

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO
THE FLORIDA RULES OF
APPELLATE PROCEDURE**

CASE NO.: 16-

**OUT-OF-CYCLE REPORT OF THE
APPELLATE COURT RULES COMMITTEE**

Kristin A. Norse, Chair of the Appellate Court Rules Committee (“Committee”), and John F. Harkness, Jr., Executive Director of The Florida Bar, file this out-of-cycle report, under Florida Rule of Judicial Administration 2.140(f).

All rule amendments have been approved by the full Committee and, as required by Florida Rule of Judicial Administration 2.140, reviewed by The Florida Bar Board of Governors. The voting records of the Committee and the Board of Governors are attached as Appendix A. Pursuant to Florida Rule of Judicial Administration 2.140(f), the amendments have not been published for comment prior to the filing of this report.

In a letter dated November 13, 2015, the Court suggested that the Committee file an out-of-cycle report proposing amendments to Rules 9.120 (Discretionary Proceedings to Review Decisions of District Courts of Appeal) and 9.200 (The Record) as the Court declined to adopt these amendments in *In Re: Amendments to Rule of Appellate Procedure 9.200*, 164 So. 3d 668 (Fla. 2015). Further, the Court indicated that it would like the “committee to consider ... ‘how a defective electronic record on appeal shall be corrected—as opposed to merely supplemented—after transmission to the appellate court and whether, and if so how, the appellate rules should address the provision of the record on appeal to the parties to a case.’ ” (See Appendix D–2.)

The Committee analyzed the request by the Court and proposes amendments to the following: Rule 9.020 (Definitions); Rule 9.120 (Discretionary Proceedings to Review Decisions of District Courts of Appeal); Rule 9.141 (Review Proceedings in Collateral Postconviction Criminal Cases); Rule 9.160 (Discretionary Proceedings to Review Decisions of County Court); Rule 9.180 (Appeal Proceedings to Review Workers’ Compensation Cases); Rule 9.200 (The Record); and, Rule 9.220 (Appendix).

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PROPOSED RULE AMENDMENTS

RULE 9.020. DEFINITIONS

The Committee proposes amending Florida Rule of Appellate Procedure 9.020 (Definitions) by creating new subdivision (l) entitled “E-filing System Docket.” This amendment will make it clear on which “docket” the record on appeal will be available to attorneys and parties who are registered users of the electronic filing system in accordance with the proposed amendment to Rule 9.200(d). As clerks keep “dockets” that are not accessible to the public or to users, the Committee felt it was important to distinguish between the e-filing system docket and other methods of storing court files.

RULE 9.120. DISCRETIONARY PROCEEDINGS TO REVIEW DECISIONS OF DISTRICT COURTS OF APPEAL

The Committee suggests amending subdivision (e) of Florida Rule of Appellate Procedure 9.120 (Discretionary Proceedings to Review Decisions of District Courts of Appeal) to create new subdivisions (e)(1)–(e)(3). The new subdivisions detail that the clerk should transmit the record from the District Court of Appeal to the Supreme Court in three separate Portable Document Format (“PDF”) files. The first PDF file would be the record on appeal as described in Rule 9.200(a) and (c). The second PDF file would be the transcript as described in Rule 9.200(b). The third PDF file would be the documents filed in the District Court of Appeal in the “record on appeal” format described in Rule 9.200(a) and (c).

RULE 9.141. REVIEW PROCEEDINGS IN COLLATERAL OR POSTCONVICTION CRIMINAL CASES

The Committee proposes amending Florida Rule of Appellate Procedure 9.141 (Review Proceedings in Collateral or Postconviction Criminal Cases) by deleting the second sentence of subdivision (b)(3)(B)(ii). The proposed amendment will conform the rule to the Court’s amendments in *In re: Amendments to Rule of Appellate Procedure 9.200*, 177 So. 3d 1254 (Fla. 2015), that require the clerk to paginate the record on appeal as required by Rule 9.200 (The Record).

Additional amendments to Rule 9.141 (Review Proceedings in Collateral or Postconviction Criminal Cases) are pending with the Court in *In re: Amendments to Florida Rules of Criminal Procedure and Florida Rule of Appellate Procedure*

9.140, SC15-1582. These amendments are indicated in Appendix B and Appendix C with double underline and double strikethrough.

RULE 9.160. DISCRETIONARY PROCEEDINGS TO REVIEW DECISIONS OF COUNTY COURTS

The Committee proposes amending Florida Rule of Appellate Procedure 9.160(g) by replacing “filed” with “transmitted.” This will bring consistency throughout the rules set when referring to the record on appeal.

RULE 9.180. APPEAL PROCEEDINGS TO REVIEW WORKERS’ COMPENSATION CASES

The Committee proposes amending Florida Rule of Appellate Procedure 9.180 to remove references to “filing” the record on appeal. Proposed amendments to subdivision (c)(2) include replacing “filed with” with “transmitted to”; in subdivision (c)(3), replacing “filed” with “transmitted”; also, in subdivision (f)(7), replacing “transmittal” with “transmission” in the subdivision title; and, in the second sentence of subdivision (f)(7), replacing “delivered” with “transmitted” and replacing “send” with “transmit.” This will bring consistency throughout the rules set.

RULE 9.200. THE RECORD

The Committee proposes amending Florida Rule of Appellate Procedure 9.200 (The Record) by deleting “duties of clerk” in the title of subdivision (d). This change was proposed because the provision of the record on appeal will not be a duty of the clerk of the lower tribunal. Also in the title of subdivision (d), the Committee proposes replacing “transmittal” with “transmission” for consistency. In the second sentence of subdivision (d)(1)(A), the Committee proposes adding a hyphen to “48-point.”

The Committee proposes creating new subdivision (d)(4) to explain how the court will provide the record on appeal to the parties. There was no disagreement as to the first part of the Court’s question to the Committee, *i.e.*, whether the rules should address the provision of the electronic record on appeal to the parties in a case. Having the record on appeal ensures attorneys cite to the right page of the record in their briefs; accurate citations benefit the parties, attorneys, law clerks, and judges on a case. As the electronic record already has to be prepared and transmitted by the lower tribunal, providing it to those preparing the appellate briefs is just one additional administrative step. Plus, in most cases, the record

contains only information that is already available to the attorneys or parties. The electronic record simply reflects how those documents are packaged for the appellate court.

Although courts on eDCA systems already provide the record in the vast majority of civil cases, the rule will ensure that the practice continues and is in place across the state. The Record on Appeal Subcommittee of the Appellate Court Rules Committee discussed concerns regarding potentially confidential information in the record, but noted that Rule 9.200(d)(1)(C) requires that the record transmitted is to include “filings in their redacted form.” To the extent the clerk of the lower tribunal does not comply with that provision, the appellate courts may reject those records before uploading them if this Court adopts the Committee’s proposal described below as to Rule 9.200(f). A further option, to the extent these provisions do not assuage those concerns, would be to make the amendment discretionary.

As to the mechanics of providing records, the Committee proposes the following language: “The court shall upload the electronic record to the electronic filing (e-filing) system docket. Attorneys and those parties who are registered users of the court’s e-filing system may download the electronic record in their case(s).”

This language was meant to capture the process by which the record is made available on eDCA. That system has worked well; attorneys that practice in the Second DCA and must use the File Transfer Protocol (“FTP”) report longer download times and a more burdensome process for obtaining records.

This proposal was drafted and revised in an effort to avoid placing additional burdens on the courts, either at the lower tribunal or the appellate level. Consequently, the proposal states that the record is only provided to registered users of a court’s e-filing system. Attorneys must register as users of the various systems in order to file documents with the respective courts. Once someone becomes a registered user, he or she has access to documents in cases for which he or she is listed as an attorney or party. Registered users may download the record of their cases, accessing documents they would have been served with at the trial court.

The Committee also proposes creating new subdivision (f)(3) to create a process for addressing a record on appeal that is noncompliant with Rule 9.200. This proposal permits appellate courts to reject records on appeal that are not in

technical compliance, *e.g.*, they are not text searchable, not correctly paginated, or not bookmarked. The proposal is permissive rather than mandatory, in accordance with the Committee’s discussions. The proposal states: “(3) If the court finds that the record is not in compliance with the requirements of this rule, it may direct the clerk of the lower tribunal to submit a compliant record, which will replace the previously filed noncompliant record.”

The Committee also considered proposing amendments to deal with substantive corrections, in light of comments made by the Second DCA Staff Attorneys to this Court’s amendments to Rule 9.200. The Committee rejected any modification to the Rules to address this issue. Permitting wholesale replacement of the record when a correction is made could be confusing, particularly if a correction is deemed necessary after any of the briefs have been filed. It could also create additional work for clerks of the lower tribunal who would be required to repaginate records and reconstruct record indices. It seems the better practice is to treat corrections as supplements; Rule 9.200(d)(1)(B) already explains how supplements to the record shall be paginated.

RULE 9.220. APPENDIX

The Committee’s proposal for Florida Rule of Appellate Procedure 9.220 (The Appendix) includes amending subdivision (b) to parallel the Court’s amendments to Rule 9.200 (The Record) in *In Re: Amendments to Florida Rule of Appellate Procedure 9.200*, 177 So. 3d 1254 (Fla. 2015). The Committee also suggests amending subdivision (c) and dividing the contents into subdivision (c) “Electronic Format” and subdivision (d) “Paper Format.” The portion of subdivision (c) addressing electronic appendices remains in subdivision (c). The rest of the subdivision is rearranged as new subdivisions (d)(1)–(d)(2). Additionally, the Committee suggests amendments detailing how the pages of the paper appendix should be numbered.

WHEREFORE, the Appellate Court Rules Committee respectfully requests that the Court amend Florida Rules of Appellate Procedure 9.020, 9.120, 9.141, 9.160, 9.180, 9.200, and 9.220 as detailed above.

Respectfully submitted on August 1, 2016.

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CERTIFICATE OF COMPLIANCE

I certify that these rules were read against *West's Florida Rules of Court—State* (2016 Edition).

I certify that this report was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Heather Savage Telfer
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