup>170</sup>

#### 5. Briefs

In *F.M.W. Properties, Inc. v. Peoples First Financial Savings & Loan Ass'n*,<sup>171</sup> the First District pointed out that “proper organization of briefs pursuant to the Florida Rules of Appellate Procedure is not only desirable and convenient, it has become an absolute necessity.”<sup>172</sup> The court refrained from striking the appellant’s brief in the case despite the fact that the argument section of the brief did not track the issues the appellants

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162. 619 So. 2d 493 (Fla. 1st Dist. Ct. App. 1993).

163. *Id.* at 495.

164. *Id.*

165. *Kobel*, 601 So. 2d at 603.

166. 605 So. 2d 1023 (Fla. 1st Dist. Ct. App. 1992).

167. *Id.* at 1025.

168. 609 So. 2d 631 (Fla. 2d Dist. Ct. App. 1992).

169. *Id.* at 632.

170. *Id.*

171. 606 So. 2d 372 (Fla. 1st Dist. Ct. App. 1992).

172. *Id.* at 377.

purported to raise.<sup>173</sup> The court noted, however, “that the failure to organize arguments under cogent and distinct issues on appeal presents sufficient reason for an appellate court to decline consideration of a matter.”<sup>174</sup>

The First District also provided guidance as to the appropriate procedure to correct typographical errors in briefs. In *North Florida Regional Medical Center v. Witt*,<sup>175</sup> the court disapproved of the practice of providing the court with pages upon which corrections have been made to be substituted for the original pages. The court stated, “[w]e do not have the staff resources to perform such tasks nor are we willing to accept the responsibility for error that might occur in the process.”<sup>176</sup> Rather, the court indicated that parties moving to amend briefs must accompany their motions with an original and three copies of an amended brief.<sup>177</sup> The same process is to be followed, the court noted, by any party required to serve an amended brief due to the striking of a brief.<sup>178</sup>

In *Beatty v. State*,<sup>179</sup> the Second District denied a motion to file an enlarged brief of sixty-five pages<sup>180</sup> when forty pages were used for the statement of facts.<sup>181</sup> The court noted that the statement started at the beginning of the trial and summarized the testimony of every witness who testified, without regard to the issues on appeal.<sup>182</sup> The court stated that this approach made it “virtually impossible to obtain an overview of the factual situation,” which the court indicated should be the purpose of the statement of facts.<sup>183</sup> Moreover, the court noted that it could “only assume this method is used because it is easier than setting forth the facts in a logical, more readable fashion.”<sup>184</sup> Although recognizing that it had little control in most cases as to the method used by appellate counsel to

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173. *Id.*

174. *Id.* at 377-78.

175. 616 So. 2d 614 (Fla. 1st Dist. Ct. App. 1993).

176. *Id.* at 614-15.

177. *Id.* at 615.

178. *Id.*

179. 621 So. 2d 678 (Fla. 2d Dist. Ct. App. 1992).

180. Absent court permission, initial briefs of appellants and answer briefs of appellees are limited to 50 pages by Florida Rule of Appellate Procedure 9.210(a)(5).

181. *Beatty*, 621 So. 2d at 678.

182. *Id.*

183. *Id.*

184. *Id.*



state the facts, the court commented that it had “no intention of encouraging the practice used here.”<sup>185</sup>

## 6. Appendices

The First District, in *Korostishevski*, dealt with the question of how appellees in appeals from non-final orders in workers’ compensation cases should cite to items not included in appellants’ appendices which appellees feel are necessary to the court’s decision.<sup>186</sup> The court interpreted Florida Rule of Workers’ Compensation 4.180(b)(3) as calling for such appellees to file their own appendix and for citations in their briefs to be made to appellant’s appendix, appellee’s appendix, or both, as may be appropriate.<sup>187</sup>

In a case involving review of non-final administrative orders, *Agency for Health Care Administration v. Orlando Regional Healthcare System, Inc.*,<sup>188</sup> the First District rejected an attempt to file as an appendix evidence which had not been submitted to the hearing officer for consideration. It was unsuccessfully argued that the 1977 Committee Note to Florida Rule of Appellate Procedure 9.100(e) authorized the inclusion of such material.<sup>189</sup> That note refers to an appendix “containing conformed copies of the order to be reviewed and other relevant material, including portions of the record, if a record exists.”<sup>190</sup> The court noted the basic rule that an appeal asserting error on the part of a lower tribunal<sup>191</sup> can only be based on evidence presented to that tribunal and stated that any exception to the general rule which may be implied from the committee note was not present in the case.<sup>192</sup>

## 7. Relinquishment of Jurisdiction

In *Lurie v. Auto-Owners Insurance Co.*,<sup>193</sup> the First District discussed the procedures and standards involved when a party seeks relinquishment of jurisdiction. The court stated that the burden is on the moving party to

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185. *Id.*

186. *Korostishevski*, 619 So. 2d at 494.

187. *Id.* at 495.

188. 617 So. 2d 385 (Fla. 1st Dist. Ct. App. 1993).

189. *Id.*

190. FLA. R. APP. P. 9.100(e) Committee Note-1977 Amendment.

191. *Agency for Health Care Admin.*, 617 So. 2d at 389.

192. *Id.*

193. 605 So. 2d 1023 (Fla. 1st Dist. Ct. App. 1992).

show entitlement to relief<sup>194</sup> and that the presumption is that judicial economy would be best served by leaving jurisdiction in the appellate court until issuance of mandate<sup>195</sup> and that, a party wishing to overcome that presumption must show entitlement to relief by informing the court of the specific nature of the proceedings it seeks to have conducted in the trial court.<sup>196</sup>

### 8. Notices of Supplemental Authority

In *Ogden Allied Services v. Panesso*,<sup>197</sup> the First District struck notices of supplemental authority and published its order doing so “to place the bar on notice” that abuses involved with such notices will be treated similarly. The appellee in the case, on the afternoon before oral argument, filed and served a notice of supplemental authority which had attached to it copies of twenty-two cases, totalling 125 pages, all of which had been decided before the appellee’s answer brief was filed.<sup>198</sup> The notice prompted the appellants to respond with their own notices on the morning of oral argument.<sup>199</sup>

The court found such filings to be a misuse of Florida Rule of Appellate Procedure 9.210(g) and Florida Rule of Workers’ Compensation Procedure 4.225, which “are intended to permit a litigant to bring to the court’s attention cases of real significance to the issues raised which were not cited in the briefs, either because they were not decided until after the briefs had been filed; or because, through inadvertence, they were not discovered earlier.”<sup>200</sup> These rules, the court went on to state, “are not intended to permit a litigant to submit what amounts to an additional brief, under the guise of ‘supplemental authorities’; or to ambush an opponent by deliberately withholding significant case citations until just before oral argument.”<sup>201</sup>

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194. *Id.*

195. *Id.* at 1025.

196. *Id.*

197. 619 So. 2d 1023 (Fla. 1st Dist. Ct. App. 1993).

198. *Id.* at 1023.

199. *Id.*

200. *Id.* at 1024.

201. *Id.*

## 9. Proceedings After Appellate Determination is Final

In *Green v. Rety*,<sup>202</sup> the supreme court considered the certified question of whether Florida Rule of Appellate Procedure 9.340(c), which states that if a judgment of reversal is entered that requires the entry of a money judgment on a verdict, the mandate shall be deemed to require such money judgment to be entered as of the date of the verdict, applies when an appellate court-ordered remittitur requires entry of a judgment in an amount less than the full amount of the jury's verdict.<sup>203</sup> The court concluded that the district court's finding that the trial court's remittitur had been excessive constituted a "reversal" under the rule.<sup>204</sup> Accordingly, the court answered the question in the affirmative, found that the date of the verdict controlled, and determined that all interest would be computed from that date.<sup>205</sup>

In *City of Miami v. Arostegui*,<sup>206</sup> the First District issued its mandate after the appellant filed a notice invoking the discretionary jurisdiction of the supreme court. The appellant moved to recall the mandate. The motion was treated as a motion to stay the effect of the mandate and was denied by the court.

The court found that the filing of a notice invoking discretionary jurisdiction does not deprive a district court of jurisdiction to issue a mandate.<sup>207</sup> The court rejected a claim that the automatic stay provision of Florida Rule of Appellate Procedure 9.310(b)(2), which states that the timely filing of a notice of appeal by a public body or a public officer shall automatically operate as a stay, applies when discretionary review is sought.<sup>208</sup> The court also rejected an additional argument that the mere fact that a case was pending review in the supreme court compels a district court to recall its mandate.<sup>209</sup> The court therefore concluded that when a public body desires to stay the decision of a district court while discretionary review is pending, it should file a motion to stay the mandate before the mandate is issued by the district court.<sup>210</sup> Once the mandate is issued,

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202. 616 So. 2d 433 (Fla. 1993).

203. *Id.*

204. *Id.* at 435.

205. *Id.*

206. 616 So. 2d 1117 (Fla. 1st Dist. Ct. App. 1993).

207. *Id.* at 1119.

208. *Id.*

209. *Id.* at 1121.

210. *Id.*

the court stated, a motion to stay its effect should be filed in the supreme court.<sup>211</sup>

In *Wilcox v. Hotelarama Associates, Ltd.*,<sup>212</sup> the Third District dealt with the question of whether, after mandate issued in a case that was reversed and remanded for a new trial, the trial court could stay the retrial until the losing parties on appeal paid an award of appellate costs or posted a cost bond. The court found such a stay to be improper, noting that “a trial court’s role upon the issuance of a mandate from an appellate court becomes purely ministerial, and its function is limited to obeying the appellate court’s order or decree.”<sup>213</sup> Despite recognizing the broad discretion a trial court has in ordering stays in proceedings before it,<sup>214</sup> the court concluded that in light of its specific mandate, which was not conditioned upon payment of the appellate costs, “the trial court was without discretion in its obligation to proceed with the disposition of the case without entering a stay pending the payment of the costs of the appeal.”<sup>215</sup>

In *In re B.C.*,<sup>216</sup> the First District held that the county, rather than the state, has the burden of paying for appointed counsel and for costs in proceedings for the termination of parental rights.<sup>217</sup> The court relied on section 43.28 of the Florida Statutes, which requires counties to provide, among other things, the “personnel necessary to operate the circuit and county courts.”<sup>218</sup> The court rejected the county’s contention that a different result was compelled by article VII, section 18 of the Florida Constitution, which limits the circumstances under which a county can be required by a general law to spend funds. The court concluded that the constitutional provision, which was ratified by the electorate in the November, 1990 election, was prospective in operation and thus targeted at

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211. *Arostegui*, 616 So. 2d at 1121.

212. 619 So. 2d 444 (Fla. 3d Dist. Ct. App. 1993).

213. *Id.* at 445-46 (citing *Milton v. Keith*, 503 So. 2d 1312 (Fla. 3d Dist. Ct. App. 1987); *O.P. Corp. v. Village of North Palm Beach*, 302 So. 2d 130 (Fla. 1974); *Berger v. Leposky*, 103 So. 2d 628 (Fla. 1958)).

214. *Id.* at 446 (citing *Regan, Inc. v. Val-Ro, Ltd.*, 396 So. 2d 834 (Fla. 3d Dist. Ct. App. 1981); *Neale v. Aycock*, 340 So. 2d 535 (Fla. 1st Dist. Ct. App. 1976), *cert. denied*, 351 So. 2d 405 (Fla. 1977); *Price v. Hernando Beach, Inc.*, 286 So. 2d 279 (Fla. 2d Dist. Ct. App. 1973)).

215. *Id.*

216. 610 So. 2d 627 (Fla. 1st Dist. Ct. App.), *review granted*, 613 So. 2d 5 (Fla. 1992).

217. *Id.*

218. *Id.* at n.1 (quoting FLA. STAT. § 43.28 (Supp. 1992)).

laws passed after its effective date,<sup>219</sup> laws which do not include section 43.28 of the Florida Statutes.

Several other cases also dealt with issues relating to appellate attorney's fees. In *Hernstadt v. Brickell Bay Club Condominium Ass'n*,<sup>220</sup> the Third District found that when an appellate court awards appellate attorney's fees and remands for a determination of the amount, it is improper for the party against whom the fees are to be assessed to argue in the trial court or on a subsequent appeal the issue of entitlement to the fees.<sup>221</sup> In *Duffy v. Brooker*,<sup>222</sup> the First District rejected a claim that sections 59.46 and 766.206(3) of the Florida Statutes mandate an award of appellate attorney's fees to prevailing parties in medical malpractice cases on the issue of compliance with the reasonable investigation requirements of chapter 766, Florida Statutes.<sup>223</sup> In *Langel v. Aetna Casualty & Surety Co.*,<sup>224</sup> the Fourth District found attorney's fees appropriate when the appellants impermissibly sought to reargue issues they had already raised and argued, and which were rejected, in a previous appeal.<sup>225</sup>

### B. Appeals in Workers' Compensation Cases

In *Hines Electric v. McClure*,<sup>226</sup> the First District interpreted Florida Rule of Workers' Compensation Procedure 4.160(b), a recently adopted rule<sup>227</sup> that deals with appellate review of non-final orders. The rule states that the district court "may" review certain listed non-final orders.

The court stated that it was "candidly perplexed"<sup>228</sup> by the new rule. The court pointed out that the rule was derived from Florida Rule of Appellate Procedure 9.130, but that the appellate rule provides for review as a matter of right from the non-final orders listed therein.<sup>229</sup> The court further noted that neither the text of the rule nor the commentary accompa-

219. *Id.* at 628.

220. 602 So. 2d 967 (Fla. 3d Dist. Ct. App. 1992).

221. *Id.* at 968.

222. 614 So. 2d 546 (Fla. 1st Dist. Ct. App. 1993).

223. *Id.* at 547.

224. 614 So. 2d 1218 (Fla. 4th Dist. Ct. App. 1993).

225. *Id.* at 1218.

226. 616 So. 2d 132 (Fla. 1st Dist. Ct. App. 1993).

227. Amendments to Fla. Rules of Workers' Compensation Procedure, 603 So. 2d 425 (Fla. 1992).

228. *Hines Elec.*, 616 So. 2d at 134.

229. *Id.*

nying its adoption provided guidance as to the correct legal standard to be utilized in determining whether to exercise jurisdiction.<sup>230</sup>

The court also pointed out that the rule provides for discretionary review of some orders that were reviewable by common law certiorari, and some that were not reviewable by certiorari or otherwise until a final order was entered by a judge of compensation claims.<sup>231</sup> This fact caused the court to comment that there was no indication of whether the adoption of the rule was intended to provide for review of a greater number of orders prior to the ultimate disposition by the judge of compensation claims, or to ease the appellate court's overburdened docket by granting greater flexibility to refuse certain types of cases.<sup>232</sup>

The court went on to indicate that the rule did not set forth a procedural mechanism for the parties to address the jurisdictional issue<sup>233</sup> nor did the rule set forth a standard of review to be used after jurisdiction is accepted.<sup>234</sup> Summing up its frustration with the rule, the court opined that it "creates a whole new type of review which did not previously exist under Florida law"<sup>235</sup> and that the court was "faced with the unenviable task of determining the procedural and substantive effect of a rule that is unclear, ambiguous and which could have a significant impact"<sup>236</sup> on the court's workload.<sup>237</sup>

The court therefore adopted a procedure calling for a party seeking review pursuant to Rule 4.160(b) to file a brief and an appendix along with the notice of appeal.<sup>238</sup> The brief is to address whether the court should exercise its jurisdiction and the merits of the issue being appealed.<sup>239</sup>

230. *Id.*

231. *Id.*

232. *Id.*

233. *Hines Elec.*, 616 So. 2d at 134.

234. *Id.*

235. *Id.*

236. *Id.* at 134-35.

237. The court noted that it appeared that the rule was adopted without any meaningful input from the judges of the court, which has statewide primary jurisdiction over workers' compensation appeals. The court took issue with the opinion adopting the rules by the supreme court, which stated that the proposed new rules had been published in the Florida Bar News. *Amendments to Fla. Rules of Workers' Compensation Procedure*, 603 So. 2d at 425. The court stated that all that was actually published was a summary of the rules and that the summary, in the court's opinion, was not accurate. *Hines Elec.*, 616 So. 2d at 135 n.5.

238. *Hines Elec.*, 616 So. 2d at 136.

239. *Id.*

The court will then review the brief and appendix to determine whether the appellant has demonstrated a prima facie case for entitlement to interlocutory relief.<sup>240</sup> For appeals from all orders listed in the rule other than discovery matters under subdivision (b)(5), the court will exercise its discretion to review the order if the order is one that would be reviewable as a matter of right under Florida Rule of Appellate Procedure 9.130.<sup>241</sup> If the order is not one reviewable as a matter of right under the appellate rule, the court will exercise its discretion only if: (1) the order constitutes a departure from the essential requirements of law; (2) would cause material harm; and (3) could not be adequately remedied by appeal.<sup>242</sup> Appeals relating to discovery matters under subdivision (b)(5) will be judged by the standard set forth by that provision, which requires the party seeking review to demonstrate irreparable harm and that there is no adequate remedy at law to rectify such harm.<sup>243</sup>

If the court determines that a prima facie basis for relief exists, it will issue an order accepting jurisdiction and briefing will continue in accordance with the appellate rules.<sup>244</sup> The answer and reply briefs will also need to address the jurisdictional issue.<sup>245</sup>

The court recognized that as it gained more experience with this type of case, it may have to revisit the adopted procedure.<sup>246</sup> The court also urged the Workers' Compensation Rules Committee to revisit the rules in an effort to alleviate the problems discussed in the opinion.<sup>247</sup>

## C. Appeals in Criminal Cases

### 1. Appointed Counsel

In *Green v. State*,<sup>248</sup> the supreme court dealt with a situation in which a court-appointed attorney for a defendant, whose conviction and death sentence had been upheld, requested the trial court to appoint him at the county's expense for the purpose of petitioning the United States Supreme

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240. *Id.*

241. *Id.*

242. *Id.*

243. *Hines Elec.*, 616 So. 2d at 136.

244. *Id.* at 136-37.

245. *Id.* at 137.

246. *Id.*

247. *Id.*

248. 620 So. 2d 188 (Fla. 1993).

Court for certiorari.<sup>249</sup> The supreme court reversed the denial of this motion, finding that the ruling denied the defendant equal protection under article I, section 2 of the Florida Constitution.<sup>250</sup>

The defendant had initially been represented on appeal by the public defender, who withdrew due to an excessive caseload.<sup>251</sup> A private attorney was then appointed to handle the unsuccessful appeal.<sup>252</sup> At a hearing on the motion to appoint counsel for the United States Supreme Court proceeding, testimony was presented that the public defender seeks certiorari review in the United States Supreme Court in every case in which the defendant is sentenced to death.<sup>253</sup>

The supreme court concluded that when a defendant is represented by court-appointed counsel and is sentenced to death, “the court-appointed counsel must have the same professional independence to seek federal relief on an individual basis as the public defender whom court-appointed counsel replaces and must be compensated accordingly.”<sup>254</sup>

In *Turner v. State*,<sup>255</sup> the Fourth District also addressed an issue dealing with appointed counsel. In that case, the attorney that had been appointed to represent the defendant at trial, due to the public defender’s conflict of interest, was later appointed for the purpose of appeal.<sup>256</sup> On motion for reconsideration by the County Commission of Palm Beach County, which was concerned with the expense of appointed counsel, the trial court determined that the conflict of interest did not carry through to the appellate stage and that it was obligated to appoint the public defender.<sup>257</sup> Noting first that Palm Beach County had no standing to intervene in the proceedings,<sup>258</sup> the appellate court found that because the public defender asserted that the conflict still existed, the issue of conflict was not extinguished, as an appeal is merely a continuation of the original proceed-

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249. *Id.* at 188.

250. *Id.*

251. *Id.* at 188-89.

252. *Id.* at 189.

253. *Green*, 620 So. 2d at 189.

254. *Id.* at 190.

255. 611 So. 2d 12 (Fla. 4th Dist. Ct. App. 1992).

256. *Id.* at 12.

257. *Id.*

258. *Id.* (citing *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130 (Fla. 1990); *Escambia County v. Behr*, 384 So. 2d 147 (Fla. 1980)).



ings.<sup>259</sup> The court therefore reversed the order appointing the public defender and directed the trial court to appoint a special counsel to represent the defendant on appeal.<sup>260</sup>

## 2. Appellate Proceedings Instituted by the State

In *State v. Zenobia*,<sup>261</sup> the Fourth District discussed the manner in which it reviews petitions for writs of common law certiorari in which the state seeks review of a pre-trial ruling on a motion in limine denying the state's request to admit certain evidence. The court noted that it viewed such rulings as "entirely tentative,"<sup>262</sup> because a judge "may suffer a change of mind"<sup>263</sup> after the evidence is actually adduced at the trial. Accordingly, the court stated that it begins its "analysis of a petition for certiorari seeking reversal of a pre-trial exclusion of evidence with an inclination to forego extraordinary review."<sup>264</sup> The court went on to indicate that when the pre-trial exclusion is attended also by factual rulings by the trial judge, such as a finding that the evidence's unfair prejudicial aspects outweigh its probative value, the court is "doubly reluctant" to reverse the exclusion.<sup>265</sup>

An unusual situation presented itself in *State v. Lozano*,<sup>266</sup> when the state petitioned the First District for a writ of certiorari purportedly to protect a defendant's constitutional rights. The case dealt with a situation in which the trial court granted a defense motion for a change of venue and moved the trial from Miami to Orlando.<sup>267</sup> Subsequently, the court on its own motion, moved the trial to Tallahassee.<sup>268</sup> The defendant then moved for another change of venue.<sup>269</sup>

After the trial court took evidence and heard argument on the motion for change of venue, the state joined in the motion insofar as the defendant claimed that his rights were violated by the small Hispanic population in

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259. *Id.* at 13 (citing *Aranda v. State*, 205 So. 2d 667, 670 (Fla. 4th Dist. Ct. App.), *cert. dismissed*, 218 So. 2d 167 (Fla. 1968)).

260. *Turner*, 611 So. 2d at 13.

261. 614 So. 2d 1139 (Fla. 4th Dist. Ct. App. 1993)

262. *Id.* at 1139.

263. *Id.*

264. *Id.* at 1140.

265. *Id.*

266. 616 So. 2d 73 (Fla. 1st Dist. Ct. App. 1993).

267. *Id.* at 74.

268. *Id.*

269. *Id.*

Tallahassee's county and because the site was chosen solely upon racially-based reasons.<sup>270</sup>

The appellate court initially noted its concern with the question of whether its jurisdiction was timely invoked because the state was in effect challenging the order moving the case to Tallahassee, which had been entered some ten months before the petition was filed.<sup>271</sup> The court pointed out that the State's challenge to the order was not presented to the trial court until the day the petition was filed.<sup>272</sup> It then stated that although it could be argued that the State's challenge was untimely, the court would decline "to adopt a rule which would preclude the State from asserting at any time that continued prosecution under the circumstances would constitute a violation of the constitutional rights of a criminal defendant."<sup>273</sup> The court therefore concluded that the state's petition was timely and proceeded to consider the case on the merits.<sup>274</sup>

In *State v. Ashley*,<sup>275</sup> the Second District denied the state's petition for certiorari without opinion. A specially concurring opinion by Judge Parker, however, reveals the existence of an interesting issue. The judge noted that he concurred because of the supreme court's decision in *State v. MacLeod*,<sup>276</sup> which concluded that the state has no statutory right to appeal a trial court's order which denies restitution in a criminal case "provided the reasons for the denial are set forth."<sup>277</sup> The concurring opinion stated that because no right of appeal exists, no right of review by certiorari exists.<sup>278</sup>

Judge Parker therefore opined that, a victim of a crime is denied the right of appellate review of a trial court's denial of restitution from a criminal defendant if the trial judge lists any reasons, right or wrong, for the denial.<sup>279</sup> Thus, notwithstanding his belief that the right of restitution in this case was denied for reasons contrary to Florida law, Judge Parker felt

270. *Id.*

271. *Lozano*, 616 So. 2d at 75.

272. *Id.*

273. *Id.*

274. In doing so, the court noted that the state, in an appeal from a Tallahassee conviction, would be bound by its position that the motion for change of venue should have been granted. *Id.* at n.4.

275. 621 So. 2d 743 (Fla. 2d Dist. Ct. App. 1993).

276. 600 So. 2d 1096 (Fla. 1992).

277. *Id.* at 1098.

278. *Ashley*, 621 So. 2d at 743 (Parker, J., specially concurring) (citing *Jones v. State*, 477 So. 2d 566 (Fla. 1985)).

279. *Id.*

compelled to concur with the appellate court's decision.<sup>280</sup> Judge Parker went on to note that as long as *MacLeod* remains the law, establishing a right to appellate review for victims who are wrongly denied restitution will apparently require legislative action.<sup>281</sup>

### 3. Cross Appeals by Defendants

In *State v. Waterman*,<sup>282</sup> the state appealed a trial court's pre-trial order partially suppressing seized evidence.<sup>283</sup> The defendant cross appealed that aspect of the order denying his motion to suppress all of the evidence.<sup>284</sup> The state moved to dismiss the cross appeal on the ground that it was not authorized under the appellate rules.<sup>285</sup> Aligning itself with the decision of the Fifth District in *State v. McAdams*,<sup>286</sup> the Second District found that a cross appeal was not foreclosed.<sup>287</sup>

In doing so, the court noted that several districts have held that there is no jurisdiction to entertain a cross appeal when the order in question is one which could not have been independently appealed by the defendant, such as a ruling or motion to suppress.<sup>288</sup> It thus appears that the issue involved in this case is one that will have to eventually be resolved by the supreme court.<sup>289</sup>

### 4. Application of Florida Supreme Court Precedent to Pending Cases

In *Smith v. State*,<sup>290</sup> the supreme court, relying on article I, sections 9 and 16 of the Florida Constitution, established a clear standard regarding

280. *Id.* at 744.

281. *Id.*

282. 613 So. 2d 565 (Fla. 2d Dist. Ct. App. 1993).

283. *Id.* at 565-66.

284. *Id.* at 566.

285. *Id.*

286. 559 So. 2d 601 (Fla. 5th Dist. Ct. App. 1990).

287. *Waterman*, 613 So. 2d at 566.

288. *Id.* (citing *State v. Williams*, 444 So. 2d 434 (Fla. 3d Dist. Ct. App. 1983); *State v. Willits*, 413 So. 2d 791 (Fla. 1st Dist. Ct. App. 1982); *State v. Clark*, 384 So. 2d 687 (Fla. 4th Dist. Ct. App.), *review denied*, 392 So. 2d 1372 (Fla. 1980)).

289. In *State v. Lopez*, 18 Fla. L. Weekly D1914 (Fla. 3d Dist. Ct. App. Aug. 31, 1993), the Third District adhered to its view that a cross appeal is inappropriate and, pursuant to article V, section (3)(b)(4) of the Florida Constitution, certified to the supreme court that the decision was in conflict with *Waterman* and *McAdams*.

290. 598 So. 2d 1063 (Fla. 1992).

the retrospective application of its decisions in criminal cases. Noting that it was troubled by the inconsistency or lack of clarity in its various decisions on the subject,<sup>291</sup> the court held “that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final.”<sup>292</sup> The court went on to note that in order to benefit from the change in law, defendants must have timely objected at trial if an objection was required to preserve the issue for appellate review.<sup>293</sup>

### 5. Appellate Jurisdiction After Change of Venue

In *Vasilinda v. Lozano*,<sup>294</sup> a member of the media challenged an order restricting certain aspects of television coverage of a criminal trial.<sup>295</sup> The challenge was brought in the Third District, the court that hears appeals from cases in the Eleventh Circuit, where the charges had originally been filed. Because a change of venue had been granted,<sup>296</sup> moving the case to the Ninth Circuit, and because the trial judge had been assigned by the supreme court to serve as judge of that circuit for purposes of the case, the district court transferred the appellate proceeding to the Fifth District, which has appellate jurisdiction over Ninth Circuit cases.<sup>297</sup>

In an opinion filed the following day, the Fifth District indicated that it was unclear as to whether the factors relied upon by the Third District gave the court jurisdiction over the appeal.<sup>298</sup> Because the trial was set to start one business day later, the court did address the issues presented by the case;<sup>299</sup> it also certified to the supreme court as a matter of great public importance, the question of when jurisdiction vests and in which appellate court jurisdiction lies when a change of venue is granted to a circuit in

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291. *Id.* at 1064.

292. *Id.* at 1066.

293. *Id.*

294. 622 So. 2d 4 (Fla. 3d Dist. Ct. App. 1993).

295. *Id.* at 5.

296. The defendant was the same defendant involved in the case of *State v. Lozano*, 616 So. 2d 73 (Fla. 1st Dist. Ct. App. 1993). *See also supra* text accompanying notes 264-72.

297. *Vasilinda*, 622 So. 2d at 5.

298. *Vasilinda v. Lozano*, 618 So. 2d 758, 759 (Fla. 5th Dist. Ct. App.); *review granted*, \_\_\_ So. 2d \_\_\_ (Fla. 1993).

299. *Id.* at 759-60.

another district and the circuit judge is appointed as a judge of the circuit to which the case is transferred.<sup>300</sup>

A similar issue was dealt with by the Fourth District in *Kohut v. Evans*.<sup>301</sup> In that case, a change of venue had been granted, moving the matter from the Thirteenth Circuit, within the Second District, to the Fifteenth Circuit, within the Fourth District and in which an order had been entered temporarily assigning the trial judge of the Thirteenth Circuit to the Fifteenth Circuit to hear the case.<sup>302</sup> On his own motion, the trial judge re-examined the venue question and determined that a jury would be selected in the Fifteenth Circuit and that the case would then be returned to the Thirteenth Circuit for the remainder of the trial, with the jurors sequestered within that circuit.<sup>303</sup>

One of the defendants challenged the procedure in a petition for writ of prohibition filed in the Second District. That court determined that the petition was directed to the trial judge in his capacity as a judge of the Fifteenth Circuit and that it therefore lacked jurisdiction to address the merits of the petition. Accordingly, it transferred the case to the Fourth District.<sup>304</sup> The Fourth District stated that it was unsure whether the trial judge thought he was acting as a Fifteenth Circuit judge when he issued the order in question, but accepted that it was the appropriate court to take jurisdiction of the case because the judge was to be acting as a judge of the Fifteenth Circuit in conducting the jury selection and ordering the jury to return to the Thirteenth Circuit for the remainder of the trial.<sup>305</sup>

#### D. Certification of Questions

In *Bradley v. State*,<sup>306</sup> the First District discussed the circumstances under which the court will exercise its discretionary review authority and consider certified questions from county courts pursuant to Florida Rule of Appellate Procedure 9.030(b)(4). The opinion dealt with two appeals in which county courts had certified essentially the same question as one of great public importance.

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300. *Id.* at 759.

301. 623 So. 2d 569 (Fla. 4th Dist. Ct. App. 1993).

302. *Id.* at 569.

303. *Id.*

304. *Id.*

305. *Id.*

306. 615 So. 2d 854 (Fla. 1st Dist. Ct. App. 1993).

The court noted there existed little discussion in case law to guide it in exercising its discretion, but determined that it should accept jurisdiction in at least one of the appeals because the issue was one of constitutional magnitude that was frequently raised in the lower tribunals.<sup>307</sup> Pointing to its “highly taxing” caseload, the court concluded that there was no useful purpose to be served by accepting more than one appeal presenting the issue.<sup>308</sup> Doing so, the court stated, would only delay resolution of other matters before the court.<sup>309</sup> The court therefore accepted jurisdiction in the appeal that involved factors which made the preparation of the record and briefing easier and declined to accept jurisdiction in the other.<sup>310</sup>

The First District also declined to accept an appeal involving a certified question from a county court in *State v. Boyd*,<sup>311</sup> noting that such appeals are appropriate from non-final orders under Florida Rule of Appellate Procedure 9.030(b)(4)(B) only when the orders are otherwise appealable to the circuit court.<sup>312</sup> Since the order in the case was not appealable in that manner, the court concluded that it was without jurisdiction.<sup>313</sup>

The First District also found that it lacked jurisdiction to consider the certified questions in *Florida Department of Health & Rehabilitative Services v. State*.<sup>314</sup> In that case, the questions were certified by a circuit court and the appellate court determined that only county courts have the authority to certify questions.<sup>315</sup>

In several cases, such as *State v. Burgos*,<sup>316</sup> the Fourth District employed a method of double certification that resulted in a county court case being reviewed by the supreme court. Pursuant to Florida Rule of Appellate Procedure 9.160, the court accepted jurisdiction from an order certified by a county court to be of great public importance. In turn, the court certified to the supreme court, pursuant to Rule 9.125, not only that the issues were of great public importance, but also that they had an effect

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307. *Id.* at 855.

308. *Id.*

309. *Id.*

310. *Id.*

311. 610 So. 2d 64 (Fla. 1st Dist. Ct. App. 1992).

312. *Id.* at 65.

313. *Id.*

314. 616 So. 2d 66 (Fla. 1st Dist. Ct. App. 1993).

315. *Id.* at 68.

316. 614 So. 2d 694 (Fla. 4th Dist. Ct. App.), *review denied*, 618 So. 2d 1369 (Fla. 1993).

on the administration of justice throughout the state and that the case required immediate resolution by the supreme court.<sup>317</sup>

### E. *Effect of Prior Prohibition Proceedings on Appeals*

In *Thomason v. State*,<sup>318</sup> the Fourth District considered a direct appeal from an order withholding adjudication and placing a defendant on probation in a criminal case. The defendant raised a double jeopardy claim that he had previously asserted in a petition for writ of prohibition that had been denied without opinion by the same court.<sup>319</sup> The court affirmed without opinion, but Judge Farmer, in a dissenting opinion, addressed the question of whether consideration of the double jeopardy claim was proper in light of the prior proceeding.<sup>320</sup>

Judge Farmer noted that such consideration was appropriate because prohibition is an “extraordinarily *prerogative writ*”<sup>321</sup> that is sometimes denied for good reasons having nothing to do with the underlying merits of a petitioner’s position.<sup>322</sup> The judge noted that his view<sup>323</sup> was contrary to that taken by the Third District in *Obanion v. State*,<sup>324</sup> in which the court considered a claim previously raised in a prohibition proceeding, but stated that in future cases, summary denials of petitions for writs of prohibition would be deemed to be denials on the merits unless the denial says otherwise.<sup>325</sup> Judge Farmer stated that the Fourth District had never adopted such a rule and that he hopes it never does, “at least as long as prohibition is deemed a matter of mere grace.”<sup>326</sup>

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317. *Id.* at 694.

318. 594 So. 2d 310 (Fla. 4th Dist. Ct. App. 1992), *quashed on other grounds*, 620 So. 2d 1234 (Fla. 1993).

319. *Thomason v. State*, 620 So. 2d 1234, 1236.

320. *Thomason*, 594 So. 2d at 310. (Farmer, J., dissenting).

321. *Id.* at 312 n.2 (Farmer, J., dissenting).

322. *Id.*

323. The other members of the panel apparently shared Judge Farmer’s belief that review of the merits was appropriate because the case was affirmed, rather than dismissed.

324. 496 So. 2d 977 (Fla. 3d Dist. Ct. App. 1986), *review denied*, 504 So. 2d 768 (Fla. 1987).

325. *Thomason*, 594 So. 2d at 312 n.2 (Farmer, J., dissenting).

326. *Id.*

This conflict between the districts<sup>327</sup> was not resolved by the supreme court's review of *Thomason*, as the court's opinion, despite setting forth the procedural history of the case,<sup>328</sup> dealt only with the merits of the double jeopardy claim.<sup>329</sup>

#### F. *Cross Appeals When Appeals are Untimely*

In *Peltz v. District Court of Appeal, Third District*,<sup>330</sup> the supreme court dealt with the question of whether a district court has jurisdiction to consider a cross appeal when the original notice of appeal is untimely. The case involved a situation in which one party filed an untimely notice of appeal from an order of a trial court.<sup>331</sup> Ten days later, the opposing party filed a notice of cross appeal.<sup>332</sup> Subsequently, a notice of voluntary dismissal of the original appeal was filed and the district court entered an order accepting the voluntary dismissal but stating that the cross appeal would remain pending.<sup>333</sup>

Acting on a petition for prohibition, the supreme court found that the notice of cross appeal could not provide an independent basis for jurisdiction and that because the original notice of appeal did not vest the district court with jurisdiction to proceed, there was no jurisdictional basis upon which the notice of cross appeal could be based.<sup>334</sup> Accordingly, prohibition was granted.<sup>335</sup>

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327. The approach taken by the Third District in *Obanion* also conflicts with that taken by the First District in *State v. Falls Chase Special Taxing District*, 424 So. 2d 787, 790 (Fla. 1st Dist. Ct. App. 1982), *review denied*, 436 So. 2d 98 (Fla. 1983), and the Second District in *Thomas v. State*, 422 So. 2d 93, 94 (Fla. 2d Dist. Ct. App. 1982).

328. *Thomason*, 620 So. 2d at 1236.

329. The case was reviewed pursuant to a certified question relating to the merits. *Id.* at 1235. The issue relating to the prior prohibition proceeding was not presented to the court.

330. 605 So. 2d 865 (Fla. 1992).

331. *Id.*

332. Florida Rule of Appellate Procedure 9.110(g) provides that an appellee may cross appeal by serving a notice within 10 days of service of the appellant's notice or within the time allowed for the filing of a notice of appeal directed to the order to be reviewed, whichever is later. FLA. R. APP. PROC. 9.110(g).

333. *Peltz*, 605 So. 2d at 865.

334. *Id.* at 866.

335. *Id.*



### G. Nature of Review

Many cases dealt with the question of whether orders were reviewable, either by appeal or by certiorari. The sheer volume of cases involving such issues precludes discussion of the reasoning relied on each case. Nonetheless, this article will set forth some of the cases, and indicate the type of order involved, and the conclusion reached.

#### 1. Cases in Which Review by Appeal was Found to be Appropriate

Among the orders that were reviewed by appeal were: (1) an order dismissing a civil action without prejudice because of a plaintiff's failure to serve the complaint within 120 days after it was filed;<sup>336</sup> (2) an order in a prosecution for driving under the influence suppressing breath test results because the breath testing device was not maintained in compliance with the appropriate regulations;<sup>337</sup> (3) an order dismissing a petition for a writ of mandamus;<sup>338</sup> (4) an adjudicatory order which reaffirmed a dependency finding and which terminated the parental rights of the natural father;<sup>339</sup> (5) an order granting a motion for summary final judgment on a permanent injunction;<sup>340</sup> (6) a non-final order denying immunity under the Longshore and Harbor Workers' Compensation Act;<sup>341</sup> (7) an order denying a motion to set aside a clerk's default;<sup>342</sup> and (8) an order compelling compliance with an investigative subpoena served by the Attorney General of Florida.<sup>343</sup>

#### 2. Cases in Which Review by Appeal was Found to be Inappropriate

Orders which were found not to be reviewable by appeal included: (1)

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336. *Carlton v. Wal-Mart Stores, Inc.*, 621 So. 2d 451 (Fla. 1st Dist. Ct. App. 1993).

337. *Blore v. Fierro*, 618 So. 2d 762 (Fla. 3d Dist. Ct. App. 1993) (conflict certified with *State v. Gemignani*, 545 So. 2d 929 (Fla. 2d Dist. Ct. App. 1989); *State v. Townsend*, 479 So. 2d 306 (Fla. 2d Dist. Ct. App. 1985)).

338. *Tunstall v. Folsom*, 616 So. 2d 1123 (Fla. 1st Dist. Ct. App. 1993).

339. *In re T.M.*, 614 So. 2d 561 (Fla. 1st Dist. Ct. App. 1993).

340. *Korandovitch v. Vista Plantation Condominium Ass'n*, 614 So. 2d 5 (Fla. 4th Dist. Ct. App. 1993).

341. 33 U.S.C. §§ 901-950 (1988); *International Ship Repair & Marine Servs., Inc. v. Emig*, 611 So. 2d 1359 (Fla. 2d Dist. Ct. App. 1993).

342. *Richardson v. Watson*, 611 So. 2d 1254 (Fla. 2d Dist. Ct. App. 1992).

343. *Transcall Am., Inc. v. Butterworth*, 604 So. 2d 1253 (Fla. 1st Dist. Ct. App. 1992).

non-final orders in child dependency proceedings;<sup>344</sup> (2) a partial summary judgment establishing the existence of insurance coverage;<sup>345</sup> (3) an order vacating an arbitration award and ordering a new hearing before a new arbitrator;<sup>346</sup> (4) an order granting a motion for final summary judgment on attorney's fees;<sup>347</sup> (5) an order granting a defendant's cross-motion for partial summary judgment, denying a plaintiff's motion for partial summary judgment and reserving jurisdiction for any and all other matters applicable to the case;<sup>348</sup> and (6) orders impleading a third party prior to the entry of a final order against the impleaded third party.<sup>349</sup>

### 3. Cases in Which Review by Appeal was Found to be Inappropriate but in Which Review by Certiorari was Found to be Appropriate

In some cases, the courts found that orders were not appealable, but that certiorari review was proper. The orders involved in these cases included: (1) an order denying a motion to mitigate a sentence in a situation in which the trial court erroneously believed that it was without jurisdiction to consider the motion;<sup>350</sup> (2) a writ of prohibition by a circuit court to a county court ordering a defendant in a criminal case discharged on speedy trial grounds;<sup>351</sup> (3) an order waiving juvenile jurisdiction and certifying a juvenile for trial as an adult;<sup>352</sup> (4) an order suppressing identification testimony in a criminal prosecution;<sup>353</sup> (5) a final judgment of foreclosure in a case in which the appellant's counterclaim asserting fraud had been severed and was still pending in the trial court;<sup>354</sup> (6) an order to show cause why a writ of prohibition should not be granted in a situation in which, absent immediate review a party might have suffered irreparable

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344. *In re M.A.*, 609 So. 2d 596 (Fla. 1992).

345. *Interamerican Car Rental, Inc. v. O'Brien*, 618 So. 2d 760 (Fla. 3d Dist. Ct. App. 1993).

346. *Central Fla. Police Benevolent Ass'n v. City of Orlando*, 614 So. 2d 1203 (Fla. 5th Dist. Ct. App. 1993).

347. *Korandovitch v. Vista Plantation Condominium Ass'n*, 614 So. 2d 5 (Fla. 4th Dist. Ct. App. 1993).

348. *Dixon v. Allstate Ins. Co.*, 609 So. 2d 71 (Fla. 1st Dist. Ct. App. 1992).

349. *Turnpike Dev., Ltd. v. Federal Deposit Ins. Corp.*, 606 So. 2d 491 (Fla. 4th Dist. Ct. App. 1992).

350. *Arnold v. State*, 621 So. 2d 503 (Fla. 5th Dist. Ct. App. 1993).

351. *State v. Frazee*, 617 So. 2d 350 (Fla. 4th Dist. Ct. App. 1993).

352. *In re D.W.*, 616 So. 2d 620 (Fla. 4th Dist. Ct. App. 1993).

353. *State v. Houston*, 616 So. 2d 595 (Fla. 4th Dist. Ct. App. 1993).

354. *Norris v. Paps*, 615 So. 2d 735 (Fla. 2d Dist. Ct. App. 1993).

harm for which remedy on plenary appeal was inadequate;<sup>355</sup> (7) an order abating an action for exhaustion of administrative remedies;<sup>356</sup> (8) an order granting a psychiatric examination of children entered after final judgment but as part of a supplementary proceeding on a petition for change of custody;<sup>357</sup> and (9) an order withholding adjudication of guilt and imposing court costs that did not place the defendant on probation.<sup>358</sup>

#### 4. Cases in Which Certiorari Review was Found to be Appropriate

In addition to those noted in the preceding section of this article, certiorari was deemed the proper method to review numerous other orders, such as: (1) an order requiring production and *in camera* inspection of certain investigative reports of Florida's Department of Health and Rehabilitative Services;<sup>359</sup> (2) an order entered on a master's report prior to the expiration of the ten day period under Florida Rule of Civil Procedure 1.490(h) for serving exceptions to the report;<sup>360</sup> (3) a protective order allowing a plaintiff, but not a defendant, to communicate *ex parte* with the defendant's former employees;<sup>361</sup> (4) an order compelling disclosure of the petitioner's workers' compensation file on the respondent;<sup>362</sup> (5) an order imposing sanctions in the form of attorney's fees and costs for failure to negotiate in good faith during court ordered mediation;<sup>363</sup> (6) an order compelling the victim of a criminal offense to appear at a live lineup and identify the person who committed the offense upon her;<sup>364</sup> (7) an order reducing a sentence upon a defendant's motion to mitigate sentence entered after the trial court lost jurisdiction to reduce or modify the sentence;<sup>365</sup>

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355. *Broward County v. Florida Nat'l Properties*, 613 So. 2d 587 (Fla. 4th Dist. Ct. App. 1993).

356. *Hedin v. Indian River County*, 610 So. 2d 715 (Fla. 4th Dist. Ct. App. 1992).

357. *Pariser v. Pariser*, 601 So. 2d 291 (Fla. 4th Dist. Ct. App. 1992).

354. *Martin v. State*, 600 So. 2d 20 (Fla. 2d Dist. Ct. App. 1992).

359. *Cebrian By and Through Cebrian v. Klein*, 614 So. 2d 1209 (Fla. 4th Dist. Ct. App. 1993).

360. *Barnett Bank of Martin County v. RGA Dev. Co.*, 606 So. 2d 1258 (Fla. 4th Dist. Ct. App. 1992).

361. *Manor Care of Dunedin, Inc. v. Keiser*, 611 So. 2d 1305 (Fla. 2d Dist. Ct. App. 1992).

362. *Adjustco, Inc. v. Sibley*, 611 So. 2d 88 (Fla. 2d Dist. Ct. App. 1992).

363. *Avril v. Civilmar*, 605 So. 2d 988 (Fla. 4th Dist. Ct. App. 1992).

364. *State v. Ray*, 604 So. 2d 1249 (Fla. 4th Dist. Ct. App.), *review denied*, 613 So. 2d 8 (Fla. 1992).

365. *State v. Blue*, 603 So. 2d 648 (Fla. 5th Dist. Ct. App. 1992).

and (8) an order denying a motion to amend and/or supplement a motion for post-conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850.<sup>366</sup>

#### IV. CERTIFICATION

A major development in the field of appellate practice in Florida was the approval by the supreme court of board certification for appellate lawyers.<sup>367</sup> The rule adopted by the court<sup>368</sup> on the subject defines "appellate practice" as "the practice of law dealing with the recognition and preservation of error committed by lower tribunals, and the presentation of argument concerning the presence or absence of such error to state or federal appellate courts through brief writing, writ and motion practice, and oral argument."<sup>369</sup> They go on to state that appellate practice "includes evaluation and consultation regarding potential appellate issues or remedies in connection with proceedings in the lower tribunal prior to the initiation of the appellate process."<sup>370</sup>

To become certified as an appellate lawyer, an applicant must demonstrate substantial involvement in appellate practice,<sup>371</sup> a showing which requires meeting several criteria,<sup>372</sup> including five years of the actual practice of law, at least thirty percent of which has involved appellate practice,<sup>373</sup> having sole or primary responsibility in at least twenty-five appellate actions for the filing of principal briefs in appeals or petitions or responses in extraordinary writ cases;<sup>374</sup> having sole or primary responsibility for at least five oral arguments;<sup>375</sup> and a demonstration of special competence as an appellate lawyer within the three years immediately preceding application.<sup>376</sup>

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366. *Rozier v. State*, 603 So. 2d 120 (Fla. 5th Dist. Ct. App. 1992).

367. The Fla. Bar re: Amendments to Rules Regulating The Fla. Bar, 621 So. 2d 1032 (Fla. 1993) [hereinafter *Florida Bar Amendments*].

368. R. REGULATING FLA. BAR 6-13.2 (1987).

369. *Florida Bar Amendments*, 621 So. 2d at 1059-60.

370. *Id.* at 1060.

371. *Id.*

372. While this article will summarize the criteria, it does not purport to set forth the criteria in detail. Attorneys interested in applying for certification should review the rule itself and not rely on this summary as a complete statement of the criteria.

373. *Id.*

374. *Id.*

375. *Florida Bar Amendments*, 621 So. 2d at 1060.

376. *Id.*

In addition, applicants must submit the names of at least four lawyers and three judges to attest to their substantial involvement in appellate practice,<sup>377</sup> demonstrate that within the three years immediately preceding application, they have accumulated approved continuing legal education credits in the field of appellate practice in amounts varying from thirty to forty-five hours depending upon when application is made,<sup>378</sup> and pass an examination.<sup>379</sup>

The rule also establishes the requirements for recertification, which, with the exception of the examination, are concerned with the same factors as the requirements for initial certification.<sup>380</sup>

It is hoped that the certification process will “identify those lawyers who engage in appellate practice and have the special knowledge, skills, and proficiency to be properly identified to the public as certified appellate lawyers.”<sup>381</sup>

## V. CONCLUSION

The changes that have occurred in Florida over the past year in the field of appellate practice have been widespread and significant. They include not only the large number of court decisions that are expected each year, but also important changes to the rules and the birth of certification. These events will undoubtedly shape the future of appellate practice in this state. The recent creation by The Florida Bar of its Appellate Practice and Advocacy Section will also impact on that future. The net result of these developments should be a better appellate process.

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377. *Id.*

378. *Id.*

379. *Id.*

380. *Florida Bar Amendments*, 621 So. 2d at 1061.

381. *Id.* at 1059.