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From: Nutt, James [mailto:jnutt@sfwmd.gov]
Sent: Thursday, November 29, 2012 10:26 AM
To: Michael Ufferman
Cc: 'Heather Telfer'
Subject: RE: ACRC reminder

Michael,

Hope your holidays are going well. Our e-filing sub-committee meets today and should be on track for end of month reports. Recent S.Ct. decisions have lightened the load. More on that committee later.

I'm writing now to refer an issue I think should be addressed by the committee. Never done it before, so please advise if there is a more formal process I have missed.

In reviewing the rules for the e-filing sub-committee task, I noticed that Rule 9.020(h) [set at the end of this e-mail] is quite out of place.

9.020 is entitled and sets forth "Definitions." But (h) is far from a definition. I would alternatively characterize it as clarifying the universe of Rules governing appeals, i.e. notifying readers that the Appellate Rules are not the solely applicable rules.

As an aside, I've always thought RJA would over time take on more and more topics that are universal to multiple procedure rules and provide more uniformity across the court rules. Obviously App. R's hold supremacy over RJA's, but the RJA's supplement the App. Rules.

Seems that point of 9.020(h) should be addressed as part of 9.010 (and partially is) rather than pretending to be a "definition."

9.020(h) Applicability of Florida Rules of Judicial Administration. [added 10-23-12]
The Florida Rules of Judicial Administration are applicable in all proceedings governed by these rules, except as otherwise provided in these rules. These rules shall govern where in conflict with the Florida Rules of Judicial Administration.

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More Possible Amendments to the Florida Rules of Appellate Procedure

A. Consistency Issues

1. The ACRC recently tried to make the language of the various rules consistent in describing and referring to the filing fees that were to accompany a notice of appeal. The ACRC decided to use the phrase "any filing fees prescribed by law." *See, e.g.*, Fla. R. App. P. 9.100(b), 9.110(b), 9.120(b), 9.130(b), 9.160(b). We missed one, in rule 9.180. The rule continues to refer to "the filing fee prescribed by law." It ought to be changed to mirror the language in the other rules. Also, comparable language should probably be added to rules 9.140(b)(2)(A)(ii) and 9.140(b)(2)(B).

2. Some rules say "district court of appeal," while others simply say "district court." *Compare* Fla. R. App. P. 9.125(g) *with* Fla. R. App. P. 9.130(a)(1).

3. In rule 9.130(a)(3)(D), the "and" should be changed to an "or" to match the language of rule 9.130(a)(3)(B).

4. The rules are inconsistent on whether a colon is used to precede a list. *Compare* Fla. R. App. P. 9.140(b)(2)(A)(ii) *with* Fla. R. App. P. 9.140(b)(2)(B).

5. Rule 9.140(d)(1)(E) uses "local circuit court" instead of the phrase "lower tribunal" that is otherwise used consistently throughout the rules.

6. The vast majority of rules use "the court" when referring to the appellate tribunal. But some rules use "appellate court" for no apparent reason—when "the court" would seemingly work just as well. *See, e.g.*, Fla. R. App. P. 9.140(f)(6)(B), 9.141(c)(3), 9.141(d)(3), 9.200(b)(3), 9.430(c)(1), 9.430(d). [Another item in this memo raises the question of whether "the court" should be replaced with something like "the appellate court" throughout the rules.]

7. In the rules, parties are almost always referred to with the use of a direct or indirect article. For example, the rules almost always say "the appellant" or "an appellant," rather than simply "appellant. But there are occasional exceptions—a few instances in which "appellant" is used without an article. *See* Fla. R. App. P. 9.141(b)(3)(B)(ii), 9.180(g)(2)(C), 9.180(g)(2)(C)(ii), 9.180(g)(2)(D), 9.180(g)(2)(E), 9.180(g)(3)(C), 9.180(h)(2).

8. Rules 9.140(f)(2)(D) refers to the "Office of the Attorney General." Other rules refer simply to "the attorney general." *See, e.g.*, Fla. R. App. P. 9.141(b)(3)(B)(iii), 9.141(c)(6)(A), 9.141(d)(6), 9.510.

9. The rules are inconsistent in using "non-indigent" or "nonindigent." *Compare* Fla. R. App. P. 9.140(f)(4) *with* Fla. R. App. P. 9.141(b)(3)(B)(iii). [See Endnote Four.]

10. The rules are inconsistent in using "non-final" or "nonfinal." *Compare* Fla. R. App. P. 9.130(a)(1) *with* 9.142(c)(1). [See Endnote Four.]

11. The rules are inconsistent in using "post-conviction" or "postconviction." *Compare* Fla. R. App. P. 9.141(b)(2)(A) *with* Fla. R. App. P. 9.142(c)(1). [The supreme court seems to prefer "post-conviction." In *In re Amendments to Fla. R. Civ. P., etc.—Electronic Filing*, Case No. SC11-399 (Fla. June 21, 2012), the court changed "Postconviction" to "Post-Conviction" in the heading of rule 9.142(d).] [But see Endnote Four.]

12. The rules are inconsistent on whether "provided" is followed by a semicolon or a comma. There is even an internal inconsistency in rule 9.120(a)(5) in that area—where a comma is used after one "provided," but a semicolon is used after the other one.

13. The rules generally use "attorneys' fees," but some rules use "attorney fees" instead. *Compare* Fla. R. App. P. 9.400(b) *with* Fla. R. App. P. 9.710(b)(1).

14. Consistently with item 7 above, "claimant" in rule 9.180(b)(1)(C) should be either "the claimant" or "a claimant."

15. Rules 9.145(b) and 9.146(b) are intended to be substantially identical, but they are worded inconsistently with each other.

16. Consistently with item 7 above, subdivision (d) of rule 9.120 should be amended to add articles before "Petitioner" and "Respondent."

17. The rules consistently use "supreme court" when referring to the Supreme Court of Florida, except in rules 9.430(a) and 9.430(c)(2), where "Supreme Court" is used.

B. <u>Errors in Grammar, Punctuation, Style, Etc.</u>

1. The "which" in rule 9.040(b)(2)(B) should be "that." (The "which" is also inconsistent with the otherwise-parallel language in rule 9.040(b)(2)(A).) [See Endnote One.]

2. In rule 9.100(e)(1), a comma should be added after "name of the petitioner."

3. In rule 9.110(g), "timely filed" should be "timely-filed." [See Endnote Three.]

4. In rule 9.130(a)(3)(C)(ii), the phrase "including but not limited to" should have commas after "including" and "to."

5. In rule 9.130(a)(3)(C)(ii), a comma should be added after the first "dissolve."

6. In rule 9.140(f)(4), the phrase "serve copies . . . to" should be changed to "served copies . . . upon."

7. In rule 9.140(f)(6)(A), "60 day period" should be changed to "60-day period." [See Endnote Three.]

8. In rule 9.141(c)(4)(F)(i), the comma at the end should be a semicolon.

9. In rules 9.146, 9.200(a)(2), and 9.430(d), the phrase "termination of parental rights cases" should be changed to "termination-of-parental-rights cases." [See Endnote Three.]

10. In rule 9.210(f), "jurisdiction" should be "jurisdictional."

11. In the second paragraph of rule 9.410(b)(4), the "which" should be "that." [See Endnote One.]

12. In rule 9.700(e), the "which" should be "that." [See Endnote One.]

13. In rule 9.710, the periods at the end of each subdivision should be semicolons (except for the last one), and "and" should be added at the end of subdivision (e). The same change is needed in rule 9.720(b).

14. In Form 9.900(f), in paragraph 3 of the "Advisory Notice to the Minor," a comma should be added after "this time period."

15. In rule 9.330(b), "decision" should be "a decision." [A separate item in this memo discusses a possible rewording of this subdivision.]

16. The parentheticals, use of "Florida Statutes," and use of "section" in rule 9.190 are inconsistent (and sometimes grammatically incorrect). *See* Fla. R. App. P. 9.190(c)(2)(A), (c)(2)(B), (c)(2)(C), (c)(2)(D), (c)(2)(E). Something like the following might be better:

> (2) *Review of Final Action Pursuant to the Administrative Procedure Act*.
>
> (A) In an appeal from any proceeding conducted pursuant to section<u>s</u> 120.56 (rule challenges)<u>,</u> ~~or sections~~ 120.569 (decisions which affect substantial interests)<u>, or</u> ~~and~~ 120.57(1)~~, Florida Statutes~~ (decisions which affect

> substantial interests involving disputed material facts), Florida Statutes, the record . . . official transcript.
>
> (B) In an appeal from any proceeding conducted pursuant to sections 120.569 (decisions which affect substantial interests) or ~~and~~ 120.57(2)~~, Florida Statutes~~ (decisions which affect substantial interests involving no disputed issue of material fact), Florida Statutes, the record . . . presiding officer.
>
> (C) In an appeal from any proceeding conducted pursuant to section 120.56~~, Florida Statutes~~ (declaratory statements), Florida Statutes, the record . . . declaratory statement petition.
>
> (D) In an appeal from any proceeding conducted pursuant to section 120.574~~, Florida Statutes~~ (summary proceedings), Florida Statutes, the record . . . final hearing.
>
> (E) In an appeal from a rule adoption pursuant to sections 120.54 (rule adoption) or ~~and~~ 120.68(9), Florida Statutes, in which the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact, the record . . . as required by sections 120.54 (rule adoption) and 120.541~~, Florida Statutes~~ (statement of estimated regulatory costs), Florida Statutes; all notices and findings made pursuant to section 120.54(4)~~, Florida Statutes~~ (adoption of emergency rules), Florida Statutes; all materials filed by the agency with the Administrative Procedures Committee pursuant to section 120.54(3)~~, Florida Statutes~~ (rule adoption procedure), Florida Statutes; all materials filed with the Department of State pursuant to section 120.54(3)~~, Florida Statutes~~ (rule adoption procedure), Florida Statutes; . . . concerning the rule.

17. The "which" in two parentheticals of rule 9.190(c)(2)(A) and two parentheticals of rule 9.190(c)(2)(B) should each be "that." [See Endnote One.]

18. In rule 9.331(d)(3), the language is not parallel after "reheard, require, . . . and may . . . ." Something like any of the following alternatives would be grammatically better:

Option One:

> (3) *Disposition of Motion for Rehearing En Banc*. A motion for rehearing en banc shall be disposed of by order.

> If rehearing en banc is granted, the court may limit the issues to be reheard, require the filing of additional briefs, ~~and may~~ require additional argument, or any combination of those options.

Option Two:

> (3) *Disposition of Motion for Rehearing En Banc*. A motion for rehearing en banc shall be disposed of by order. If rehearing en banc is granted, the court may limit the issues to be reheard, require the filing of additional briefs, or ~~and may~~ require additional argument.

Option Three:

> (3) *Disposition of Motion for Rehearing En Banc*. A motion for rehearing en banc shall be disposed of by order. If rehearing en banc is granted, the court may limit the issues to be reheard~~,~~ or require the filing of additional briefs~~,~~. The court ~~and~~ may also require additional argument.

D. Minor, Nonsubstantive Clarifications

1. Change "notice" to "notice of appeal" in rules 9.140(h)(1), 9.142(d)(2)(A), 9.200(b)(1), and 9.200(c).

5. In rule 9.420(f)(15), the language currently just refers to the "clerk's office." To avoid unnecessary confusion and litigation, it should specify *which* clerk's office is the relevant one—whether the clerk of the lower tribunal or the clerk of the appellate court. In *R.J. Reynolds v. Kenyon*, 826 So. 2d 370 (Fla. 2d DCA 2002), the court suggested that the provision should be amended to read: "Any other day when the clerk's office is closed in that court where the proceeding is pending or, in the case of filed documents, the court where the document would regularly be filed." *Id.* at 373 n.5. In *Roadrunner Construction, Inc. v. Department of Financial Services*, 33 So. 3d 78 (Fla. 1st DCA 2010), the court said that "there can be no doubt about the meaning of the term ['clerk'] as it is used in rule 9.420(f). The word 'clerk' in the phrase 'any other day when the clerk's office is closed' is plainly a reference to the clerk in the office where the document at issue is to be filed." *Id.* at 80-81.

6. In rule 9.360(b)(4), it is unclear what type of "notice" is being referred to. Is it a notice of appeal, a notice under subdivision (a) of the rule, both, or something else altogether?

E. Provisions That May Be Unnecessary

1. In rule 9.010, delete "provided that . . . 1962 Amendment."

2. In rule 9.010, delete "shall take effect . . . March 1, 1978."

3. Possibly delete everything except the first sentence of rule 9.040(b)(2)(C). The location of the record is irrelevant in appeals from orders transferring venue. Those appeals proceed with appendices, not with the use of records.

5. Should rule 9.320 be amended to remove the references to the time allowed for oral arguments, given that all of Florida's appellate courts have their own policies—and none complies strictly with the rule?

6. In Form 9.900(i), should the part of the form requiring recordation information for a judgment be deleted? Is it really necessary? Sometimes a notice of appeal is filed before a judgment is recorded (often when a judgment provides for execution "forthwith").

F. Provisions That May Need to be Updated

1. The definition of "petitioner" in rule 9.020(g)(3) does not include some instances in which a party seeking relief is indeed deemed a "petitioner" under the rules, such as proceedings under rules 9.141(c), 9.141(d), 9.142(b), and 9.142(c).

3. At its meeting on January 21, 2011, the ACRC voted to amend rule 9.331(d) to allow a party to move for rehearing en banc on the ground that the *issue* in a case (as opposed to the case itself) is of exceptional importance. Should that change likewise be incorporated into rule 9.331(a), which concerns hearings en banc?

G. Major, But Nonsubstantive, Restructuring or Rewording

1. Should the rules be amended to specify "appellate court," rather than simply "the court" throughout? In considering individual rule amendments, there are frequently suggestions that a particular rule state "appellate court" rather than merely "the court" for clarity purposes. Should that be done consistently in all of the appellate rules?

10. In rule 9.210(a)(3), the sentence regarding headings should be moved to subdivision (a)(2). I'd suggest something like the following:

> (2) The lettering in briefs shall be black and in distinct type, double-spaced, with margins no less than 1 inch. Lettering in script or type made in imitation of handwriting shall not be permitted. Footnotes and quotations may be single-spaced and shall be in the same size type, with the same spacing between characters, as the brief's text. Headings and subheadings shall be at least as large as the brief's text and may be single-spaced. Computer-generated briefs shall be submitted in either Times New Roman 14-point font or Courier New 12-point font. All computer-generated briefs shall contain a certificate of counsel signed by counsel, or the party if unrepresented, certifying that the brief complies with the font requirements of this rule. The certificate of compliance shall be contained in the brief immediately following the certificate of service.
>
> (3) Briefs shall be securely bound in book form and fastened along the left side in a manner that will allow them to lie flat when opened or be securely stapled in the upper left corner. ~~Headings and subheadings shall be at least as large as the brief text and may be single spaced.~~

11. Rule 9.330(b) is unclear and confusing. It should be reworded. I'd suggest something like the following:

> **(b) Limitation.** With respect to a particular decision, a ~~A~~ party shall not file more than 1 motion for rehearing, 1 motion ~~or~~ for clarification of decision, ~~and~~ 1 motion for certification, and 1 motion for a written opinion ~~with respect to a particular decision~~. Multiple motions may be combined, but all shall be filed within the time period prescribed by this rule.

H. Major Substantive Restructuring, Rewording, or Changes

1. Rule 9.040(a) provides that "[i]n all proceedings a court shall have such jurisdiction as may be necessary for a complete determination of the cause." That provision troubles me slightly because: (a) it's not really accurate; and (b) I'm not entirely sure what it means—and the courts don't seem to be either.

That rule has been cited substantively in only six reported cases, for very different purposes or reasons. *See Lopez v. State*, 638 So. 2d 931 (Fla. 1994) (rule cited to support

conclusion that defendant in criminal case could file cross-appeal even without specific rule authorizing him to do so); *Whitten v. Progressive Cas. Ins. Co.*, 410 So. 2d 501 (Fla. 1982) (rule cited as basis for court's consolidating review proceedings on its own motion); *Myers v. Hawkins*, 362 So. 2d 926 (Fla. 1978) (rule used as basis for ordering parties to brief issue that had not previously addressed); *Danzes Taiwan, Ltd. v. Freeman*, 868 So. 2d 537 (Fla. 3d DCA 2003) (rule used to direct dismissal of case on remand); *Gibson v. Florida Dep't of Corrections*, 828 So. 2d 422 (Fla. 1st DCA 2002) (Benton, J., dissenting) (would have used rule to treat petitioner's mandamus petition in trial court as petition for habeas corpus); *Dixon v. Melton*, 515 So. 2d 1309 (Fla. 1st DCA 1987) (rule cited as basis for reversing contempt order in prohibition proceeding directed to another order, which court also quashed).

I don't think the rule is entirely accurate because there are certain types of appellate proceedings in which the appellate tribunal does *not* in fact have the authority (or jurisdiction) to "completely determine" the "cause"—although that may depend entirely what the word "cause" means in this provision. Generally speaking, I think the provision is accurate with respect to appeals from final orders and in original proceedings, but—unless one employs a fairly strained definition of "cause"—I don't think it's accurate with respect to appeals from nonfinal orders. In those cases, an appellate tribunal's authority manifestly does not extend to a disposition of the entire "cause" that still remains pending in the lower tribunal.

I'm not entirely sure how to fix the problem that I perceive with the current language of the rule. Perhaps it could be done with something like one of the following:

Option One:

> **(a) Complete Determination.** In all proceedings, a court shall have such jurisdiction as may be necessary for a complete determination of the cause before it.

Option Two:

> **(a) Complete Determination.** In all proceedings, a court shall have such jurisdiction as may be necessary for a complete determination of the ~~cause~~ issues properly before it.

4. Rule 9.120(d): Should jurisdictional briefs be permitted in certified question cases? It's been said that the supreme court has, in recent years, denied discretionary review or dismissed discretionary review as improvidently granted more frequently in certified question cases than it has in the past. I have no idea whether that's true, but it's certainly true that the supreme court sometimes denies or dismisses discretionary review in certified question cases on the ground that "certified question jurisdiction" did not really exist, usually because the district court did not actually "pass upon" the certified question in its decision. *See Floridians for Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832 (Fla. 2007); *see also Pirelli*

Armstrong Tire Corp. v. Jenson, 777 So. 2d 973 (Fla. 2001); *Salgat v. State*, 652 So. 2d 815 (Fla. 1995). Although both the ACRC and the supreme court have previously considered whether to amend rule 9.120(d) to allow jurisdictional briefs in certified question cases, maybe it's time to revisit that question. If so, I'd suggest something like one of the two following alternatives:

Option One:

> **(d) Briefs on Jurisdiction.** Petitioner's brief, limited solely to the issue of the supreme court's jurisdiction and accompanied by an appendix containing only a conformed copy of the decision of the district court of appeal, shall be served within 10 days of filing the notice. Respondent's brief on jurisdiction shall be served within 20 days after service of petitioner's brief. Formal requirements for both briefs are specified in rule 9.210. No reply brief shall be permitted. ~~If jurisdiction is invoked under rule 9.030(a)(2)(A)(v) (certifications of questions of great public importance by the district courts of appeal), no briefs on jurisdiction shall be filed.~~

Option Two:

> **(d) Briefs on Jurisdiction.** Petitioner's brief, limited solely to the issue of the supreme court's jurisdiction and accompanied by an appendix containing only a conformed copy of the decision of the district court of appeal, shall be served within 10 days of filing the notice. Respondent's brief on jurisdiction shall be served within 20 days after service of petitioner's brief. Formal requirements for both briefs are specified in rule 9.210. No reply brief shall be permitted. If jurisdiction is invoked under rule 9.030(a)(2)(A)(v) (certifications of questions of great public importance by the district courts of appeal), ~~no~~ briefs on jurisdiction shall be ~~filed~~ limited only to the issues of:
>
> (1) whether the disposition by the district court of appeal qualifies as a decision in the case;
>
> (2) whether the decision actually passes upon the certified question; and
>
> (3) whether the decision to certify the question was supported by a majority of the judges participating in the decision of the district court of appeal.

5. Should "suggestion" be changed to "motion" in subdivisions (a), (c), (d), (e), and (f) of rule 9.125?

8. Should a new subdivision be added to rule 9.210 prescribing the contents of a jurisdictional brief? Or should the rule be amended to specify that the same requirements for initial and answer briefs apply also to jurisdictional briefs? Or should a provision on that subject be added instead to rule 9.120(d)? If so, I'd suggest something like one of the following alternatives:

Option One (amending rule 9.120(d):

> **(d) Briefs on Jurisdiction.** The ~~P~~petitioner's brief, limited solely to the issue of the supreme court's jurisdiction and accompanied by an appendix containing only a conformed copy of the decision of the district court of appeal, shall be served within 10 days of filing the notice. The ~~R~~respondent's brief on jurisdiction shall be served within 20 days after service of the petitioner's brief. The contents of the petitioner's brief shall be the same as rule 9.210 prescribes for initial briefs, and the contents of the respondent's brief shall be the same as rule 9.210 prescribes for answer briefs. Other ~~F~~formal requirements for both briefs are specified in rule 9.210. No reply brief shall be permitted. . . .

Option Two (adding a new subdivision to rule 9.210):

> **(i) Contents of Jurisdictional Briefs.** In proceedings under rule 9.120, a petitioner's jurisdictional brief shall contain, in the same order, the same contents as this rule prescribes for initial briefs. A respondent's jurisdictional brief shall contain the same contents that this rule prescribes for answer briefs.

Option Three (amending rule 9.210(b) and (c)):

> **(b) Contents of Initial Brief and Petitioner's Jurisdictional Brief.** The initial brief (and the petitioner's jurisdictional brief in proceedings under rule 9.120) shall contain the following, in order:
>
> . . .

> **(c) Contents of Answer Brief and Respondent's Jurisdictional Brief.** The answer brief (and the respondent's jurisdictional brief in proceedings under rule 9.120) shall be prepared in the same manner as the initial brief . . . .

9. Rule 9.225 refers to supplemental authorities "discovered after the last brief." Sometimes that is not what happens, such as when an appellee discovers an authority after its answer brief is filed but before the reply brief is due. Maybe an amendment along the following lines is warranted:

> Notices of supplemental authority may be filed with the court before a decision has been rendered to call attention to decisions, rules, statutes, or other authorities that are significant to the issues raised and that have been discovered after the filing party's last brief served in the cause. . . .

10. Given the well-known overuse, misuse, and abuse of motions for rehearing, should language be added to rule 9.330 comparable to what is in rule 9.331(d)(2)—telling counsel that a motion for rehearing is "extraordinary" and that an attorney's duty is fully discharged without filing a motion for rehearing unless the grounds for such a motion truly exist? If so, maybe a new subdivision in rule 9.330 could read in a way similar to the following:

> **(e) Duty of Counsel.** A rehearing is extraordinary relief. In every case the duty of counsel is discharged without filing a motion for rehearing unless the grounds for such a motion set forth in subdivision (a) of this rule are clearly met.

11. In rule 9.420(f), should the day after Thanksgiving be added to the list of official holidays? As far as I know, Florida courts are always closed on that day—and the courts have treated that day as a legal holiday for that reason—so the rules might as well go ahead and formally, officially reflect that day as a legal holiday. Silly, unnecessary litigation could be avoided as a consequence. *See, e.g.*, *State v. Garber*, 726 So. 2d 338 (Fla. 5th DCA 1999); *Cummins Alabama, Inc. v. Allbritten*, 548 So. 2d 258 (Fla. 1st DCA 1989).

14. Should rule 9.800(*l*) be amended to: (a) provide for citations to Federal Appendix for cases published in that service; and (b) provide for citations to slip opinions for cases not published in the Federal Reporter, Federal Appendix, or Florida Law Weekly Federal (similarly to the way citations to slip opinions are provided for with respect to Florida cases in subdivisions (a), (b), and (c))? If so, I'd suggest something like the following:

(*l*) Federal Courts of Appeals.

Gulf Oil Corp. v. Bivins, 276 F.2d 753 (5th Cir. 1960).

For opinions not in the Federal Reporter, cite to Federal Appendix: *PNC Bank, N.A. v. Branch Banking & Trust Co.*, 451 F. App'x 835 (11th Cir. 2012). For opinions not published in the Federal Reporter or the Federal Appendix, cite to Florida Law Weekly Federal: *Cunningham v. Zant*, 13 Fla. L. Weekly Fed. C591 (11th Cir. Mar~~ch~~. 27, 1991). For opinions not published in the Federal Reporter, Federal Appendix, or Florida Law Weekly Federal, cite to the slip opinion: *Hayes v. Automotive Components Holdings, LLC*, No. 07-5495 (6th Cir. Jan. 28, 2008).

15. Should rule 9.800(m) be amended to provide for citations to Federal Rules Decisions—and for citations to slip opinions for cases not published in the Federal Supplement, Federal Rules Decisions, or Florida Law Weekly Federal (similarly to the way citations to slip opinions are provided for with respect to Florida cases in subdivisions (a), (b), and (c))? If so, I'd suggest something like the following:

(m) Federal District Courts.

Pugh v. Rainwater, 332 F. Supp. 1107 (S.D. Fla. 1971).

McCabe v. Foley, 233 F.R.D. 683 (M.D. Fla. 2006).

For opinions not published in the Federal Supplement or Federal Rules Decisions, cite to Florida Law Weekly Federal: *Wasko v. Dugger*, 13 Fla. L. Weekly Fed. D183 (S.D. Fla. Apr. 2, 1991). For opinions not published in the Federal Supplement, Federal Rules Decisions, or Florida Law Weekly Federal, cite to the slip opinion: *Orlando Holidays, Inc. v. 740 Ocean Drive Corp.*, No. 07-20215-CIV (S.D. Fla. May 31, 2007).

18. Rule 9.430 governs proceedings by indigents. Subdivision (c) of the rule governs proceedings by incarcerated parties. Subdivision (c)(2) governs civil proceedings by those parties. It reads as follows:

(2) *Non-Criminal Proceedings*. Except in cases involving criminal or collateral proceedings, an application for determination of indigent status filed under this rule by a person who has been convicted of a crime and is incarcerated for that crime or who is being held in custody pending extradition or sentencing shall contain

> substantially the same information as required by an application form approved by the Supreme Court for use by circuit court clerks. The determination of whether the case involves an appeal from an original or collateral proceeding depends on the substance of the issues raised and not on the form or title of the petition or complaint. In these non-criminal cases, the clerk of the lower tribunal shall require the party to make a partial prepayment of court costs or fees and to make continued partial payments until the full amount is paid.

The last sentence of this subdivision is problematic. It was undoubtedly intended to implement certain provisions of section 57.085 of the Florida Statutes, which governs the deferral or prepayment of court costs for indigent prisoners in civil actions. But the problem is that the last sentence of subdivision (c)(2): (a) does not really mirror what the statute says; and (b) is almost certainly violative of the access-to-courts provision of the Florida Constitution.

The legislature has the constitutional authority to restrict, and place some limitations upon, the ability of proceed in court without payment of costs or fees, because that is a matter of substantive law, rather than procedure—and it has done so in section 57.085. *See generally Jackson v. Florida Dep't of Corrections*, 790 So. 2d 381 (Fla. 2000); *cf. Quigley v. Butterworth*, 708 So. 2d 270 (Fla. 1998). But neither the legislature nor the supreme court has the constitutional authority to deny *complete* access to Florida courts due to a genuine, true, *literal* inability to pay *any* costs or fees.

And indeed, the legislature has not actually purported to do so in section 57.085. Instead, the statute provides that "[w]hen the clerk has found the prisoner to be indigent *but concludes the prisoner is able to pay part of the court costs and fees required by law*, the court shall order the prisoner to make, prior to service of process, an initial partial payment of those court costs and fees." § 57.085(4), Fla. Stat. (emphasis added). Thus, the statute requires an initial partial payment of a filing fee only if a prisoner, though indigent, is nonetheless "able to pay part of the court costs and fees required by law."

Subdivision (c)(2) of rule 9.430 does not contain that limitation, however. Its language literally imposes an absolute, across-the-board requirement that a prisoner make not only an initial "partial prepayment of court costs or fees" (in some unspecified amount or according to some undefined percentage) and then "make continued partial payments until the full amount is paid." Thus, under the literal language of the rule, a prisoner who is genuinely without the financial ability to make even a partial prepayment of court costs or fees could not commence an appeal. And, in Florida, the right to appeal is a constitutional right.

So the problem with the last sentence of subdivision (c)(2) is actually three-fold: (1) it violates the access-to-courts provision of the Florida Constitution; (2) it unconstitutionally "legislates" on a matter of substantive law, rather than procedure; and

(3) it goes beyond, and conflicts with, the corresponding statute governing the same subject. That subdivision should therefore be amended to fix these problems. Something like the following might be appropriate:

> (2) *Non-Criminal Proceedings*. Except in cases involving criminal or collateral proceedings, an application for determination of indigent status filed under this rule by a person who has been convicted of a crime and is incarcerated for that crime or who is being held in custody pending extradition or sentencing shall contain substantially the same information as required by an application form approved by the ~~S~~supreme ~~C~~court for use by circuit court clerks. The determination of whether the case involves an appeal or other review from an original or collateral proceeding depends on the substance of the issues raised and not on the form or title of the petition or complaint. In these non-criminal cases, the clerk of the lower tribunal shall, to the extent required by general law, require the party to make a partial prepayment of court costs or fees and to make continued partial payments until the full amount is paid.

19. Even though motions for enlargements of time are common in appellate proceedings, there isn't actually a rule that expressly authorizes them (although rule 9.300(a) impliedly does so). Should there be? More generally, should there be a rule specifying what deadlines an appellate court can—and cannot—extend? The rules currently contain no provision of that nature.

The Florida Rules of Civil Procedure contain a provision embodying both concepts. It reads as follows:

> **(b) Enlargement.** When an act is required or allowed to be done at or within a specified time by order of court, by these rules, or by notice given thereunder, for cause shown, the court at any time in its discretion (1) with or without notice, may order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made and notice after expiration of the specified period, may permit the act to be done when failure to act was the result of excusable neglect, but it may not extend the time for making a motion for new trial, for rehearing, or to alter or amend a judgment; making a motion for relief from a judgment under rule 1.540(b); taking an appeal or filing a petition for certiorari; or making a motion for a directed verdict.

Fla. R. Civ. P. 1.090(b).

The Federal Rules of Appellate Procedure similarly contain a provision addressing both subjects:

> **(b) Extending Time.** For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:
>
> **(1)** a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or
>
> **(2)** a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

Fed. R. App. P. 26(b).

Additionally, many (although by no means all) of the United States Courts of Appeals have also adopted local rules governing motions for extensions of time to file briefs. *See* 4th Cir. R. 31(c); 5th Cir. R. 31.4; 6 Cir. R. 26; 7th Cir. R. 26; 10th Cir. R. 27.4; 11th Cir. R. 26-1 & 31-2; D.C. Cir. R. 27(h) & 28(e); Fed. Cir. R. 26(b); *see also* Vet. App. R. 26(b).

Thus, if the ACRC believes that the Florida Rules of Appellate Procedure should include a formal provision governing extensions of time, there are plenty of sources on which such a rule could be modeled.

20. An informal poll that I conducted revealed a surprising degree of uncertainty, confusion, and sharp disagreement among even experienced appellate practitioners as to the answers to some questions that arise out of procedural scenarios that are quite common, such as:

(a) whether an attorney who represents multiple appellees—and who is responding to a single initial brief from a single appellant—can file a separate answer brief for each appellee;

(b) whether an appellee responding to multiple initial briefs from multiple appellants can file an answer brief as to each initial brief—or must instead file a single answer brief directed to *all* of the initial briefs; and

(c) whether an appellant responding to multiple answer briefs from multiple appellees can file a reply brief as to each answer brief—or must instead file a single reply brief directed to *all* of the answer briefs.

The Florida Rules of Appellate Procedure currently do not answer these questions, and opinions on the "right" answers to them appear to differ sharply. Maybe the rules should be amended to provide some clarity in these areas.

The only provision in the Federal Rules of Appellate Procedure that touches upon this subject does not really address the questions of concern:

> **(i) Briefs in a Case Involving Multiple Appellants or Appellees.** In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

Fed. R. App. P. 28(i).

Potentially relevant provisions from the local rules or IOPs of the United States Courts of Appeals on this subject include the following:

United States Court of Appeals for the Fourth Circuit:

> **Local Rule 28(a). Consolidated Cases and Briefs**.
>
> Related appeals or petitions for review will be consolidated in the Office of the Clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by Court order, unless leave to the contrary is granted upon good cause shown. In consolidated cases lead counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the clerk within 14 days of the date of the order of consolidation. In the absence of an agreement by counsel, the clerk shall designate lead counsel. The individual so designated shall be responsible for the coordination, preparation and filing of the briefs and appendix.
>
> **. . .**
>
> **Local Rule 28(d). Joint Appeals and Consolidations.**

> Where multiple parties are directed to file a consolidated brief, counsel on the same side of the case should confer and agree upon a means for assuring that the positions of all parties are addressed within the length limits allowed and that each counsel will have an opportunity to review and approve the consolidated brief before it is filed.

4th Cir. Loc. R. 28(a), (d).

United States Court of Appeals for the Seventh Circuit:

> (d) *Brief in Multiple Appeals*.
>
> (1) *Order and Number of Briefs*. **[superceded by Fed. R. App. P. 28.1; eff. 12/01/05]**
>
> (a) If a cross-appeal is filed, the clerk will designate which party will file the opening brief, and will set a briefing schedule. The adverse party may file a combined responsive brief and opening brief in its own appeal. This brief may not exceed the page limitation for principal briefs. The party that filed the opening brief may file a combined responsive brief to the cross-appeal and reply brief in its own appeal. This brief may not exceed the page limitation for reply briefs.
>
> (b) The court will entertain motions for realignment of the briefing schedule and enlargement of the number of pages when the norm established by this rule proves inappropriate. Because it is improper to take a cross-appeal in order to advance additional arguments in support of a judgment, the court will not grant motions under this subsection by cross-appellants that do not seek to enlarge their rights under the judgment.
>
> (2) *Captions of Briefs in Multiple Appeals*. When two or more parties file cross-appeals or other separate but related appeals, the briefs shall bear the appellate case numbers and captions of all related appeals.

7th Cir. R. 28(d).

United States Court of Appeals for the Eighth Circuit:

> **RULE 32A: BRIEFS AND REPLY BRIEFS RESPONDING TO MULTIPLE**

BRIEFS

(a) Appellee Briefs in Consolidated Criminal Cases Involving Multiple Appellants. In consolidated criminal appeals involving multiple appellants, the United States must file a single appellee brief. The type-volume limitations set forth in FRAP 32(a)(7)(I) apply to the brief. If the United States believes presentation of the cases would be aided by separate appellee briefs, it may file a motion, at least 7 days prior to the brief due date, setting forth good cause to file separate briefs. Inability to comply with the type-volume limitations set forth in FRAP 32(a)(7)(B)(i) is not good cause for filing separate briefs.

(b) Appellee Briefs in Consolidated Civil Cases Involving Multiple Appellants. In consolidated civil cases involving multiple appellants, each separately-represented appellee must file a single appellee brief. The type-volume limitations set forth in FRAP 32(a)(7)(I) apply to the appellee brief.

(c) Reply Briefs in Appeals Involving Multiple Appellees. In cases involving multiple appellee briefs, appellant must file a single reply brief responding to all of the appellee briefs. The type-volume limitations set forth in FRAP 32(a)(7)(B)(ii) apply to the reply brief.

8th Cir. R. 32A.

United States Court of Appeals for the Ninth Circuit:

Circuit Rule 28-4. Extensions of Time and Enlargements of Size for Consolidated and Joint Briefing

In a case or consolidated cases involving multiple separately represented appellants or appellees, all parties on a side are encouraged to join in a single brief to the greatest extent practicable. As set forth below, the Court will grant a reasonable extension of time and enlargement of size for filing such a joint brief or for filing a brief responding to a joint brief or to multiple briefs.

Notice Procedure. If no previous extension of the filing deadline or enlargement of brief size has been obtained and the case has not been expedited, the Court will grant a 21-

day extension of time and an enlargement of five (5) pages, 1,400 words or 130 lines of monospaced text for a joint brief upon the filing of the notice at Appendix of Forms, No. 7 to these rules. *(Rev. 7/1/00)*

If no previous extension of the filing deadline or enlargement of brief size has been obtained and the case has not been expedited, the Court will grant a 21-day extension of time and an enlargement of five (5) pages, 1,400 words or 130 lines of monospaced text to a party filing a single response to a joint brief or multiple briefs upon the filing of the notice at Appendix of Forms, No. 7.

Upon receipt of such a notice, a corresponding adjustment to the responsive brief's due date will be recorded on the docket. *(Rev. 7/1/00)*

All notices described in this rule must be filed at least 7 days prior to the brief's due date and signed by counsel for all parties on that side. If the parties on a side have different due dates for their briefs, the notice must be filed at least 7 days before the earliest due date and the extended due date shall be calculated from the latest due date. *(Rev. 12/1/09)*

Motion Procedure. If parties filing a joint brief or responding to multiple briefs or joint briefs wish to obtain a lengthier extension of time or greater enlargement of brief size than described above, or if the case has been previously expedited, the extension or enlargement request must be made by written motion. Motions for extensions of time must be filed at least 7 days prior to the brief's due date; joint motions for extensions of time and/or to enlarge brief size must be signed by all counsel filing the motion. If the parties on a side have different due dates for their briefs, the motion must be filed at least 7 days prior to the earliest due date. *(Rev. 12/1/02; 12/1/09)*

The previous grant of an extension of time under Circuit Rule 31-2.2(a) precludes a request for relief under this rule absent a showing of extraordinary and compelling circumstances. *(Rev. 7/97)*

9th Cir. R. 28-4.

United States Court of Appeals for the Tenth Circuit:

31.2 Joint briefing in criminal appeals.

Codefendants in criminal appeals may each file a brief or may join in a single brief. Joint briefs must bear the appellate case numbers and captions of all appeals. The United States is encouraged to file a single brief.

31.3 Joint briefing in civil appeals.

(A) Multiple parties. In civil cases involving more than one appellant or appellee, including consolidated cases, all parties on a side (including intervenors) must – to the extent practicable – file a single brief. Where, however, multiple response briefs are filed pursuant to 10th Cir. R. 31.3(B), the appellant may file only one reply except upon motion to the court seeking an exemption.

(B) Certificate of counsel. Any brief filed separately by one of multiple parties must contain a certificate plainly stating the reasons why the separate brief is necessary.

(C) Extension of time. On motion, the clerk may extend the time for briefing to allow the parties time to coordinate a single brief.

(D) Government entities exempt. This rule does not apply to government entities.

10th Cir. R. 31.2, 31.3.

United States Court of Appeals for the Eleventh Circuit:

2. "One Attorney, One Brief". Unless otherwise directed by the court, an attorney representing more than one party in an appeal may only file one principal brief (and one reply brief, if authorized), which will include argument as to all of the parties represented by that attorney in that appeal, and one (combined) record excerpts or appendix. A single party responding to more than one brief, or represented by more than one attorney, is similarly bound.

IOP 2 following 11th Cir. R. 28-5.

United States Court of Appeals for the Federal Circuit:

Practice Notes

> . . .
>
> **MULTIPLE PARTIES**. When there are multiple parties represented by the same counsel or counsel from the same firm, a combined brief must be filed on behalf of all the parties represented by that counsel or firm.
>
> . . .
>
> **Rule 31. Serving and Filing Briefs**
>
> **(a) Time for Service and Filing.**
>
> . . .
>
> (4) **Single Brief Responding to Multiple Parties.** A single brief that responds to the briefs of multiple parties must be served and filed within the time prescribed after service of the last of these briefs or, if no such brief is filed, after the time expires for filing the last of these briefs.

Practice Note re Fed. R. App. P. 28 & Fed. Cr. P. 31.

21. The Florida Rules of Appellate Procedure currently contain no rule governing motions to consolidate appeals or other proceedings. Maybe they should. Attorneys frequently move to consolidate appeals without specifying which of the various types of "consolidation" they are actually seeking—probably because they don't even *know* about the multiple alternatives. Maybe a specific rule will provide needed guidance in this area—guidance that currently is available only in the case law and not within the rules themselves. If so, I would suggest that the rule should perhaps be modeled on the principles articulated in *J.M.B. v. State*, 776 So. 2d 353 (Fla. 1st DCA 2001).

22. In rules 9.100(*l*) and 9.210(a)(2), should the categories of permissible fonts be revised, expanded, or enlarged? Some have suggested that Florida adopt formatting requirements modeled after rule 32(a) of the Federal Rules of Appellate Procedure. But even if that is not a viable option right now, there might be additional "acceptable" font choices that could be added to the rules that would: (a) appear "professional" and be suitable for inclusion in formal appellate filings; (b) not be in imitation of handwriting; (c) occupy roughly the same amount of space as Times New Roman 14-point (if proportionally spaced) or Courier New 12-point (if monospaced)—so as to prevent people from using font choices to include a greater volume of text than would be permitted under the current rules and the page limitations contained in those rules; and (d) be common, readily available, and easily obtainable—system fonts that require no licenses, rather than professional fonts.

ENDNOTES

Note One: *That* vs. *Which*

The misuse of *which* when the proper word is *that* is probably the most common grammatical error that lawyers make when they write. *See, e.g.*, L. Sue Baugh, *Essentials of English Grammar: A Practical Guide to the Mastery of English* 32 (2d ed. Passport Books 1993) ("the subordinating conjunction changes from *that* in a restrictive clause to *which* in a nonrestrictive clause. In general, *that* is used to indicate information essential to the meaning of the sentence. *Which* indicates information that is not essential."); Mary A. DeVries, *The Encyclopedic Dictionary of Style and Usage* 372 (Berkley Books 1999) ("*that* is used in restrictive clauses and *which* or *who* in nonrestrictive clauses"); Bryan A. Garner, *A Dictionary of Modern Legal Usage* 765-66 (2d ed. Oxford Univ. Press 1995) ("Legal writers who fail to distinguish restrictive from nonrestrictive clauses—and especially *that* from *which*—risk their credibility with careful readers. . . . Restrictive clauses are essential to the grammatical and logical completeness of a sentence. Nonrestrictive clauses, by contrast, are so loosely connected with the essential meaning of the sentence that they might be omitted without changing the essential meaning. Hence, three guidelines. First, if you cannot omit the clause without changing the basic meaning, the clause is restrictive; use *that* without a comma. Second, if you can omit the clause without changing the basic meaning, the clause is nonrestrictive; use *which* after a comma. Third, if you ever find yourself using a *which* that doesn't follow a comma, it probably needs to be a *that*. . . . Using *which* for *that* is perhaps the most common blunder with these words."); Bryan A. Garner, *The Elements of Legal Style* 142 (2d ed. Oxford Univ. Press 2002) ("Restrictive relative clauses, which most properly begin with *that*, are not set off my commas. This kind of clause is essential to grammatical and logical completeness . . . . Nonrestrictive relative clauses, which most properly begin with *which*, are set off by commas. This kind of clause is so loosely connected with the essential meaning of the sentence that it might have been omitted without a change in that essential meaning . . . . The simplest test for determining the type of relative clause is this: if putting the clause in parentheses leaves the basic meaning of the sentence intact, the clause is nonrestrictive (properly introduced by *which*). If the sentence is rendered nonsensical in context when the clause is put in parentheses, or gives the sentence an entirely different sense, then it is restrictive (properly introduced by *that*)."); Bryan A. Garner, *The Redbook: A Manual On Legal Style* 156, 274 (2d ed. Thomson/West 2006) ("For relative pronouns referring to anything other than people, use *that* to introduce a restrictive clause and *which* (after a comma) to introduce a nonrestrictive clause. . . . *That* introduces a restrictive clause, one that can't be left out without changing the meaning of the sentence . . . . *Which* introduces a nonrestrictive clause, one set off by commas and whose omission would not change the meaning"); Bryan A. Garner, *The Winning Brief: 100 Tips For Persuasive Briefing in Trial and Appellate Courts* 209 (Oxford Univ. Press 1999) ("Use *that* restrictively, *which* nonrestrictively."); Terri LeClercq, *Expert Legal Writing* 143 (Univ. of Texas Press 1995) ("If you draft an essential (restrictive) clause that will not be punctuated 'out' of the sentence with commas, use *that*. If the caluse is meant to be nonessential, relatively unnecessary to the sentence's meaning, use two commas and *which*."); Richard Lederer

& Richard Dowis, *Sleeping Dogs Don't Lay: Practical Advice for the Grammatically Challenged* 11 (St. Martin's Press 1999) ("The rule to follow is this: When the relative clause is defining, restrictive, or essential, always use *that* and *never* precede it with a comma. When the relative clause is nondefining, nonrestrictive, or nonessential, introduce it with *which* and precede it with a comma."); Patricia T. O'Connor, *Woe Is I: The Grammarphobe's Guide to Better English in Plain English* 3 (Riverhead Books 1996) ("If you can drop the clause and not lose the point of the sentence, use *which*. If you can't, use *that*. A *which* clause goes inside commas. A *that* clause doesn't."); Mary Barnard Ray & Jill J. Ramsfield, *Legal Writing: Getting It Right and Getting It Written* 214 (West Pub. Co. 1987) ("Use *that* when you are introducing information that limits the definition of the word before *that*. This limiting information is a restrictive phrase. . . . Use *which* when you are introducing information that is extra, not limiting. This extra information is a nonrestrictive phrase."); William Strunk Jr. & E.B. White, *The Elements of Style* 59 (4th ed. Allyn & Bacon 2000) ("*That* is the defining, or restrictive, pronoun, *which* the nondefining, or nonrestrictive. . . . Careful writers . . . go *which*-hunting, remove the defining *whiches*, and by so doing improve their work."); Bill Walsh, *Lapsing Into a Comma: A Curmudgeon's Guide to the Many Things That Can Go Wrong in Print—and How to Avoid Them* 213 (Contemporary Books 2000) ("*That* introduces essential clauses; *which* introduces nonessential (also known as nonrestrictive) clauses. . . . *Which* clauses are always set off—usually by a comma, but sometimes by a dash or with parentheses. So your choice is between *that* and *comma-which*. If the comma seems out of place, *that* is your answer."); Richard H. Weisberg, *When Lawyers Write* 135 (Little, Brown & Co. 1987) ("A restrictive clause, one that precisely defines a preceding term, should begin with 'that'; a nonrestrictive clause, which only describes a preceding term, should begin with 'which' and be set off by commas.").

<u>Note Two: The Serial Comma</u>

Some might say that the use of the serial comma is optional (or a matter of "style") but the great weight of authority—virtually every source that one could find outside the newspaper context—favors its use. *See, e.g.*, Bryan A. Garner, *A Dictionary of Modern Legal Usage* 714 (2d ed. Oxford Univ. Press 1995) (the omission of the serial comma "may cause ambiguities, whereas its inclusion never will"); Bryan A. Garner, *The Elements of Legal Style* 15-16 (2d ed. Oxford Univ. Press 2002) ("Always use the serial comma. . . . [M]ake a habit of using it consistently, regardless of whether ambiguity threatens to invade your sentence."); Bryan A. Garner, *The Redbook: A Manual On Legal Style* 3 (2d ed. Thomson/West 2006) ("Use commas to separate words or phrases in a series of three or more, and include a comma before the conjunction."); Bryan A. Garner, *The Winning Brief: 100 Tips For Persuasive Briefing in Trial and Appellate Courts* 249 (Oxford Univ. Press 1999) ("Use the serial comma."); Terri LeClercq, *Expert Legal Writing* 152 (Univ. of Texas Press 1995) ("Place commas between all items in a series. . . . [I]n legal writing, it is more important to be clear than to save the space of a comma."); Richard Lederer & Richard Dowis, *Sleeping Dogs Don't Lay: Practical Advice for the Grammatically Challenged* 149 (St. Martin's Press 1999) ("'Use commas to separate items in a series of three or more even if the last item is preceded by *and*."); Mary

Barnard Ray & Jill J. Ramsfield, *Legal Writing: Getting It Right and Getting It Written* 99 (West Pub. Co. 1987) ("When writing a list in legal writing, put a comma before the *and* or *or* that introduces the final item in the list."); Margaret D. Shertzer, *The Elements of Grammar* 79 (Macmillan Pub. Co. 1986) ("Present usage advocates the use of the comma before *and* connecting the last two words of a series"); William Strunk Jr. & E.B. White, *The Elements of Style* 2 (4th ed. Allyn & Bacon 2000) ("In a series of three or more terms with a single conjunction, use a comma after each term except the last. Thus, write *red, white, and blue*"); Bill Walsh, *Lapsing Into a Comma: A Curmudgeon's Guide to the Many Things That Can Go Wrong in Print—and How to Avoid Them* 81 (Contemporary Books 2000) ("Newspapers, by and large, don't use [serial commas]. Other publications usually do. . . . But what a lot of newspaper editors don't know is that the serial comma is sometimes necessary even in newspaper style"); Richard H. Weisberg, *When Lawyers Write* 71 (Little, Brown & Co. 1987) ("Use a comma to separate a series of words, phrases, or clauses. . . . [T]he majority advise using the final comma to avoid all ambiguity"); Richard C. Wydick, *Plain English for Lawyers* 92 (Carolina Academic Press 1998) ("When a sentence contains a series of three or more items joined with one conjunction, put commas after each item except the last. 'The defendant was armed with a sawed-off shotgun, a semi-automatic pistol, and a hunting knife when he entered the bank.'").

<u>Note Three: Phrasal Adjectives</u>

"When a phrase functions as an adjective—an increasingly frequent phenomenon in late-20th-century English—the phrase should ordinarily be hyphenated. Seemingly everyone in the literary world knows this except lawyers. For some unfathomable reason—perhaps because they are accustomed to slow, dull, heavy reading—lawyers resist these hyphens." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 657 (2d ed. Oxford Univ. Press 1995); *see also* L. Sue Baugh, *Essentials of English Grammar: A Practical Guide to the Mastery of English* 45 (2d ed. Passport Books 1993) ("When compound adjectives are used before the noun, they are hyphenated."); Bryan A. Garner, *The Elements of Legal Style* 24 (2d ed. Oxford Univ. Press 2002) ("a phrase, when functioning as an adjective (or compound modifier) before a noun, should be hyphenated. . . . The principle applies to countless legal phrases"); Bryan A. Garner, *The Redbook: A Manual On Legal Style* 38 (2d ed. Thomson/West 2006) ("A phrase functioning as an adjective in front of a noun or pronoun should ordinarily be hyphenated"); Bryan A. Garner, *The Winning Brief: 100 Tips For Persuasive Briefing in Trial and Appellate Courts* 234-35 (Oxford Univ. Press 1999) ("Hyphenate your phrasal adjectives. . . . Invariably, lawyers are skeptical of this point, as if it were something newfangled or alien. But professional editors learn this lesson early and learn it well: you need to hyphenate your phrasal adjectives, Here's the rule: if two or more consecutive words make sense only when understood together as an adjective modifying a noun that follows, those words (excluding the noun) should be hyphenated."); Terri LeClercq, *Expert Legal Writing* 166-67 (Univ. of Texas Press 1995) ("When they create . . . compound-adjectival units, writers should not neglect the necessary hyphen, because the result can be ambiguous or even error"); Richard Lederer & Richard Dowis, *Sleeping Dogs Don't Lay: Practical Advice for the Grammatically*

Challenged 160 (St. Martin's Press 1999) ("The main purpose of the hyphen is to prevent awkward or confusing constructions. Most often, hyphens join two or more words that, taken together, form an adjective. Examples: *business-writing seminar, front-office decision, in-house legal counsel, state-of-the-art equipment*."); Mary Barnard Ray & Jill J. Ramsfield, *Legal Writing: Getting It Right and Getting It Written* 86 (West Pub. Co. 1987) ("Use a hyphen to signal that the words hyphenated work together to modify a subsequent word in the sentence"); Margaret D. Shertzer, *The Elements of Grammar* 110 (Macmillan Pub. Co. 1986) ("Use a hyphen . . . between units forming a compound adjective before the noun modified"); William Strunk Jr. & E.B. White, *The Elements of Style* 34 (4th ed. Allyn & Bacon 2000) ("When two or more words are combined to form a compound adjective, a hyphen is usually required."); Bill Walsh, *Lapsing Into a Comma: A Curmudgeon's Guide to the Many Things That Can Go Wrong in Print—and How to Avoid Them* 8 (Contemporary Books 2000) ("*Compound modifiers*, also known as *unit modifiers* or *compound adjectives*, generally must be hyphenated."); Richard C. Wydick, *Plain English for Lawyers* 103 (Carolina Academic Press 1998) ("If two or more words act together as a single modifier, they should usually be joined by hyphens.").

Note Four: *Non- and Post-* as Nonhyphenated Prefixes

The overwhelming weight of authorities on modern English usage would favor "nonfinal" over "non-final" (and "Postconviction" over "post-conviction"). *See, e.g.*, L. Sue Baugh, *Essentials of English Grammar: A Practical Guide to the Mastery of English* 84 (2d ed. Passport Books 1993) ("Most prefixes are added without using a hyphen. . . . *nonfood*"); Mary A. DeVries, *The Encyclopedic Dictionary of Style and Usage* 311 (Berkley Books 1999) ("Most prefixes are affixed without a hyphen unless the prefix is connected to a proper noun."); Bryan A. Garner, *A Dictionary of Modern Legal Usage* 716 (2d ed. Oxford Univ. Press 1995) ("Words with prefixes are generally made solid: *nonstatutory* (not *non-statutory*), *pretrial* (not *pre-trial*), *posttrial* (not *post-trial*), *preemption* (not *pre-emption*)."); Bryan A. Garner, *The Elements of Legal Style* 26 (2d ed. Oxford Univ. Press 2002) ("Professional writers and editors today prefer that prefixes and their bases be written as solids 99% of the time—that is, as *un*hyphenated single words, whatever the word class of the base may be (adjective, noun, adverb, or verb). Generally, solidify each of the following prefixes when adding it to a base: . . . non_."); Bryan A. Garner, *The Redbook: A Manual On Legal Style* 42 (2d ed. Thomson/West 2006) ("Modern usage omits most hyphens after prefixes, even when it results in a doubled letter. . . . *nonstatutory*"); Bryan A. Garner, *The Winning Brief: 100 Tips For Persuasive Briefing in Trial and Appellate Courts* 240 (Oxford Univ. Press 1999) ("In American English, most prefixes aren't hyphenated. They make solid words, such as *coworker*, *pretrial*, and *nonstatutory*. If you write those terms with hyphens . . . you're running against the grain of well-edited writing."); Margaret D. Shertzer, *The Elements of Grammar* 112 (Macmillan Pub. Co. 1986) ("Do not ordinarily use the hyphen between a prefix and the stem when the added word is not a proper noun."); Richard C. Wydick, *Plain English for Lawyers* 104 (Carolina Academic Press 1998) ("A hyphen is usually

not used after the prefixe[] . . . *non* . . . unless the second element is capitalized or the hyphen is needed to avoid confusion.”).

Note Five: *And/Or*

The use of “and/or” is *always* inferior to some other alternative. *See, e.g.*, *Ex parte Bell*, 122 P.2d 22, 29 (Cal. 1942) (*and/or* “lends itself . . . as much to ambiguity as to brevity”); *Raine v. Drasin*, 621 S.W.2d 895, 905 (Ky. 1981) (“this much condemned conjunctive-disjunctive crutch of sloppy thinkers”); *State v. Smith*, 184 P.2d 301, 303 (N.M. 1947) (“the highly objectionable phrase *and/or* . . . has no place in pleadings, findings of fact, conclusions of law, judgments or decrees, and least of all in instructions to a jury. . . . [*And/or* is a] linguistic abomination.”); *American Gen. Ins. Co. v. Webster*, 118 S.W.2d 1082, 1084 (Tex. Civ. App. 1938) (“to our way of thinking the abominable invention *and/or* is as devoid of meaning as it is incapable of classification by the rules of grammar and syntax”); *Employers’ Mut. Liab. Ins. Co. v. Tollefsen*, 263 N.W. 376, 377 (Wis. 1935) (“that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance as a cunning device to conceal rather than to express meaning”); Dwight G. McCarty, *That Hybrid “and/or,”* 39 Mich. State B.J. 9, 17 (1960) (“the only safe rule to follow is not to use the expression in any legal writing, document or proceeding, under any circumstances”); Bryan A. Garner, *A Dictionary of Modern Legal Usage* 765-66 (2d ed. Oxford Univ. Press 1995) (“”*and/or* has been vilified for most of its life—and rightly so.”); Bryan A. Garner, *The Elements of Legal Style* 103 (2d ed. Oxford Univ. Press 2002) (“Banish from your working vocabulary”); Bryan A. Garner, *The Redbook: A Manual On Legal Style* 50 (2d ed. Thomson/West 2006) (“”grammatical abomination[]”); Terri LeClercq, *Expert Legal Writing* 136 (Univ. of Texas Press 1995) (“Watch out for this form, or you will create ambiguity and confusion.”); Richard Lederer & Richard Dowis, *Sleeping Dogs Don’t Lay: Practical Advice for the Grammatically Challenged* 33 (St. Martin’s Press 1999) (*and/or* “seems to us to be a rather graceless way to express oneself”); Mary Barnard Ray & Jill J. Ramsfield, *Legal Writing: Getting It Right and Getting It Written* 11 (West Pub. Co. 1987) (“Avoid this construction because it creates ambiguity.”); William Strunk Jr. & E.B. White, *The Elements of Style* 40 (4th ed. Allyn & Bacon 2000) (“A device, or shortcut, that damages a sentence and often leads to confusion or ambiguity”); Bill Walsh, *Lapsing Into a Comma: A Curmudgeon’s Guide to the Many Things That Can Go Wrong in Print—and How to Avoid Them* 101 (Contemporary Books 2000) (“this clumsy device”).

From: "Michael Ufferman" <ufferman@uffermanlaw.com>
To: "'Heather Telfer'" <HTelfer@flabar.org>
Date: 12/17/2012 09:03 AM
Subject: RE: 3 judges v 1 (RJA referral from 1999-2000)

So I think we should send a referral to general that says:

An inquiry was made as to whether there should be a rule that requires 3-judge panels for county-to-circuit appeals. Many, if not most, of the county-to-circuit appeals involve 3-judge panels. The reason for this is that it is consistent with the DCA model and it appeals generally involve a panel of judges (rather than a single judge). Additionally, in those circuits that have single judges decide county-to-circuit appeals, it is usually the same judge deciding every appeal and the parties do not have the benefit of only needing to convince a majority of the panel (because there is only one judge). This issue was considered several years ago and it is my understanding that it was rejected because it was impractical in small counties/circuits (i.e., it was too difficult for counties that only have 2 circuit judges to have to bring in a circuit judge from a neighboring county due to travel, time, etc.). It seems that with current advancements in technology, this is no longer a concern. Judges would not necessarily need to meet face-to-face to decide cases; rather, the decision can be accomplished electronically. In fact, it is my understanding that the majority of cases at the DCA level are not decided after conference (i.e., they are decided electronically). Every circuit in this state has at least 3 circuit judges, so every circuit can allow for 3-judge panels even if the judges do not reside in the same county.

So the subcommittee should consider whether it is in favor of a rule that requires 3-judge panels in county-to-circuit appeals. Next, if the answer is yes, the subcommittee should consider whether RJA also needs to be involved in order for such a rule to be accomplished.

I would send the subcommittee the proposed ACRC and RJA rules that were considered and rejected in 2000. Also, can we say that this referral came from Sylvia (is that accurate)? If it is, we can change the beginning to "Sylvia Walbolt made an inquiry as to whether . . . ."

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To: The Appellate Court Rules Committee

From: Judge Chris W. Altenbernd

July 25, 2013

Re: Proposed Amendments to the Appellate Rules

(Part of comments on 2014 Three-year cycle amendments)

* * *

While I have your attention:

Let me mention several other rules with issues--

FRAP 9.110(h) and (k) and (g). 9.110(h)--the first sentence of this rule is a perfect explanation of scope of review. The second sentence--which is similar to proposed 9.130(i) is nice information about appealing multiple orders, but it has nothing to do with scope of review. I wish we could rename/move that sentence.

More important, Rule 9.110(h) was created long before (k). The scope of review in (h) is wrong for many, if not all, (k) appeals. A (k) appeal only allows review of issues related to the separate matter resulting in the partial final order or of issue related to the party dismissed. The same is true of cross-appeals; in K appeals they are limited to issues tied to the partial final judgment. I wish this could be clarified in the rules or comments.

FRAP 9.210(b). It has always seemed odd to me that a brief has to "identify the issues" in the table of contents but it does not need to have "points on appeal." No self-respecting appellate attorney omits points on appeal. We spend hours training people how to write them. Briefs without them are a real annoyance for appellate judges. I wish they were mentioned in this rule.

If you go back to old 3.7, you will see that lawyers had to brief from "assignments of error." These were filed early in the appeal. The content of the brief's argument was structured around the assignments. They were intended to be comparable to points on appeal--but all appellate lawyers (including me) created expansive "assignments" and then tried to argue narrower points. At any rate the pre-1977 rules probably didn't mention points due to assignments. I wish we mentioned points now.

FRAP 9.360(a). "Parties." This "joinder" provision in the "Parties" rule is arguably misnamed and most folks seem to miss it. Under your definitions in 9.020, everybody in the trial court case joins the appeal as a party. Nobody needs to "join." They need to switch sides. They never figure out that they need to switch sides until more than 10 days after the notice of appeal. This is further complicated by the new filing fee requirement. I wish it were a "Changing Party Status" or even a "changing sides" rule and I wish the parties had a much longer period to do this--maybe as late as the date of the answer brief/response so long as they adopt the appellant's brief.

CERTIORARI REDEFINED: WOULD THE "FUNCTIONAL RESTATEMENT" FUNCTION?*

Anthony Russo**
Ezequiel Lugo***
Jared Krukar****

I. INTRODUCTION

Some pretrial rulings can impose unbearable pressures on a litigant, change the course of a case, and cause lasting harm. Sometimes, your client just cannot wait until the end of a case to appeal. Imagine that the trial court has just issued a non-final order adverse to your client that you think will likely be reversed on appeal. You research the possibility of interlocutory review to provide the studied and reasoned advice your client expects. You quickly realize that, unfortunately, your chances of obtaining interlocutory review are slim to none.[1]

While every litigant in Florida has a constitutional right to an appeal from a final order,[2] no such right exists as to a non-final order.[3] Florida courts discourage the piecemeal review of non-final orders,[4] so a litigant seeking interlocutory review of

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1. The Florida Rules of Appellate Procedure were drafted to limit interlocutory review of non-final orders based on the theory that such review "waste[s] court resources and needlessly delays final judgment." *Travelers Ins. Co. v. Bruns*, 443 So. 2d 959, 961 (Fla. 1984).

2. *In re Amends. to the Fla. R. of App. P.*, 696 So. 2d 1103, 1104 (Fla. 1996).

3. *See* Philip J. Padovano, *Florida Appellate Practice* § 4:4, 97 (2011 ed., Thompson Reuters 2010) (explaining the limited nature of review of non-final orders).

4. *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822 (Fla. 2004); *Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 215 (Fla. 1998).

non-final orders has very limited options in Florida state courts.[5] Florida Rule of Appellate Procedure 9.130 allows district courts to hear interlocutory appeals from non-final orders in civil cases that fall into one of ten categories.[6] And the district courts have discretion to review non-final orders that fall outside Rule 9.130 under their certiorari jurisdiction,[7] which ebbs and flows in response to changes to Rule 9.130.[8] Otherwise, certiorari jurisdiction is not limited to any specific kind of non-final orders and, theoretically, applies to most non-final orders.[9]

However, the district courts' certiorari jurisdiction to review non-final orders is constrained by key limitations that do not apply to appeals under Rule 9.130.[10] Common law certiorari is considered an extraordinary remedy, described as a "safety net" that covers the space between final appeals and the other writs.[11] Certiorari should not be used to circumvent Rule 9.130, so certiorari jurisdiction is available only in limited circumstances.[12] For these reasons, a litigant seeking certiorari review must show that the non-final order (1) constitutes a clear "departure from the essential requirements of the law," (2) resulting in material injury that (3) cannot be remedied on appeal from a final order.[13] This three-prong test is deceptive in that it appears to be simple, yet it has confounded judges and practitioners for decades.[14]

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5. *See Heritage Paper Co. v. Farah*, 440 So. 2d 389, 390 (Fla. 1st Dist. App. 1983) (explaining that "procedures for taking interlocutory appeals . . . provide for review of only a limited group of non-final orders 'based upon the necessity or desirability of expeditious review'").

6. *Bd. of Trustees of the Internal Improvement Trust Fund v. Am. Educ. Enters., LLC*, 99 So. 3d 450, 454 (Fla. 2012); Padovano, *supra* n. 3, at 97–98.

7. Fla. R. App. P. 9.030(b)(2)(A); *Bd. of Trustees*, 99 So. 3d at 454.

8. William A. Haddad, *The Common Law Writ of Certiorari in Florida*, 29 U. Fla. L. Rev. 207, 215 (1977); Tracy E. Leduc, *Certiorari in the Florida District Courts of Appeal*, 33 Stetson L. Rev. 107, 124 (2003).

9. Padovano, *supra* n. 3, at 102.

10. *Id.* at 102–103.

11. *Broward Co. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001).

12. *Reeves*, 889 So. 2d at 822.

13. *Nader v. Fla. Dep't of Hwy. Safety & Motor Vehs.*, 87 So. 3d 712, 721 (Fla. 2012); *Reeves*, 889 So. 2d at 822.

14. *See* Haddad, *supra* n. 8, at 228 (noting that the departure from the essential requirements of the law requirement is vague and creates a "large grey area"); William H. Rogers & Lewis Rhea Baxter, *Certiorari in Florida*, 4 U. Fla. L. Rev. 477, 507 (1951) (complaining that "the practitioner will have to guess for himself [or herself] his [or her] chances of getting an interlocutory order reviewed"); *cf. Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 898 (Fla. 2003) (Wells, J., dissenting) (criticizing the majority opinion as making second-tier certiorari review "standardless and subject to the particular views of different appellate court panels as to which decisions meet an amorphous criterion");

The frustration with this three-prong test has prompted a recent call to replace the current test with a functional restatement of the standard for certiorari review.[15] The proponents of this functional restatement argue that the current three-prong test is "inherently unpredictable" given its subjective nature.[16] In place of the current three-prong test, they propose a functional test that examines (1) the nature and degree of the alleged error and (2) the justification for the appellate court to exercise its discretionary jurisdiction to immediately review the error.[17] The proponents of the functional restatement aim for many narrow, functional tests that apply to each different kind of non-final order reviewable under the district courts' certiorari jurisdiction.[18]

As this Article shows, however, practitioners' attempts to convince Florida's appellate courts to institute a functional restatement of the standard for certiorari review may ultimately be futile.[19] Part II of this Article describes the current subjective standard for certiorari review and the recently proposed functional restatement of the standard for certiorari review. Part III analyzes and compares the current subjective standard and the

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Leduc, *supra* n. 8, at 121 (concluding that "practitioners can expect that the decision of whether to grant second-appeal certiorari review is not governed by a particular standard, but rather, is subject to the whims of the different district courts of appeal").

15. *See generally* Chris W. Altenbernd & Jamie Marcario, *Certiorari Review of Nonfinal Orders: Does One Size Really Fit All? Part I*, 86 Fla. B.J. 21 (Feb. 2012) (proposing the functional restatement) [hereinafter Altenbernd & Marcario I]; Chris W. Altenbernd & Jamie Marcario, *Certiorari Review of Nonfinal Orders: Trying On a Functional Certiorari Wardrobe, Part II*, 86 Fla. B.J. 14 (Mar. 2012) (applying the functional restatement to orders denying trial by jury and orders denying discovery) [hereinafter Altenbernd & Marcario II].

16. Altenbernd & Marcario I, *supra* n. 15, at 21.

17. *Id.* at 23.

18. *Id.* at 21; *e.g.* Altenbernd & Marcario II, *supra* n. 15, at 14–18 (describing different standards for certiorari review of orders denying trial by jury and orders denying discovery).

19. The scope of this Article is limited to analyzing Florida district courts' certiorari jurisdiction to review non-final orders in civil cases. This Article does not address issues associated with second-tier certiorari at the district court level and past and present certiorari review in the Supreme Court of the United States, the Florida Supreme Court, and Florida's circuit courts. *See e.g. Nader*, 87 So. 3d at 721–723 (distinguishing the different kinds of common law certiorari proceedings); Haddad, *supra* n. 8, at 209–210 (describing the Florida Supreme Court's prior ability to review orders by certiorari); Leduc, *supra* n. 8, at 114–121 (discussing second-tier certiorari in the district courts); Padovano, *supra* n. 3, at 118, 729 (explaining the circuit court's certiorari jurisdiction); Rogers & Baxter, *supra* n. 14, at 479–480 (summarizing certiorari review of Florida decisions by the Supreme Court of the United States).

proposed functional restatement in the context of three kinds of non-final orders: (1) orders denying motions to enforce settlement agreements; (2) orders denying motions to dismiss; and (3) orders allowing punitive damages claims. Part IV advocates for the use of the functional restatement as a litmus test to identify non-final orders that should be reviewed by interlocutory appeal under Rule 9.130. Part V concludes that, while a functional restatement of the standard for certiorari review may prove to be unworkable, expansion of the categories of orders reviewable under Rule 9.130 would result in the consistency and certainty that the functional restatement aims to create.

II. COMPETING STANDARDS FOR THE COMMON LAW WRIT OF CERTIORARI

A. The Birth of the Current Standard

Between 1885 and 1956, the Florida Supreme Court had constitutional power to issue writs of common law certiorari.[20] The Court initially limited certiorari review to consider only final judgments of lower appellate courts.[21] The Court eventually recognized a few exceptions to the general rule that only final judgments were reviewable by certiorari[22] and expanded the scope of certiorari jurisdiction to encompass review of any appellate order:

(1) rendered by a lower court lacking jurisdiction;[23]

20. Haddad, *supra* n. 8, at 209–210. The common law writ of certiorari is much older, dating back to the English common law, when certiorari was an original writ of chancery ordering a lower tribunal to return the record of a pending case so that the higher court could review the proceedings. *Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 525 (Fla. 1995). The Florida Supreme Court recognized its certiorari jurisdiction as early as 1855. *Id.* (citing *Halliday v. Jacksonville & Alligator Plank Rd. Co.*, 6 Fla. 304, 305 (1855)).

21. Rogers & Baxter, *supra* n. 14, at 502; *e.g. Davis v. First Nat'l Bank of Miami*, 16 So. 2d 46, 47 (Fla. 1943) (denying certiorari because the order under review was not a final judgment); *First Nat'l Bank of Gainesville v. Gibbs*, 82 So. 618, 620 (Fla. 1919) (stating that "[o]rdinarily the writ of certiorari may not be used to quash a judgment of an inferior court, unless such judgment is a final adjudication of the cause"). Today, *Davis* and *First National Bank* would be considered cases involving second-tier certiorari because the Supreme Court was reviewing appellate decisions of circuit courts sitting in their appellate capacities. *See* Leduc, *supra* n. 8, at 114–121 (discussing second-tier certiorari in the district courts).

22. Rogers & Baxter, *supra* n. 14, at 505.

23. *Seaboard Air Line Ry. v. Ray*, 42 So. 714, 716 (Fla. 1906).

(2) considered a "palpable miscarriage of justice";[24]

(3) resulting in a "substantial injury to the legal rights of the petitioner";[25] or

(4) that was "illegal or essentially irregular and violative of established principles of law . . . [resulting] in substantial injury to the legal rights of the petitioner, and for which no other adequate remedy is afforded by law."[26]

In the 1940s, the Court went further and began reviewing non-final orders of lower trial courts under its certiorari jurisdiction in *Kilgore v. Bird*.[27] *Kilgore* is the first decision where the Supreme Court used certiorari to review a non-final order of a trial court.[28] The *Kilgore* case involved a dispute over interrogatories that the defendant considered illegal.[29] After the trial court ordered the defendant to answer the interrogatories, the defendant filed a petition for writ of prohibition[30] in the Supreme Court.[31] The Supreme Court ruled that prohibition was not the proper remedy,[32] but certiorari was available to review whether the non-final order "require[d] an unauthorized proceeding or a departure from the essential requirements of the law and reasonably may cause substantial injury for which no other adequate remedy is afforded by the law."[33] Thus, the Supreme Court granted the defendant leave to amend his petition to seek a writ of common law certiorari.[34]

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24. *Am. Ry. Express Co. v. Weatherford*, 93 So. 740, 742 (Fla. 1922).

25. *Miami Poultry & Egg Co. v. City Ice & Fuel Co.*, 172 So. 82, 84 (Fla. 1936).

26. *Florio v. Colquitt Hardware Co.*, 33 So. 2d 722, 725–726 (Fla. 1948) (quoting *Janet Realty Corp. v. Hoffman's Inc.*, 17 So. 2d 114, 117 (Fla. 1943)).

27. 6 So. 2d 541, 545 (Fla. 1942).

28. *See id.* at 547 (Brown, C.J., dissenting) (stating, "I do not recall any case where [certiorari review of a trial court's non-final order] has been done").

29. *Id.* at 543–544, 546.

30. "Prohibition is an extraordinary writ by which a superior court may prevent an inferior court or tribunal, over which it has appellate and supervisory jurisdiction, from acting outside its jurisdiction." *Mandico v. Taos Constr., Inc.*, 605 So. 2d 850, 853 (Fla. 1992).

31. *Kilgore*, 6 So. 2d at 546 (Brown, C.J., dissenting).

32. *Id.* at 542 (majority).

33. *Id.* at 545. The majority decision in *Kilgore* drew a strong rebuke from Chief Justice Brown, who insisted that "[t]he overwhelming weight of authority in this and other jurisdictions is to the effect that the modified common[ ]law writ of certiorari cannot be used to review interlocutory matters, but only to review final adjudications." *Id.* at 550 (Brown, C.J., dissenting).

34. *Id.* at 546 (majority).

Kilgore's expansion of the Court's certiorari jurisdiction soon led to the actual quashal of non-final orders. In *Atlantic Coast Line Railway Co. v. Allen*,[35] the Supreme Court quashed a trial court's order granting a subpoena *duces tecum* that sought materials protected by work product immunity.[36] In *Miami Transit Co. v. Hurns*,[37] the Court also quashed a discovery order that compelled production of materials protected by work product immunity.[38] Also, in *Kauffman v. King*,[39] the Court quashed an order denying a motion to dismiss on the ground of improper venue and explained that

> [c]ommon[ ]law certiorari is a discretionary writ and ordinarily will not be issued by this [C]ourt to review interlocutory orders in a suit at law, since such errors as are made may be corrected on appeal. It is only in exceptional cases, such as those where the lower court acts without or in excess of jurisdiction, or where the interlocutory order does not conform to the essential requirements of law and may reasonably cause material injury throughout the subsequent proceedings for which the remedy by appeal will be inadequate, that this [C]ourt will exercise its discretionary power to issue the writ.[40]

Thus, the current certiorari standard had emerged by the time the Court decided *Kauffman* in 1956.

The year 1956 is significant for another reason: substantial revisions to the Florida Constitution went into effect that year—the district courts were created.[41] The Supreme Court lost its general power to issue writs of common law certiorari.[42] Only the district courts and the circuit courts had certiorari jurisdiction to review orders from lower courts.[43] For this reason, the district courts have been largely responsible for refining the current standard and determining which non-final orders may be

35. 40 So. 2d 115 (Fla. 1949).
36. *Id.* at 116.
37. 46 So. 2d 390 (Fla. 1950).
38. *Id.* at 391.
39. 89 So. 2d 24, 25–26 (Fla. 1956).
40. *Id.* at 26. Interestingly, the *Kauffman* Court based its ruling on the injustice of requiring the petitioner "to incur the expense and be subjected to the inconvenience of defending this suit" in the wrong venue. *Id.*
41. Haddad, *supra* n. 8, at 210.
42. *Id.*
43. *Id.*

reviewed by certiorari.[44] The Supreme Court has been relegated to resolving conflicts between the district courts.[45]

B. The Current Three-Prong Test

The district courts were quickly confronted with proceedings to review non-final orders pursuant to their certiorari jurisdiction.[46] The district courts held that they had certiorari jurisdiction, under *Kilgore* and its progeny, to review non-final orders.[47] The district courts refined the standard for certiorari review, which was developed by the Supreme Court in *Kilgore* and *Kauffman*, into the current three-prong standard requiring that a petitioner establish "(1) a departure from the essential requirements of the law[ ] (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on postjudgment appeal."[48] These three prongs actually describe a two-step process, detailed below, where the district court first determines whether it has certiorari jurisdiction before deciding the merits of the petition.[49]

1. The Jurisdictional Prongs

The caselaw now requires that a district court first consider the last two prongs of the three-prong standard, which set the

44. *See e.g. Snyder v. Douglas*, 647 So. 2d 275, 276, 278 (Fla. 2d Dist. App. 1994) (ruling that non-final orders denying stay authorized by statute may be reviewed by certiorari); *King v. Thompson & McKinnon, Auchincloss Kohlmeyer, Inc.*, 352 So. 2d 1235, 1235 (Fla. 4th Dist. App. 1977) (granting certiorari and quashing an order compelling arbitration).

45. *See e.g. Bd. of Trustees*, 99 So. 3d 450, 457 (resolving conflict regarding certiorari review of non-final orders compelling production of overbroad discovery); *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1101 (Fla. 1987) (resolving conflict regarding certiorari review of non-final orders denying motions to strike a punitive damages claim), *superseded by statute*, Fla. Stat. § 768.72 (1989).

46. *See e.g. Boucher v. Pure Oil Co.*, 101 So. 2d 408, 411 (Fla. 1st Dist. App. 1957) (granting certiorari and quashing a non-final discovery order); *City of Sarasota v. Colbert*, 97 So. 2d 872, 874 (Fla. 2d Dist. App. 1957) (granting certiorari and quashing a non-final order allowing discovery of alleged work product).

47. *Boucher*, 101 So. 2d at 411; *City of Sarasota*, 97 So. 2d at 874.

48. *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 648 (Fla. 2d Dist. App. 1995); *AVCO Corp. v. Neff*, 30 So. 3d 597, 601 (Fla. 1st Dist. App. 2010).

49. Leduc, *supra* n. 8, at 108. This two-step process is a vestige of the pre-1939 procedure that required the petitioner to file separate briefs on jurisdiction and the merits. *Id.*; Haddad, *supra* n. 8, at 208.

jurisdictional threshold for certiorari review.[50] A party seeking certiorari review must demonstrate that he or she will suffer irreparable harm that cannot be corrected through some other means.[51] The district courts will dismiss any petition that fails these jurisdictional prongs.[52]

The different kinds of non-final orders that will cause irreparable harm escape any easy classification.[53] No comprehensive taxonomy of such orders exists.[54] At best, the caselaw reveals nothing more than certain patterns useful in identifying non-final orders that would satisfy the jurisdictional prongs.[55] For example, the courts have found that the following kinds of orders will cause irreparable harm warranting certiorari review:

- orders compelling disclosure of privileged information;[56]
- orders granting or denying motions to disqualify counsel;[57]
- orders granting a motion for jury interview;[58]

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50. *Bd. of Trustees*, 99 So. 3d at 455; *Parkway Bank*, 658 So. 2d at 649; *see Spry v. Prof. Employer Plans*, 985 So. 2d 1187, 1188 (Fla. 1st Dist. App. 2008) (explaining that "[i]rreparable harm is a condition precedent to invoking certiorari jurisdiction, and so should be considered first").

51. *Bd. of Trustees*, 99 So. 3d at 457.

52. *E.g. Skipper v. Cooksey*, 808 So. 2d 279, 279 (Fla. 1st Dist. App. 2002); *Wal-Mart Stores, Inc. v. Strachan*, 82 So. 3d 1052, 1054 (Fla. 4th Dist. App. 2011).

53. Valeria Hendricks, *Writ of Certiorari in Florida*, in *Florida Appellate Practice* § 11.1, § 11.7 (8th ed., The Fla. Bar 2012); Padovano, *supra* n. 3, at 368. This problem has plagued practitioners for decades. *See* Rogers & Baxter, *supra* n. 14, at 507 (stating that "[t]he cases in which interlocutory orders at law have been held reviewable on certiorari are not classifiable generically").

54. Although several sources provide brief descriptions of orders reviewable by certiorari, none claims to be exhaustive. *E.g.* Matthew J. Conigliaro, *The Continuing Story of Certiorari*, 83 Fla. B.J. 38, 38–42 (Dec. 2009); Hendricks, *supra* n. 53, at 11-8 to 11-21; Padovano, *supra* n. 3, at 729–734; Sylvia H. Walbolt & Susan L. Landy, *Common Law Certiorari—Where an Appeal Will Not Provide an Adequate Remedy*, 70 Fla. B.J. 56, 56–58 (Oct. 1996).

55. Padovano, *supra* n. 3, at 368.

56. *E.g. McDonald's Rests. of Fla., Inc. v. Doe*, 87 So. 3d 791, 794 (Fla. 2d Dist. App. 2012) (allowing certiorari review of an order compelling the production of trade secrets); *State Farm Fla. Ins. Co. v. Kramer*, 41 So. 3d 313, 314–315 (Fla. 4th Dist. App. 2010) (granting certiorari to review assertions of work-product immunity and attorney-client privilege); *Hill v. State*, 846 So. 2d 1208, 1211–1212 (Fla. 5th Dist. App. 2003) (granting certiorari to review an order that allegedly violated psychotherapist-patient privilege).

57. *E.g. Walker v. River City Logistics Inc.*, 14 So. 3d 1122, 1123 (Fla. 1st Dist. App. 2009); *AlliedSignal Recovery Trust v. AlliedSignal, Inc.*, 934 So. 2d 675, 677 (Fla. 2d Dist. App. 2006); *Event Firm, LLC v. Augustin*, 985 So. 2d 1174, 1175–1176 (Fla. 3d Dist. App. 2008).

58. *Pesci v. Maistrellis*, 672 So. 2d 583, 585 (Fla. 2d Dist. App. 1996).

- orders compelling production of documents by a non-party;[59] and
- orders compelling genetic testing for a determination of paternity.[60]

By contrast, certiorari is not available if the non-final order merely exposes the petitioner to the waste of time, money, and effort in trying a case twice.[61] Interlocutory review itself will result in additional expense and delay.[62] The party seeking interlocutory review may ultimately obtain a favorable verdict, mooting the issue, or the order may appear less harmful or erroneous in light of a fully developed record.[63] Certiorari review of such non-final orders would flood the district courts with certiorari proceedings and interrupt cases in the trial courts.[64] Further, if the alleged harm can be remedied through a final appeal, a non-final appeal under Rule 9.130, or a different writ, then courts do not consider the harm irreparable.[65]

2. The Substantive Prong

If the non-final order under review satisfies the jurisdictional prongs, then the district court has discretion to decide whether the order "departs from the essential requirements of the law."[66]

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59. *Rowe v. Rodriguez–Schmidt*, 89 So. 3d 1101, 1103 (Fla. 2d Dist. App. 2012).

60. *E.g. Dep't of Revenue v. Long*, 937 So. 2d 1235, 1237 (Fla. 1st Dist. App. 2006); *J.S. v. S.M.M.*, 67 So. 3d 1231, 1232–1233 (Fla. 2d Dist. App. 2011).

61. *Jaye*, 720 So. 2d at 214–215; *see also Whiteside v. Johnson*, 351 So. 2d 759, 760 (Fla. 2d Dist. App. 1977) (asserting that "[c]ertiorari is not designed to serve as a writ of expediency and should not be granted merely to relieve the petitioners seeking the writ from the expense and inconvenience of a trial"); *Mariner Health Care v. Griffith*, 898 So. 2d 982, 984 (Fla. 5th Dist. App. 2005) (stating that "the inconvenience and expense of litigation after an allegedly incorrect interlocutory ruling does not constitute the kind of material harm or irreparable injury for which certiorari review is available"); *contra Kauffman*, 89 So. 2d at 26 (granting certiorari because "it is palpably unjust" to require the petitioner to incur the expense, inconvenience, and time involved in retrying the case after a final appeal).

62. *Parkway Bank*, 658 So. 2d at 650.

63. *Martin-Johnson, Inc.*, 509 So. 2d at 1100.

64. *Id.*; *see also Jaye*, 720 So. 2d at 215 (stating that "piecemeal review of non[-]final trial court orders will impede the orderly administration of justice and serve only to delay and harass").

65. Leduc, *supra* n. 8, at 108; *see Bd. of Trustees*, 99 So. 3d at 455 (explaining that harm is not considered irreparable where it can be remedied on appeal).

66. *Parkway Bank*, 658 So. 2d at 649.

This phrase, described as "amorphous"[67] and "subjective,"[68] applies equally when district courts review non-final orders and circuit court appellate decisions.[69] Not surprisingly, this phrase has generated confusion among practitioners and judges, partly because of conflicting language in various Florida Supreme Court decisions.[70]

One of the earliest conflicts concerned whether certiorari review was limited to correct procedural errors. Although one line of Supreme Court opinions limited certiorari review to correct only procedural errors,[71] another line of cases ignored this limitation, and the scope of certiorari review was often as broad as the scope of review on plenary appeal.[72] The Florida Supreme Court, in *Combs v. State*,[73] resolved the conflict by holding that

> the phrase "departure from the essential requirements of law" should not be narrowly construed so as to apply only to violations [that] effectively deny appellate review or [that] pertain to the regularity of procedure. In granting writs of common[ ]law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of a

67. Walbolt & Landy, *supra* n. 54, at 56.

68. Padovano, *supra* n. 3, at 362.

69. *Id.* at 367 n. 2; *see Byrd v. S. Prestressed Concrete, Inc.*, 928 So. 2d 455, 457 (Fla. 1st Dist. App. 2006) (applying the definition developed in the second-tier certiorari context to the review of a protective order); *Jimenez v. Rateni*, 967 So. 2d 1075, 1077 (Fla. 2d Dist. App. 2007) (applying the definition developed in the second-tier context to the review of an order denying a motion for the assignment of an appellate case).

70. *Combs v. State*, 436 So. 2d 93, 95 (Fla. 1983).

71. *Id.* at 95 (quoting *Am. Nat'l Bank of Jacksonville v. Marks Lumber & Hardware Co.*, 45 So. 2d 336, 337 (Fla. 1950)). Practitioners understood certiorari review to "comprehend[ ] only (1) jurisdiction below[;] and (2) the regularity of the procedure followed below. It does not afford complete review of the litigation nor does it extend to the correctness of rulings of inferior courts on substantive law." Rogers & Baxter, *supra* n. 14, at 493.

72. *Heggs*, 658 So. 2d at 526; *Combs*, 436 So. 2d at 95. Practitioners complained that "the scope of substantive review by certiorari has often, for all practical purposes, been fully as broad as review by appeal in many of the cases, despite protestations by the Court to the contrary." Rogers & Baxter, *supra* n. 14, at 498.

73. 436 So. 2d 93.

> clearly established principle of law resulting in a miscarriage of justice.[74]

The problem then became figuring out what is "a clearly established principle of law."[75] The Second District Court of Appeal held that a lower court could not violate a clearly established principle of law where no Florida case squarely addressed the issue.[76] The Florida Supreme Court, in *Allstate Insurance Co. v. Kaklamanos*,[77] rejected this interpretation as too narrow because "'clearly established law' can derive from a variety of legal sources, including [caselaw], rules of court, statutes, and constitutional law."[78] Thus, certiorari review may be grounded in the application or interpretation of a relevant constitutional provision, statute, procedural rule, or caselaw.[79]

In the *Kaklamanos* opinion, Justice Wells noted that allowing certiorari review based on the application or interpretation of the law was inconsistent with *Ivey v. Allstate Insurance Co.*[80] In *Ivey*, the Supreme Court quashed a decision from the Third District Court of Appeal that "merely disagreed with the circuit court's interpretation of the applicable law, which . . . is an improper basis for common law certiorari."[81] *Ivey* was based on the rule that the erroneous application of the correct law to the facts does not constitute a departure from the essential requirements of the law.[82] To date, no decision has addressed the conflict identified by Justice Wells in *Kaklamanos*.[83]

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74. *Id.* at 95–96.

75. Leduc, *supra* n. 8, at 112 (internal quotation marks omitted).

76. *Stilson v. Allstate Ins. Co.*, 692 So. 2d 979, 982–983 (Fla. 2d Dist. App. 1997); *see also Wolf Creek Land Dev., Inc. v. Masterpiece Homes, Inc.*, 942 So. 2d 995, 997 (Fla. 5th Dist. App. 2006) (holding that certiorari review was not available to review a non-final order because "there appears to be no [caselaw] on the matter").

77. 843 So. 2d 885.

78. *Id.* at 890.

79. *Id.*

80. *Id.* at 897–898 (Wells, J., dissenting) (discussing *Ivey v. Allstate Insurance Co.*, 774 So. 2d 679, 683 (Fla. 2000)); *see also* Leduc, *supra* n. 8, at 113–114 (criticizing *Kaklamanos* for expanding the scope of common law certiorari review).

81. 774 So. 2d at 683.

82. *Id.* at 682.

83. *See Kaklamanos*, 843 So. 2d at 898 (Wells, J., dissenting) (finding that the Court should have followed its own decision in *Ivey* and asserting that certiorari review should not be determined by whether the Court agrees with the circuit court's decision). Instead, the Supreme Court appears ready to abandon *Kaklamanos* and limit certiorari review to exclude cases where there is no precedent and "the law is not yet settled." *Citizens Prop. Ins. Corp. v. San Perdido Ass'n*, 104 So. 3d 344, 355 (Fla. 2012).

Recently, the district courts confronted cases where the circuit court applied binding precedent from a different district court that conflicted with clearly established statutory law.[84] A circuit court is bound to follow controlling precedent from other districts if its own district appellate court has not ruled on the issue, assuming no interdistrict conflict exists.[85] However, caselaw interpreting a statute is less authoritative than the statute itself.[86] For this reason, the Florida Supreme Court has held that certiorari relief is appropriate when the lower court's application of binding precedent disregards the plain language of a controlling statute.[87]

The absence of a bright-line test to determine whether an order causes "irreparable harm" or constitutes a "departure from the essential requirements of the law" allows the district courts broad discretion to exercise their certiorari jurisdiction.[88] This broad discretion is consistent with certiorari's status as a "safety net" and overall purpose of "fill[ing] the interstices between direct appeal and the other prerogative writs[,]"[89] but it has also exposed the current standard for certiorari review to valid criticism.[90]

C. The Proposed "Functional" Restatement

Proponents of the functional restatement criticize the current, subjective three-prong standard as "inherently unpredictable because it contains no objective standards and often requires each judge to inject his or her own unstated policies into these proceedings."[91] They contend that "concepts like 'departure,' 'essential requirements,' 'material injury,' and 'adequate remedy' are all subjective terms that nearly defy definition."[92] According

84. *Dep't of Hwy. Safety & Motor Vehs. v. Nader*, 4 So. 3d 705, 709–711 (Fla. 2d Dist. App. 2009), *aff'd*, 87 So. 3d 712 (Fla. 2012).

85. *Pardo v. State*, 596 So. 2d 665, 666–667 (Fla. 1992).

86. *See Nader*, 87 So. 3d at 726 (stating that "[s]uch a result would treat [caselaw] interpreting a statute as more authoritative than the statute itself—a proposition that is not supported by our precedent").

87. *Id.* at 725–726.

88. *Combs*, 436 So. 2d at 95–96 (asserting that "the district courts must be allowed a large degree of discretion so that they may judge each case individually").

89. *Broward Co.*, 787 So. 2d at 842.

90. *E.g.* Altenbernd & Marcario I, *supra* n. 15, at 22–23.

91. *Id.* at 21.

92. *Id.* at 22.

to the proponents of the functional restatement, these vague terms have fostered the creation and adoption of "[m]ore [r]hetoric [t]han [r]eason."[93] They argue that courts have made some seemingly groundless distinctions to find that some orders are more deserving of certiorari review than others.[94]

Of their many points, the proponents of the functional restatement validly highlight the current rule that litigation expense cannot form the basis for certiorari relief.[95] They argue quite accurately that "this rule only makes sense if it's not your money."[96] They recognize that public policy dictates that an appellate court should not intrude upon a trial court case based solely upon the timing, nature, and size of the litigation expense.[97] They conclude, however, that "the 'it's only money' reason to avoid certiorari review does not help create a rational review policy."[98]

Litigation expense as a basis for certiorari relief has been a contentious subject for well over a half a century.[99] While a few opinions have granted certiorari review based upon litigation expense, those cases are few and far between.[100]

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93. *Id.*

94. *Id.* at 23.

95. *See id.* (explaining that courts deny review because expense is not considered an irreparable harm); *see also Wright v. Sterling Drugs, Inc.*, 287 So. 2d 376, 376–377 (Fla. 2d Dist. App. 1973) (asserting that "[t]he incurring of the expense of a trial on the merits has been held not to constitute material or irreparable injury").

96. Altenbernd & Marcario I, *supra* n. 15, at 23.

97. *Pullman Co. v. Fleishel*, 101 So. 2d 188, 190 (Fla. 1st Dist. App. 1958) (finding that "[a]lthough . . . the expense of defending the action may well be substantial, . . . to grant the relief sought would, in the final analysis, produce more harm to our system of procedure than could be compensated by any benefit petitioner might derive from issuance of the writ it seeks"); *see also Wright*, 287 So. 2d at 376–377 (holding that, if litigation expense were a proper basis for certiorari review, "many interlocutory orders . . . would be subject to review by certiorari[, which] would result in an unseemly intrusion into the progress of the case in the trial court").

98. Altenbernd & Marcario I, *supra* n. 15, at 23.

99. In *Patten v. Daoud*, 12 So. 2d 299 (Fla. 1943) (per curiam), in a four-to-three decision, the court per curiam denied a petition for writ of certiorari. *Id.* at 299. The defendants sought review of an interlocutory order "sustaining a declaration seeking damages for civil conspiracy." *Id.* at 302 (Chapman, J., dissenting). In his dissent, Justice Terrell considered the case to be one that merited a grant of certiorari because it presented a purely legal issue and intervention would avoid a complex trial involving a large volume of evidence and thousands of dollars of expenses. *Id.* at 300 (Terrell, J. dissenting). "It would be a travesty on justice to require this to be done and then on appeal from final judgment dispose of the case on the ground that the declaration failed to state a cause of action. Any appeal that imposes such a burden on litigants is inadequate." *Id.*

100. *See Enfinger v. Baxley*, 96 So. 2d 538, 540–541 (Fla. 1957) (granting certiorari to prevent a defendant from having to defend a lawsuit in an improper venue), *receded from*,

Based upon these concerns, the proponents conclude that the "one-size-fits-all" approach of current certiorari law fails to offer reliable and consistent results to "the wide array of issues presented by common law certiorari."[101] Instead, critics of the inherently unpredictable current standard propose replacing it with a "'functional' restatement."[102] The functional restatement would consist of two main questions:

> (1) Has the trial court committed an error that can be identified with a high level of confidence from the limited record provided in an original proceeding?
>
> (2) Can the reviewing court confidently state that the trial court's error will be so detrimental to the goal of providing a fair, consistent, accurate, and even-handed dispute[-]resolution process that it should use its resources to interfere in the trial court proceeding to correct the problem?[103]

For each of these questions, the proponents suggest a number of key policies that courts should consider.[104] For example, when considering the first question, the appellate court should contemplate the likelihood the error would result in a reversal on appeal.[105] And in considering the second question, the appellate court should determine whether the burden upon a party caused by the error is sufficiently great that he or she is deprived of due process or that the public might perceive the trial court to be an "illegitimate forum for fair decision[-]making."[106]

The goal of this new test "is to announce policies and related predictable rules for determining when 'exceptional circum-

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Brown v. Nagelhout, 84 So. 3d 304, 308–311 (Fla. 2012); *Kauffman*, 89 So. 2d at 26 (quashing an order denying a motion to dismiss for improper venue because it would be "palpably unjust" to require the petitioner "to incur the expense and . . . inconvenience" of defending a suit in an improper venue and then, if reversed on plenary appeal, to have the petitioner defend the suit again in the proper venue); *Leithauser v. Harrison*, 168 So. 2d 95, 97 (Fla. 2d Dist. App. 1964) (stating that "the probability that a verdict . . . would have to be reversed . . . and the injustice of requiring the plaintiffs to incur the expense and inconvenience of trying these suits a second time . . . lead us to conclude that this case is an exceptional one in which the writ [of certiorari] should issue").

101. Altenbernd & Marcario I, *supra* n. 15, at 21.
102. *Id.*
103. *Id.* at 23.
104. *Id.* at 23–24.
105. *Id.* at 23.
106. *Id.* at 24.

stances' exist."[107] The answers to the two preliminary questions would determine whether the district court *should* review the subject interlocutory order.[108] Thereafter, the proponents suggest that, "[a]s the courts encounter petitions for certiorari review of each type of [non-final] order, they could create precedent announcing narrower, functional tests for use only in that context, with a view toward helping lawyers decide whether to pursue a certiorari proceeding in a district court."[109] In other words, it would be up to the courts to develop independent principles for each type of order to determine whether that error could be corrected on certiorari review.[110]

To test their functional analysis, the proponents created hypothetical cases addressing two types of interlocutory orders: orders denying trial by jury and orders denying discovery.[111] In each hypothetical case, application of the functional test resulted in the appellate court likely granting certiorari review so long as the petitioner could create a sufficient record for review.[112]

This Article applies the proponents' functional analysis to three more types of orders: orders denying motions to enforce settlement, orders denying motions to dismiss, and orders allowing punitive damages claims.

III. THE COMPETING STANDARDS IN ACTION

A. Orders Denying Motions to Enforce Settlement Agreements

Assume you have been retained by an insurance company to defend its insured, who has been sued in an automotive negligence case[113] in Leon County.[114] Your client rear-ended the plaintiff's car, allegedly causing substantial personal injury. Long before the lawsuit began, the plaintiff sent your client's insurance company a demand letter requesting tender of $100,000. The day

107. *Id.* at 23.
108. Altenbernd & Marcario II, *supra* n. 15, at 15–16.
109. Altenbernd & Marcario I, *supra* n. 15, at 21.
110. *Id.*; Altenbernd & Marcario II, *supra* n. 15, at 16.
111. Altenbernd & Marcario II, *supra* n. 15, at 14, 16.
112. *Id.* at 15, 17.
113. The facts of this hypothetical are loosely based upon those discussed in *Mercury Insurance Co. of Florida v. Fonseca*, 3 So. 3d 415, 416 (Fla. 3d Dist. App. 2009).
114. Leon County falls within the territorial jurisdiction of the Florida First District Court of Appeal. Fla. Stat. §§ 26.021, 35.02 (2012).

after receipt, the insurance company responded by sending a check for $100,000 with a letter asking for the plaintiff's signature on an enclosed settlement release. The plaintiff rejected the check and instituted the lawsuit against your client instead, seeking an amount well above your client's $250,000 policy limit.

You immediately recognize that you have strong legal authority to raise an affirmative defense of settlement.[115] You assert the affirmative defense in your answer to the complaint and file a motion shortly thereafter to enforce the settlement agreement.[116] At the hearing on your motion, the parties stipulate to the facts and present the court with a pure question of law: did the parties' actions constitute a settlement? Despite *Mercury Insurance Co. v. Fonseca*,[117] which answers the question in the affirmative,[118] the trial court denies your motion. It finds that no settlement agreement had been reached. Discovery, and eventually a trial, will proceed.

With the denial of your motion, your client is faced with the prospect of expensive litigation and a trial on issues that were conclusively settled, or so you thought. You quickly file a notice of appeal to seek review of this order by the Florida First District Court of Appeal. Your opponent then promptly files a motion to dismiss your appeal as one from a non-final, non-appealable order.

When you initially found *Fonseca*, where the Third District reviewed a case that was factually on all fours with yours, you did not scrutinize the basis for that court's interlocutory review.[119] Returning to that opinion with a new mission, you discover with dismay that the court avoided including any relevant information about the procedure by which it conducted its review.[120] Nor did the court indicate the exact type of order on review.[121] All that you

115. *See generally Fonseca*, 3 So. 3d 415 (holding that similar facts established an enforceable settlement).

116. *See Hanson v. Maxfield*, 23 So. 3d 736, 739–740 (Fla. 1st Dist. App. 2009) (recognizing the potential for an affirmative defense of settlement); Fred O. Goldberg, *Enforcement of Settlements: A Jurisdictional Perspective*, 85 Fla. B.J. 30, 31 (July/Aug. 2011) (discussing the jurisdictional issues involved in reopening cases to enforce settlements).

117. 3 So. 3d 415.

118. *Id.* at 417.

119. *Id.* at 415.

120. *Id.* at 416–417.

121. The court indicated that "[t]he single issue on appeal is whether correspondence between Fonseca and [the insurance company] was sufficient to form a settlement. The trial court held that it was not." *Id.* at 416.

can infer is that the court did not review the order under certiorari because the opinion refers to the parties as "Appellant" and "Appellee."[122]

So now you take to the books seeking a basis to support your plea for interlocutory review.[123] As you scour caselaw, you discover that the law on this jurisdictional issue is unclear, unsettled, and probably not in your favor.

Most of the cases you read that are remotely relevant to your research cite to *Naghtin v. Jones*,[124] which appears to be something of a seminal case in this arena. In *Naghtin*, the trial court entered judgment against the defendants.[125] While an appeal was pending, the parties entered into a settlement agreement in which the defendants and their insurance company paid the plaintiffs $800,000, with another $400,000 contingent upon the outcome of the appeal.[126] The appellate court vacated the entire judgment.[127] On remand, the plaintiffs claimed they were owed more money under the settlement agreement, while the defendants claimed the proceedings were over.[128] The trial court ordered a trial on a single issue, capping damages at the $400,000 amount described in the settlement agreement.[129] The defendants appealed.[130]

On appeal, the court determined that it had no jurisdiction to review the order.[131] The court held that the order was not a final order under Rule 9.030(b)(1)(A), nor was it an enumerated non-final order under Rule 9.130(a)(3)(C)(iii).[132] Further, it was not reviewable by petition for writ of certiorari.[133] The court stated, "That a non-final order puts the parties to the expense of a trial that an appeals court may later determine to have been unneces-

122. *Id.*
123. *See* Christopher Sprague, Student Author, *The Power of Interlocutory Appeals: Defining the Essence of Personal Jurisdiction through the Scope of Appellate Jurisdiction*, 29 Nova L. Rev. 75, 85–88 (2004) (listing the categories under which an interlocutory appeal may be granted).
124. 680 So. 2d 573 (Fla. 1st Dist. App. 1996).
125. *Id.* at 575.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 576.

sary is not a proper ground for the grant of a petition for writ of common law certiorari."[134] The court instructed that "the defendants' remedy is by appeal from the final judgment."[135]

The next case you find is *Croteau v. Operator Service Co. of South Florida*.[136] There, the parties entered into a settlement agreement pursuant to court-ordered mediation.[137] One party refused to go along with the settlement, claiming it was not binding, so the other filed an authorized[138] motion to enforce.[139] When the trial court denied enforcement, the defendants filed a petition for writ of certiorari.[140] The appellate court agreed with the *Naghtin* court that certiorari did not lie,[141] but in this case, the court held that the order was an appealable partial final judgment[142] due to its evolution from court-ordered mediation.[143] The court changed the petition's designation[144] to a notice of final appeal for further consideration.[145]

Continuing along the chain of caselaw, you next come across *Delmas v. Harris*,[146] in which the plaintiffs filed suit against the defendants after engaging in settlement negotiations with the defendants' insurer.[147] The defendants raised the affirmative defense of settlement, claiming that the prior negotiations resulted in a completed agreement.[148] The defendants then filed a motion to enforce the settlement.[149] The trial court held an evidentiary hearing on the motion and then entered a partial final judgment in favor of the plaintiffs on the motion to enforce the settlement.[150]

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134. *Id.*
135. *Id.*
136. 721 So. 2d 386 (Fla. 4th Dist. App. 1998).
137. *Id.* at 387.
138. *See* Fla. R. Civ. P. 1.730(c) (authorizing sanctions for failure to perform agreements entered into after mediation).
139. *Croteau*, 721 So. 2d at 387.
140. *Id.*
141. *Id.*
142. Fla. R. App. P. 9.110(k) allows for review of partial final judgments either on interlocutory appeal or on plenary appeal.
143. *Croteau*, 721 So. 2d at 387.
144. *See* Fla. R. App. P. 9.040(c) (stating in part that "[i]f a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought").
145. *Croteau*, 721 So. 2d at 387.
146. 806 So. 2d 578 (Fla. 4th Dist. App. 2002).
147. *Id.* at 578–579.
148. *Id.* at 579.
149. *Id.*
150. *Id.*

The defendants sought to appeal the order, but the appellate court determined there was no jurisdictional basis for review.[151] Agreeing with *Naghtin*, the court held that the order was not an appealable non-final order under Rule 9.130(a).[152] Nor was the order reviewable by certiorari because "[c]ertiorari is not designed to serve as a writ of expediency."[153] Further, the court held that this order could not be deemed an appealable partial final judgment like the order examined in *Croteau*.[154] There was further labor (the trial on the merits) for the trial court, and if the end result of the proceedings were a finding in favor of the defendants, the settlement issue would be moot.[155]

To add to the confusion, you find that some courts, in addition to the Third District in *Fonseca*, have chosen to review similar enforcement orders while declining to address the jurisdictional issue. For example, in *Cirrus Design Corp. v. Sasso*,[156] the Fourth District undertook review of an order denying the defendant's motion to enforce three settlements between the defendant and three plaintiffs in three related cases.[157] The plaintiffs' first argument on appeal was that the order was a non-appealable, non-final order.[158] The appellate court disagreed with that contention "without discussion" before addressing the merits of the substantive issues.[159]

In *Maldonado v. Rojas*,[160] two members of a three-judge panel, sitting per curiam, dismissed an appeal with only a cita-

151. *Id.*

152. *Id.*

153. *Id.* (quoting *Naghtin*, 680 So. 2d at 577) (internal quotation marks omitted).

154. *Delmas* distinguished *Croteau* on two bases. *Id.* First, while *Croteau* dealt with an issue where one side refused to carry out a settlement agreement, *Delmas* involved a finding by the trial court that a settlement agreement never existed. *Id.* "While there might be special reasons to enforce an actual settlement before any trial takes place on the underlying claim, there is no similar urgency to review an order merely determining that the parties did not in fact settle their controversy." *Id.* Second, *Delmas* noted that the court in *Croteau* was authorized to enter judgment on the settlement under Florida Rule of Civil Procedure 1.730 because the settlement arose out of court-ordered mediation under Rules 1.700–1.750. *Id.* The same authority did not exist in *Delmas* where the settlement arose from events outside the lawsuit. *Id.* at 579–580.

155. *Id.* at 580.

156. 95 So. 3d 308 (Fla. 4th Dist. App. 2012).

157. *Id.* at 309–310.

158. *Id.* at 310.

159. *Id.* The court noted in a footnote that the case was governed by *Croteau* rather than *Delmas* because, unlike in *Delmas*, there was a written settlement in each of the three cases on appeal. *Id.* at 310 n. 2.

160. 45 So. 3d 13 (Fla. 2d Dist. App. 2010).

tion to *Delmas*.[161] In *Maldonado*, however, Judge Altenbernd specially concurred in the dismissal, providing a lengthier recitation of the facts.[162] He explained that, in the underlying case, the plaintiff sued a defendant in an automobile negligence suit, and the defendant raised the affirmative defense of settlement.[163] The trial court "merely entered an order denying the defendant's motion to enforce the settlement and grant[ed] the [plaintiff's] motion for summary judgment on the affirmative defense of settlement."[164] Judge Altenbernd agreed that this particular order granting summary judgment was not appealable.[165]

However, Judge Altenbernd noted that "[i]f the order . . . were an order determining that the releases were unenforceable or were a partial final judgment on the issue of settlement," the appellate court would have jurisdiction to review the order under Florida Rule of Appellate Procedure 9.110(k).[166]

Returning to your own case, you are at a loss as to how to respond to the motion to dismiss. You did not obtain your settlement by way of court-ordered mediation, so your order is not a partial final judgment reviewable under Rule 9.110(k).[167] Your order is not an enumerated appealable non-final order under Rule 9.130.[168] And certiorari is unavailable under the current standard because the only harms you can allege all arise out of the potential cost and time of proceeding through an unnecessary trial.[169]

You think that your client's best and only hope is to try to convince the court to apply the proposed functional test to determine whether the order merits early intervention. With respect to the first prong, you think that the error can be identified with a

161. *Id.* at 13.
162. *Id.* (Altenbernd, J., specially concurring).
163. *Id.* at 13–14.
164. *Id.* at 14.
165. *Id.*
166. *Id.*
167. *See Croteau*, 721 So. 2d at 387 (holding that a court-ordered mediation is a partial final judgment under Florida law).
168. Fla. R. App. P. 9.130; *see Naghtin*, 680 So. 2d at 575 (dismissing appeal on jurisdictional grounds).
169. *See Pullman Co.*, 101 So. 2d at 190 (denying certiorari partly because "defending any legal action . . . is one of the hazards of living and doing business under a system of free enterprise in which one who conceives himself to be injured is privileged to seek redress in a court of law").

high level of confidence.[170] *Fonseca* is factually on point, establishing that your client and the plaintiff did, in fact, reach a settlement agreement as a matter of law.[171] The only record necessary for a full review of the issue is the order on appeal and the transcript of the hearing on your motion.[172] In your case, that record demonstrates that the court "failed to follow binding precedent" and so the error "would result in a reversal on direct appeal with little or no debate among appellate judges."[173]

You are equally confident that you could show that the test's second prong is also satisfied.[174] The trial court's order would appear, to the public and your client, to be unfair in that it burdens your client with the unnecessary expense of lengthy and costly discovery, to be followed by a lengthy and costly trial.[175] The court system will also have to waste its precious time on a pointless trial.[176] The prospect of the protracted proceedings may induce your client's insurance company to enter a new settlement agreement for a higher amount than previously agreed just to avoid further extended litigation.[177] If the insurance company does not settle, your client will be left to fret about the possibility of personal liability for any excess judgment[178] that the plaintiff insists it can obtain. And once the trial concludes, you think the appellate court would have to reverse the final appeal under *Fonseca* for entry of an order enforcing the original settlement, nullifying all the proceedings that happened after your motion to enforce was denied.[179]

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170. *See* Altenbernd & Marcario I, *supra* n. 15, at 23 (providing a test to address meritorious appeals arising out of non-final orders).

171. *See* 3 So. 3d at 417 (reasoning that once a party proposed settlement, all that was needed was acceptance by the other party to create a binding agreement).

172. Altenbernd & Marcario II, *supra* n. 15, at 17.

173. Altenbernd & Marcario I, *supra* n. 15, at 23.

174. *Id.*

175. *Id.* at 23–24.

176. *See id.* at 23 (proposing that appellate courts reverse non-final orders only if they would be reversed "on direct appeal with little or no debate among appellate judges").

177. *See id.* at 24 (explaining that the burdens of expensive litigation often lead parties to settle a case to avoid the risk of losing at trial).

178. *See Black's Law Dictionary* 919 (Bryan A. Garner ed., 9th ed., West 2009) (defining "excess judgment" as "[a] judgment that exceeds all of the defendant's insurance coverage").

179. *Cf.* Robert G. Kerrigan, *Allowing Interlocutory Appeals from Orders Denying Summary Judgment*, 80 Fla. B.J. 42, 46 (Oct. 2006) (recognizing that the rationale for the traditional rule against allowing "piecemeal" review of pretrial orders is that allowing such review, "while perhaps efficient in some cases, would in the long run be inefficient because it would allow separate appeals of matters that did not resolve the entire case[ ]

In light of these numerous concerns, the social and economic cost of allowing the unnecessary trial to proceed surely outweighs the cost of intervention.[180] The appellate court could quickly avoid these costs by correcting the error with a simple, narrowly drafted opinion relying upon *Fonseca*.[181]

You explain the uncertainty in the caselaw to your client. You propose responding to the motion to dismiss with argument based on the functional restatement. Frustrated, your client approves your proposed course of action. You file the response and hope for the best.

B. Orders Denying Motions to Dismiss

Now, assume that you represent a property insurance carrier. The carrier insures a large shopping plaza in Pinellas County and another similar property in Hernando County. A late-season hurricane blows through both counties, leaving a trail of destruction. Both properties are heavily damaged, so both property owners submit property insurance claims to your client. Both property owners are unsatisfied with your client's payments, which they view as inadequate to compensate them for the damage to their property. They each sue your client. One owner files suit in Pinellas County, which is within Florida's Second District Court of Appeal. The other owner files suit in Hernando County, which is within Florida's Fifth District Court of Appeal.

The two lawsuits are identical. Each contains one count for breach of contract and a second count for insurer bad faith, a statutory cause of action authorized by Florida Statutes Section 624.155.[182] The breach of contract counts seek to recover the limits of the insurance policy proceeds. The insurer bad faith counts seek to recover consequential damages, alleged to be the interest on construction loans taken out to rebuild the properties in the absence of insurance proceeds, and business income losses result-

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and that could have been reviewed pursuant to a single appeal from a final judgment"); Sylvia H. Walbolt & Joseph H. Lang, Jr., *Original Proceedings, Writ Large*, 83 Fla. B.J. 38, 38 (Oct. 2009) (noting that original jurisdiction is narrowly confined by caselaw that "expresses an overwhelming bias against piecemeal appeals").

180. Altenbernd & Marcario I, *supra* n. 15, at 24.

181. *Id.* In *Fonseca*, the appellate court intervened prior to trial to decide the narrow issue of whether a contract for settlement had been formed. 3 So. 3d at 417.

182. Fla. Stat. § 624.155(1)(b)(1) (2012).

ing from your client's alleged delay and eventual refusal to pay all policy proceeds.[183] The liability for these extra contractual damages is based on allegations that the insurer did not pay what it owed on the insurance contract when, had it been acting in good faith and with due regard for the insured, it should have done so.[184] The bad faith count alleges your client underpays claims as a regular business practice and as a result, should pay punitive damages.[185]

The carrier seeks your advice on how it should respond to the lawsuits. You advise the carrier in each case to answer the breach of contract count and move to dismiss the bad faith count as premature. You base your advice on *Vest v. Travelers Insurance Co.*,[186] where the Supreme Court held that an action under Section 624.155 "is premature until there is a determination of liability and extent of damages owed on the first-party insurance contract."[187] Since the "extent of damages owed on the first-party insurance contract" will not be known until the breach of contract count is resolved, you reason that the action under Section 624.155, which seeks extra contractual damages, must be dismissed as premature.[188]

On the basis of *Vest*, you move to dismiss the bad faith counts of the complaints, and the trial court denies your motion in both cases. Your client asks what appellate remedy is available to him. Because this is not a final order, but only one denying a motion to dismiss,[189] you turn to the remedy of a petition for writ of certiorari to the district court of appeal. Your research leads you to the

183. The fact pattern is drawn loosely from *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n*, 94 So. 3d 541, 543–544 (Fla. 2012).

184. *See e.g. Mayfair H. Ass'n v. QBE Ins. Corp.*, 2009 WL 2132704 at *1 (S.D. Fla. July 14, 2009). In *Mayfair House Association*, a condominium association sued its property insurer under Section 624.155, alleging the insurer had failed to compensate it for hurricane damage when "it could and should have done so, had it acted . . . with due regard" for the association's interest. *Id.* at *2 (internal quotation marks omitted).

185. Fla. Stat. § 624.155(5)(a).

186. 753 So. 2d 1270 (Fla. 2000).

187. *Id.* at 1276.

188. *Id.* The Court clarified its position, maintaining, "[w]e continue to hold in accord with *Blanchard*[,] . . . [and t]his avoids the problem *Blanchard* dealt with, which was the splitting of causes of action. However, a claim brought prematurely is not subject to a summary judgment. Such a claim should be dismissed as premature." *Id.*

189. Orders denying motions to dismiss are not enumerated in Florida Rule of Appellate Procedure 9.130.

conclusion that the fate of the Pinellas action is different from the fate of the Hernando action.

Both the Second and Fifth District Courts of Appeal recognize that a trial court commits legal error by allowing a Section 624.155 action to proceed before the breach of insurance contract action is concluded.[190] The Fifth District, in *Hartford Insurance Co. v. Mainstream Construction Group, Inc.*,[191] held that "there must first be a determination regarding coverage and contractual issues between [the policyholder] and [the insurer] before an action for bad faith can proceed."[192] The Second District has recognized the same point of law in *State Farm Mutual Automobile Insurance Co. v. O'Hearn*:[193]

> As to the order denying [the insurer]'s motion to dismiss, we agree with [the insurer] that the trial court departed from the essential requirements of the law. There is an abundance of [caselaw] that holds that a first-party bad faith claim does not accrue until there has been a final determination of both liability and damages in an underlying coverage claim.[194]

The Second and Fifth Districts take different approaches on the jurisdictional prong of the certiorari test. The Fifth District finds that irreparable injury is inflicted on the insurer when it is required to defend a breach of contract action at the same time it defends against a Section 624.155 bad faith claim.[195] The Fifth District further holds that "an insurer would be prejudiced by having to litigate either a bad faith claim or an unfair settlement practices claim in tandem with a coverage claim[ ] because the evidence used to prove either bad faith or unfair settlement practices could jaundice the jury's view on the coverage issue."[196] Therefore, you conclude the Fifth District will accept a petition for certiorari where a trial court has denied a motion to dismiss a premature bad faith claim.

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190. *State Farm Mut. Automobile Ins. Co. v. O'Hearn*, 975 So. 2d 633, 635 (Fla. 2d Dist. App. 2008); *Hartford Ins. Co v. Mainstream Constr. Group, Inc.*, 864 So. 2d 1270, 1272 (Fla. 5th Dist. App. 2004).

191. 864 So. 2d 1270.

192. *Id.* at 1272.

193. 975 So. 2d 633.

194. *Id.* at 635.

195. *Mainstream Constr. Group, Inc.*, 864 So. 2d at 1271.

196. *Md. Cas. Co. v. Alicia Diagnostic, Inc.*, 961 So. 2d 1091, 1092 (Fla. 5th Dist. App. 2007).

You conclude the Second District will reach a different conclusion. In *O'Hearn*, the court ruled:

> While we recognize that some courts have held that such orders are reviewable by way of certiorari in first-party bad faith actions, . . . we follow this court's [rule] . . . that the denial of a motion to dismiss results in a premature claim going forward does not, by itself, establish irreparable harm to the insurer. Therefore, because [the insurer] cannot establish that it will suffer irreparable harm as a result of the denial of its motion to dismiss, we dismiss the petition to the extent it is directed to that order.[197]

The Second District concluded that "an appellate court does not generally have certiorari jurisdiction to review an order denying a motion to dismiss even when the cause of action is one for first-party bad faith."[198]

So, under the existing certiorari test, you reasonably conclude that the Fifth District would likely take jurisdiction over your client's petition for certiorari and that you would likely prevail. In the Second District, however, the outcome would likely be different. Your client likely would not obtain immediate review of the order denying its motion to dismiss the premature bad faith claim.

You think that your client's best and only hope is to try to convince the Second District to apply the functional test to determine whether your order merits early intervention. You know the Second District already agrees with you as to the first prong of the test. *O'Hearn* is factually on point and appears to be settled in the Second District's jurisprudence. The only parts of the record that the appellate court must necessarily review to support its early intervention are the complaint, motion to dismiss, and transcript of the hearing where your client's motion to dismiss was denied.[199]

You then ask whether the Second District "can confidently state that the trial court's error is so detrimental to the goal of providing a fair, consistent, accurate, and even-handed

197. 975 So. 2d at 636.
198. *Id.*
199. *See* Altenbernd & Marcario II, *supra* n. 15, at 17 (suggesting that a hearing transcript could be sufficient to evaluate whether a case qualifies for certiorari review).

dispute[-]resolution process that it should use its resources to interfere in the trial court proceeding to correct the problem."[200] At this point, you realize that while the Fifth District Court of Appeal views the legal error as sufficiently detrimental to the goal of providing an even-handed trial,[201] the Second District does not.[202] This was the conclusion the Second District announced in prior cases.[203] You are confident that you could show the test's second prong is also satisfied: that the trial court's order would, to the public and your client, appear to be unfair and that it burdens your client with the unnecessary expense of costly discovery, to be followed by an expensive trial. You can make an excellent argument that the court system will waste its precious time and taxpayer money on pointless proceedings that the appellate court has agreed are infected with serious legal error. You realize then, in all likelihood, the Second District's strict adherence to its precedent that certiorari is not available to review orders denying a motion to dismiss will likely trump the goal of providing a fair, accurate, and even-handed dispute-resolution process.

C. Orders Allowing Claims for Punitive Damages

Assume next that your client is sued in Miami for breach of fiduciary duty in a shareholder derivative suit.[204] The plaintiffs allege that your client, without notice to any shareholders, executed documents withdrawing the authorization to do business in Florida. The plaintiffs also allege that your client then transferred and conveyed the assets of the corporation's New Jersey subsidiary to a close corporation whose sole shareholders are your client and his wife. The plaintiffs further claim that your client then renamed the close corporation and resumed business in Florida.

A few months later, you receive the plaintiffs' motion for leave to amend the complaint to include a claim for punitive

200. *Id.* at 14.
201. *Mainstream Constr. Group, Inc.*, 864 So. 2d at 1271.
202. *O'Hearn*, 975 So. 2d at 636.
203. *Id.*
204. This factual scenario is based on *Chemplex Florida v. Norelli*, 790 So. 2d 547 (Fla. 4th Dist. App. 2001).

damages under Florida Statutes Section 768.72.[205] The motion included a proffer of documents from the different corporations and affidavits from the plaintiffs that recite the facts alleged in the complaint.[206] You also receive a request for financial-worth discovery of both the close corporation's finances and your client's personal finances.

You file a response in opposition to the motion where you object that punitive damages are not recoverable in equitable actions, such as shareholder derivative suits. You also move for a protective order[207] seeking to stop the financial-worth discovery on the ground that such discovery was not relevant to the plaintiffs' sole count for breach of fiduciary duty.

At the hearing, the trial judge rejects your arguments based on the statutory language indicating that Section 768.72 applies to "any civil action"[208] and "all causes of action."[209] The trial judge then denies your motion for a protective order and, based on the proffer, grants the plaintiffs' motion to include a punitive damages claim. You immediately move to stay the financial-worth discovery while you pursue appellate review, and the trial judge grants your motion on the record.[210]

Your client directs you to pursue any avenue for interlocutory review of the trial court's rulings. Your research quickly uncovers the leading case, *Globe Newspaper Co. v. King*,[211] where the Florida Supreme Court held that the district courts had "certiorari jurisdiction to review whether a trial judge has conformed with the procedural requirements of [S]ection 768.72."[212] According to *Globe Newspaper*, Section 768.72 "create[s] a substantive legal right not to be subject to a punitive damages claim and ensuing financial[-]worth discovery until the trial court makes a determi-

205. *See* Fla. Stat. § 768.72(1) (2012) (allowing a party to move to amend his or her complaint to assert a claim for punitive damages).

206. *See id.* (requiring "a reasonable showing by evidence in the record or proffered" as a condition precedent to asserting a claim for punitive damages).

207. *See* Fla. R. Civ. P. 1.280(c) (allowing a party to request an order "that the discovery not be had").

208. Fla. Stat. § 768.72(1).

209. *Id.* at § 768.72(4).

210. *See* Fla. R. App. P. 9.310(a) (allowing a party to seek a stay of a non-final order pending appellate review); *see generally* Anthony J. Russo, *The Stay of Judgments and Proceedings in Florida State Courts*, 86 Fla. B.J. 31, 32–33 (Jan. 2012) (discussing ways to seek stays pending appellate review).

211. 658 So. 2d 518 (Fla. 1995).

212. *Id.* at 519.

nation that there is a reasonable evidentiary basis for recovery of punitive damages."[213] The Court reasoned that forcing a party to disclose financial information without compliance with Section 768.72 would cause irreparable harm because an appeal from a final order cannot restore a party's rights under the statute.[214] For this reason, the *Globe Newspaper* Court held "that appellate courts should grant certiorari in instances in which there is a demonstration by a petitioner that the procedures of [S]ection 768.72 have not been followed."[215]

However, *Globe Newspaper* also held that the district courts lack certiorari jurisdiction to review the sufficiency of the evidence considered by the trial court.[216] The Florida Supreme Court, relying on *Martin-Johnson, Inc. v. Savage*,[217] explained that the resulting harm would not rise to the level of irreparable harm.[218] The *Martin-Johnson* Court reasoned that the harm caused by disclosure of financial information was not "significantly greater" than the harm created by discovery in a case where the appellate court determines the complaint should have been dismissed.[219] The *Martin-Johnson* Court was concerned about interrupting trial court proceedings and opening the floodgates to interlocutory review of orders denying motions to dismiss.[220] Thus, *Globe Newspaper* prohibits certiorari review of the factual basis of a claim for punitive damages.[221]

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213. *Id.*

214. *Id.* at 520.

215. *Id.* For example, certiorari would be appropriate to review an order allowing a claim for punitive damages "prior to a party asking for and receiving leave of the court." *Simeon, Inc. v. Cox*, 671 So. 2d 158, 160 (Fla. 1996); *see also Royal Carib. Cruises, Ltd. v. Doe*, 44 So. 3d 230, 233 (Fla. 3d Dist. App. 2010) (quashing an order allowing a claim for punitive damages where the trial court did not make the evidentiary inquiry or the factual determinations required by Section 768.72), *quashed on other grounds*, *Bd. of Trustees*, 99 So. 3d at 459; *Strasser v. Yalamanchi*, 677 So. 2d 22, 23 (Fla. 4th Dist. App. 1996) (quashing an order allowing punitive damages claim before the trial court determined there was a reasonable basis to support the claim); *Keller Indus., Inc. v. Kennedy*, 668 So. 2d 328, 329 (Fla. 4th Dist. App. 1996) (quashing an order allowing punitive damages because the trial court did not conduct an evidentiary hearing).

216. 658 So. 2d at 520.

217. 509 So. 2d 1097.

218. 658 So. 2d at 520.

219. 509 So. 2d at 1100. The Court explained that: (1) financial information is not privileged; and (2) the petitioner's privacy interest was lower than the level of privacy associated with work product, trade secrets, or the identity of a confidential informant. *Id.*

220. *Id.*

221. 658 So. 2d at 220; *e.g. Parker, Landerman & Parker, P.A. v. Riccard*, 871 So. 2d 1043, 1043–1044 (Fla. 5th Dist. App. 2004) (denying petition for writ of certiorari in a case

Your client's problem, however, does not fall squarely into either of the two categories described in *Globe Newspaper*. The issue for the appellate court, in your view, would not be whether the court complied with Section 768.72 or whether the plaintiffs' proffer was sufficient to support a punitive damages claim. Instead, the issue would be whether punitive damages are allowed, as a matter of law, in a shareholder derivative suit.

You narrow the scope of your research to better reflect what you consider to be the real issue. You find a line of cases where the appellate courts granted certiorari and quashed orders allowing punitive damages because such damages were not available as a matter of law.[222] Your case is in Miami, however, and the Third District Court of Appeal has rejected this line of cases.[223] The Third District explained that, based on *Globe Newspaper*, it lacked certiorari jurisdiction to review the trial court's decision to allow a claim for punitive damages where the plaintiff and the trial court have complied with the procedural requirements of Section 768.72.[224]

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where the petitioner argued the party seeking punitive damages had not shown a reasonable basis to support a claim for punitive damages); *Massey Servs., Inc. v. Brown*, 801 So. 2d 307, 308 (Fla. 5th Dist. App. 2001) (denying petition for writ of certiorari and determining that the trial court followed requirements for adding a claim for punitive damages).

222. *See McGuire, Woods, Battle & Boothe, LLP v. Hollfelder*, 771 So. 2d 585, 586–587 (Fla. 1st Dist. App. 2000) (remanding to trial court with instructions to strike the punitive damages claim); *Chemplex Fla.*, 790 So. 2d at 549–550 (quashing order allowing punitive damages because such damages were not available as a matter of law in a shareholder derivative suit); *Nova S.E. U., Inc. v. McCollough*, 693 So. 2d 1125, 1125–1126 (Fla. 4th Dist. App. 1997) (granting certiorari where no record evidence would have supported an award of punitive damages against an employer); *see also Ortega v. Silva*, 712 So. 2d 1148, 1149 (Fla. 4th Dist. App. 1998) (explaining that "[a]llowing a claimant to seek punitive damages as part of a claim in which such exemplary damages are unavailable as a matter of law[ ] is tantamount to allowing them without determining whether there is an evidentiary basis for them").

223. *Carnival Corp. v. Iscoa*, 922 So. 2d 359, 360–361 (Fla. 3d Dist. App. 2006).

224. *Id.* Curiously, the Third District would have granted certiorari review if the plaintiffs had not raised Section 768.72. *See Capco Props., LLC. v. Monterey Gardens of Pinecrest Condo.*, 982 So. 2d 1211, 1214–1215 (Fla. 3d Dist. App. 2008) (quashing an order compelling production of personal financial information in a case where such information was not relevant and the plaintiff had not sought punitive damages under Section 768.72); *e.g. Spry*, 985 So. 2d at 1188–1189 (quashing an order compelling production of financial information where plaintiff presented no evidence showing relevance); *Vega v. Swait*, 961 So. 2d 1102, 1103–1104 (Fla. 4th Dist. App. 2007) (quashing an order compelling personal finance information because there was no showing that the information was relevant); *Mogul v. Mogul*, 730 So. 2d 1287, 1290 (Fla. 5th Dist. App. 1999) (holding that "[t]he disclosure of personal financial information may cause irreparable harm to a person forced to disclose it, in a case in which the information is not relevant").

You decide to explore whether the functional restatement would lead to a different result. Under the first prong of the functional restatement,[225] you think the limited record in this case is sufficient to allow the appellate court to identify the error. An award of punitive damages in this shareholder derivative case would be an error that an appellate panel would reverse on appeal from a final order.[226] The ruling involves a pure question of law that leaves no discretion to the trial court. And the pleadings, the proffer, and the transcript of the hearing are sufficient for the appellate court to evaluate the propriety of allowing the plaintiffs to assert a claim for punitive damages and compelling production of your client's financial-worth discovery. For these reasons, the trial court's orders are capable of interlocutory review with basically the same level of accuracy as review on final appeal.

You next analyze the second prong to determine whether there is an adequate justification for the appellate court to exercise its discretionary certiorari jurisdiction.[227] As Justice Anstead explained in *Globe Newspaper*, the requirement that the party seeking punitive damages establish a reasonable basis for such damages is the heart of Section 768.72:

> The legislature has specifically granted the petitioner a substantive right to be free of financial discovery, absent a particularized evidentiary showing. A violation of the statutory provisions obviously cannot be remedied on plenary appeal. As has often been stated, by then "the cat is out of the bag." Consistent with the intent of the legislature in imposing this requirement, and, presumably expecting that it would be

225. Altenbernd & Marcario I, *supra* n. 15, at 23 (framing the first prong as a question of whether the trial court has "committed an error that can be identified with a high level of confidence from the limited record provided").

226. *See McGuire*, 771 So. 2d at 586–587 (quashing an order allowing punitive damages because statutes governing punitive damages did not overrule caselaw prohibiting punitive damages in a shareholder derivative suit); *Chemplex Fla.*, 790 So. 2d at 549–550 (quashing an order that allowed punitive damages because punitive damages were not available as a matter of law in shareholder derivative suits).

227. Altenbernd & Marcario I, *supra* n. 15, at 23 (framing the second prong of the test as whether the trial court's error will be so harmful to a fair judicial proceeding that the reviewing court should intervene).

> enforced by the courts, I would hold that certiorari review is appropriate in such cases.[228]

Additionally, "personal finances are among those private matters kept secret by most people."[229] Thus, the erroneous disclosure of financial-worth discovery would violate the constitutional right to privacy under Article I, Section 23, of the Florida Constitution.[230]

Further, you know that a cost-benefit analysis supports interlocutory review. The appellate court can correct the error on certiorari review with a brief opinion that can be issued with little expense of judicial resources or time.[231] This limited appellate cost is likely to save the parties and the court the considerable amount of time spent in discovery and litigation of the punitive damages claim. Therefore, based on your analysis under the functional restatement, you determine that the trial court's orders involve the kind of error and the circumstances that would meet the general policies behind the functional restatement.

You meet with your client to explain that the Third District is unlikely to take certiorari jurisdiction of this case. You also note the functional restatement and how this case meets this proposed new approach. You explain to your client that there is a slim possibility that the court would adopt the functional restatement, review this case, and quash the trial court's orders. Your client again directs you to pursue any avenue for interlocutory review of the trial court's rulings. You file the petition for writ of certiorari asserting interdistrict conflict and arguing that the Third District should adopt the functional restatement. The question is now out of your hands.

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228. 658 So. 2d at 521 (Anstead, J., dissenting); *Massey Servs., Inc.*, 801 So. 2d at 308 n. 1.

229. *Rowe*, 89 So. 3d at 1103 (quoting *Woodward v. Berkery*, 714 So. 2d 1027, 1035 (Fla. 4th Dist. App. 1998)) (internal quotation marks omitted).

230. *Id.* (quoting *Borck v. Borck*, 906 So. 2d 1209, 1211 (Fla. 4th Dist. App. 2005)).

231. *E.g. McGuire*, 771 So. 3d at 586–587 (quashing an order that allowed punitive damages because the statutes governing punitive damages did not overrule the existing caselaw prohibiting punitive damages in a shareholder derivative suit); *Chemplex Fla.*, 790 So. 2d at 549–550 (quashing an order allowing punitive damages because such damages were not available as a matter of law in a shareholder derivative suit).

D. The Problems with the Functional Restatement

1. Convincing the Appellate Courts to Adopt the Functional Restatement

The value of the functional restatement is clear to the clients in all three of our examples. But what would it take to actually shift the courts to this new approach? The path to this goal is ominous and replete with obstacles.

First, the appellate court must consider abandoning over half a century of Florida common law precedent that establishes the current test for certiorari.[232] Moreover, because the functional approach requires the creation of new tests for each type of order that is deemed suitable for interlocutory review,[233] the appellate court would also need to be convinced that it should create those tests.[234] It would also require a majority of the entire court to make this decision: for any of the Florida district courts of appeal, the court must vote en banc to recede from its own precedent.[235]

But the appellate court is unlikely to simply recede from its prior opinions to adopt the functional approach. To eschew the current test would also create conflict with decades of caselaw from the other districts and the Florida Supreme Court.[236] The Court could simply quash the district court's opinion as violative of established common law.[237] Rather, the appellate court would more likely deny certiorari but certify the question to the Supreme Court,[238] letting the Supreme Court determine the

232. "[T]he linguistic description that constitutes the modern three-prong test and the meaning ascribed to its words do not derive from long-established, time-tested common law. Instead, they reflect an ongoing, relatively recent struggle to properly explain the nature and extent of review by a district court of appeal in a certiorari proceeding. If we can find better words, nothing in the common law prohibits us from using them." Altenbernd & Marcario I, *supra* n. 15, at 22.

233. *Id.* at 21; Altenbernd & Marcario II, *supra* n. 15, at 16.

234. Creation of new tests in disregard of established precedent may violate the philosophy of "judicial restraint." *See Black's Law Dictionary* 852 (Bryan A. Garner ed., 7th ed., West Group 1999) (defining "judicial restraint").

235. *See State v. Washington*, 2012 WL 2400879 at *6 (Fla. 3d Dist. App. June 27, 2012) (explaining that "only this Court, sitting en banc, may recede from an earlier opinion").

236. *See Bd. of Trustees*, 99 So. 3d at 459 (overturning decisions that have granted certiorari for claims of overly broad discovery orders).

237. Fla. Const. art. V, § 3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(iv).

238. Fla. Const. art. V, § 3(b)(4); Fla. R. App. P. 9.030(a)(2)(A)(v).

applicability of the new test.[239] If the issue has made it this far, the task is now to convince a majority of the Supreme Court to abandon its precedent in favor of this new functional standard.[240]

The daunting task upon the party seeking to gain review of its order under the functional approach can be summarized thusly: convince a majority of a district court of appeal and then a majority of the Supreme Court to abandon decades of established precedent in favor of an approach that requires appellate judges to establish new tests for every type of order they encounter, all based upon a theory so far only proposed in articles in the Florida Bar Journal.[241]

2. The Multiple Standards Created by the Functional Approach

Once the courts have adopted the functional restatement, a new problem would arise. The functional restatement, after all, only identifies "circumstance[s] in which the appellate courts should fashion narrow, context-specific tests for determining whether certiorari review is appropriate."[242] A court that finds a particular order subject to certiorari review must then figure out a specific test for use only when reviewing that kind of order.[243]

For example, the proponents of the functional restatement suggest two different tests for certiorari review of orders denying discovery. First, when the order involves a novel issue, the district court should review the order if: (1) no clear law on the issue exists; and (2) the trial judge certifies that the order involves an

239. *See* Nancy Marshall-Genzer, Am. Pub. Media Marketplace Video, *The Origin of "Kick the Can"* (Marketplace posted on Dec. 19, 2011) (transcript available at http://www.marketplace.org/topics/life/origin-kick-can) (exploring the roots and overuse of the phrase "kick the can," particularly relating to instances when a party runs and hides).

240. A majority of the current Court appears unlikely to adopt a functional approach, given the recent ruling that "the writ of certiorari cannot be used simply because strong policy reasons support interlocutory review." *San Perdido Ass'n*, 104 So. 3d at 353. As Justice Lewis has explained: "the proper mechanism for the expansion of the scope of interlocutory review is not to eviscerate one hundred years of well-grounded, common law jurisprudence regarding certiorari review." *Id.* at 358 (Lewis, J., specially concurring).

241. Altenbernd & Marcario I, *supra* n. 15; Altenbernd & Marcario II, *supra* n. 15.

242. Altenbernd & Marcario II, *supra* n. 15, at 17.

243. *See* Altenbernd & Marcario I, *supra* n. 15, at 21 (explaining that "[a]s the courts encounter petitions for certiorari review of each type of non[-]final order, they could create precedent announcing narrower, functional tests for use only in that context, with a view toward helping lawyers decide whether to pursue a certiorari proceeding in a district court").

exceptional issue not resolved by binding authority.[244] Second, when there is binding precedent, the district should review the order if: (1) there is a factual basis to predict a substantial probability that the requested discovery will lead to the discovery of admissible evidence; (2) the evidence is not cumulative, collateral, or sought solely for the sake of impeachment; and (3) the evidence will be "at least moderately relevant" to an issue to be decided by the fact-finder.[245] While more detailed than the current standard, these tests are still plagued with terms (like "substantial probability" and "at least moderately relevant") that are no clearer than "departure from the essential requirements of the law."[246]

The gradual development of these specific tests on a case-by-case basis will increase uncertainty in the short term. Practitioners will try to take advantage of the adoption of the functional restatement, but they will have no way of anticipating the particular test that a district court will ultimately apply. Trial courts would have no advance notice that their rulings may be erroneous. And district courts may end up disagreeing with one another about the appropriate test for a particular kind of order.

This uncertainty will, in turn, affect the timely resolution of cases. Trial courts will be faced with more stays of proceedings pending certiorari review. The number of certiorari petitions will likely increase after the courts embrace the functional restatement and before the courts agree on the specific tests applicable.[247] Further, dissatisfied litigants will likely seek to invoke the Florida Supreme Court's discretionary review to challenge the district courts' rulings.

The current certiorari standard is not perfect. The proposed functional restatement aims to remove the vagueness of the current standard. But the current standard is vague and open to interpretation for a reason: the writ of certiorari is meant to be a "safety net" in the "interstices between direct appeal and the other prerogative writs."[248] Certiorari would probably not fulfill its intended purpose without the flexibility created by the vague-

244. Altenbernd & Marcario II, *supra* n. 15, at 18.
245. *Id.*
246. *Id.*
247. *See Eberhardt v. Eberhardt*, 666 So. 2d 1024, 1025 (Fla. 4th Dist. App. 1996) (attributing an increase in certiorari petitions to practitioners' perception that the Supreme Court had expanded the standard for certiorari review).
248. *Broward Co.*, 787 So. 2d at 842.

ness of the current standard. Thus, the functional restatement should not replace the current certiorari standard; instead, it should serve as a sieve to identify orders that should be reviewable under Florida Rule of Appellate Procedure 9.130.[249]

IV. THE ALTERNATIVE: FLORIDA RULE OF APPELLATE PROCEDURE 9.130

The legal infrastructure of Florida Rule of Appellate Procedure 9.130 has produced a transparent, effective, and responsive system to systematically and thoughtfully identify classes of orders that should be reviewed on an interlocutory basis.

As we have seen, some classes of orders, such as orders compelling disclosure of privileged communication or trade secrets, are so important that litigants can count on the district court exercising its discretionary certiorari jurisdiction over the issue.[250] And for some classes of orders that deserve immediate appellate attention, the Florida Supreme Court has created an immediate right of appeal through the vehicle of Rule 9.130.[251] Using this rule, the Court creates a uniform jurisdictional platform for an entire class of orders, bypassing the certiorari process and relieving the party seeking review from the burden of showing a particular order departs from the essential requirements of law and causes injury not remediable on plenary appeal. Those two characteristics are, in essence, deemed inherent in these classes of orders reviewable under Rule 9.130.

A. A Short History of Rule 9.130, Florida Rule of Appellate Procedure

In 1980, Florida voters decided to alter the jurisdiction of the Florida Supreme Court by adopting an amendment to Article V of the Florida Constitution.[252] This amendment provided to the dis-

249. *See San Perdido Ass'n*, 104 So. 3d at 353 (explaining that "if strong policy reasons favor interlocutory review, this Court will direct that the categories of appealable nonfinal orders be expanded by amendment to the rules and not by expanding use of the common law writ of certiorari").

250. *See supra* pt. II(B)(1) (discussing the jurisdictional prongs of certiorari review).

251. Justice Lewis has identified this rulemaking process as the "'common sense mechanism' to resolve the limited scope of certiorari review of interlocutory orders." *San Perdido Ass'n*, 104 So. 3d at 358 (Lewis, J., specially concurring).

252. *In re Emerg. Amends. to R. of App. P.*, 381 So. 2d 1370, 1371 (Fla. 1980).

trict courts of appeal the jurisdiction to review interlocutory orders, with a provision written as follows:

> (b) JURISDICTION.—
>
> > (1) District courts of appeal shall have jurisdiction to . . . review interlocutory orders in such cases to the extent provided by rules adopted by the [S]upreme [C]ourt.[253]

The district courts of appeal possessed the jurisdiction to review interlocutory orders under the prior constitutional provision.[254] The important difference for this discussion is that the amendment called for "rules adopted by the [S]upreme [C]ourt."[255] The Supreme Court, anticipating approval of the constitutional amendment, had prepared proposed amendments to Florida Rule of Appellate Procedure 9.130 to implement the changes.[256] Rule 9.130 (Proceedings to Review Non-Final Orders) was restated as follows:

> This rule applies to review of the non-final orders authorized herein the district courts of appeal and the circuit courts. . . .
>
> > (3) Review of non-final orders of lower tribunals is limited to those which:
> >
> > > (A) concern venue;
> > >
> > > (B) grant, continue, modify, deny or dissolve injunctions, or refuse to modify or dissolve injunctions;
> > >
> > > (C) determine:
> > >
> > > > (i) jurisdiction of the person;
> > > >
> > > > (ii) right to immediate possession of property;
> > > >
> > > > (iii) right to immediate monetary relief or child custody in domestic relations matters; or

253. Fla. Const. art. V, § 4(b)(1) (amended 1980).

254. This prior provision stated: "The [S]upreme [C]ourt shall provide for expeditious and inexpensive procedure in appeals to the district courts of appeal[ ] and may provide for review by such courts of interlocutory orders or decrees in matters reviewable by the district courts of appeal." Fla. Const. art. V, § 5(3) (1968) (revised 1972).

255. Fla. Const. art V, § 4(b)(1) (amended 1980).

256. *In re Emerg. Amends. to R. of App. P.*, 381 So. 2d at 1385–1386.

> (iv) the issue of liability in favor of a party seeking affirmative relief.[257]

Rule 9.130 replaced former Florida Rule of Appellate Procedure 4.2.[258] Rule 4.2 had provided litigants an alternative to certiorari for interlocutory relief but only to a limited number of specified interlocutory orders. In 1967, Florida Appellate Rule 4.2(a) stated, in relevant part:

> Rule 4.2. Interlocutory Appeals
>
> a. Application. Appeals may be prosecuted in accordance with this rule from interlocutory orders in civil actions that, from the subject matter of the relief sought, are such as formerly were cognizable in equity, and from interlocutory orders relating to venue or jurisdiction over the person, from orders granting partial summary judgment on liability in civil actions . . . .[259]

The 1980 version of Rule 9.130 provided the district courts with the jurisdiction to review a greater variety of interlocutory orders than did the former appellate Rule 4.2, and in the committee notes to the new rule, the authors explained their intentions.[260]

The Advisory Committee characterized these enumerated interlocutory orders as "the most urgent interlocutory orders."[261] The Committee sought to relieve petitioners from the "heavy burden" that the common law writ of certiorari imposed to show "that a clear departure from the essential requirements of law has resulted in otherwise irreparable harm."[262] The Committee anticipated that it would be "extremely rare that erroneous interlocutory rulings can be corrected by resort to common law certio-

257. *Id.*

258. Fla. R. App. P. 9.130 advisory comm. nn. (amended 1977).

259. *See WEG Indus., SA v. Co. De Seguros Generales Granai*, 937 So. 2d 248, 251 (Fla. 3d Dist. App. 2006) (emphasis omitted) (quoting Florida Appellate Rule 4.2(a) as it was in 1967).

260. "Although the committee notes to [Appellate R]ule 9.040(b) are only persuasive authority and are not part of the rule, . . . this Court may look to the notes as a means of determining the clear intent of the rule." *Kaweblum v. Thornhill Ests. Homeowners Ass'n*, 755 So. 2d 85, 87 (Fla. 2000).

261. Fla. R. App. P. 9.130 advisory comm. nn.

262. *Id.*

rari."[263] Whether correction by certiorari is "rare" or not can be debated, but, again, we see evidence of judicial intent that certiorari should not be a common remedy. Consistent with that sentiment, the Committee voiced an intent to retain the distinction between the remedy afforded by Rule 9.130 and the remedy of certiorari.

This dual-track approach allows measured access to immediate appellate review of interlocutory orders. On the one hand, Rule 9.130 provides a ready-made jurisdictional basis, consistent over all five Florida judicial districts, allowing for the immediate review of entire classes of orders, apparently those that repeat with sufficient frequency to warrant a place on the Rule 9.130 list and that are deemed to be "most urgent."[264] For all other types of orders, which may not recur with sufficient frequency to justify a separate rule or do not always possess the required urgency, the matter of immediate review is tested by the case-by-case certiorari process.[265] The rule process is a necessary complement to the common law case-by-case certiorari process.

Article V, Section 4, empowers the Supreme Court to define the district courts' jurisdiction over interlocutory orders.[266] Judicial Administration Rule 2.140 establishes a detailed procedure for the regular review and amendment of the appellate rules, including Rule 9.130.[267] The process established by Rule 2.140 is a useful tool to quickly fashion sensible changes to the law of appellate jurisdiction, superior in many—but not all—situations to the case-by-case common law determination of the certiorari process.

First, the rule process of identifying those classes of orders that are immediately reviewable is deliberative, transparent, and fair.[268] Rule 2.140 commands The Florida Bar to appoint an Appellate Court Rules Committee to consider rule-change pro-

263. *Id.*

264. *See* Fla. R. App. P. 9.130(3)(A)–(D) (providing a list of the most urgent non-final orders).

265. *See id.* at 9.130 advisory comm. nn. (noting that the most urgent interlocutory orders are appealable under Rule 9.130 but that relief may be obtainable under common law certiorari—albeit in rare circumstances).

266. Fla. Const. art. V, § 4(b)(1).

267. Fla. R. Jud. Admin. 2.140.

268. *See San Perdido Ass'n*, 104 So. 3d at 358 (Lewis, J., specially concurring) (explaining that "[t]he careful consideration given to potential amendments to the appellate rules would result in well-crafted, limited interlocutory review").

posals.[269] The Committee is to "be composed of attorneys and judges with extensive experience and training in the area of practice of the [C]ommittee calling for . . . [the] frequent use of the rules."[270] The Florida Bar appoints these attorneys and judges for terms of specific duration and charges them with considering requests for rule changes from those both within and outside the Committee.[271] The process is structured to be open and inclusive.

The Committee prepares formal reports and proposals every three years.[272] The Committee provides the report to the Florida Supreme Court and the legislative leadership[273] and also publishes it on The Florida Bar website and in The Florida Bar News.[274] The Committee maintains meeting minutes and records that are available to the public on The Florida Bar website.[275]

The Supreme Court may order oral argument on the merits of the proposals, with notice to legislators and members of the judiciary.[276] After notice and hearing, the Supreme Court decides whether to adopt or reject the recommendations with a written, published order.[277] This open, public process provides sharp contrast to the case-by-case work of three district court judges who, in relative secrecy, labor with the input of only the two parties to the petition to determine if an interlocutory ruling is immediately reviewable.

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269. Fla. R. Jud. Admin. 2.140(a)(3).

270. *Id.* at 2.140(a)(4).

271. *Id.* at 2.140(a)(6). Rule 2.140(a)(6) provides:

> The committees may originate proposals [for amendments to the Rules of Appellate Procedure] and are charged with the duty of regular review and reevaluation of the rules to advance orderly and inexpensive procedures in the administration of justice. The committees may accept or reject proposed amendments or may amend proposals. The committees shall keep minutes of their activities, which minutes shall reflect the action taken on each proposal. Copies of the minutes shall be furnished to the clerk of the [S]upreme [C]ourt, to the board of governors of The Florida Bar, and to the proponent of any proposal considered at the meeting.

Id.

272. *Id.* at 2.140(b)(1).

273. *Id.* at 2.140(b)(2), (4).

274. *Id.* at 2.140(b)(2).

275. *See* The Fla. Bar, *Appellate Court Rules*, http://www.floridabar.org/cmdocs/cm205.nsf/WDOCS (accessed Apr. 1, 2013) (providing links to the Committee's meeting minutes, agendas, and other documents).

276. Fla. R. Jud. Admin. 2.140(b)(5).

277. *Id.* at 2.140(b)(6)–(7). Rule 2.140 also provides that the Supreme Court may draft emergency amendments without recommendation from the Rules Committee. *Id.* at 2.140(d).

Second, the rulemaking process establishes jurisdiction over an entire class of interlocutory orders with certainty and uniformity over all five judicial districts. The district court's power to provide immediate review of an order is not based on the particular conception of one district court as to what constitutes irreparable injury. No questions arise in the litigant's mind as to whether the district court will find the troublesome order to be one "that departs from the essential requirements of law."[278] A stated purpose of Rule 9.130 is to eliminate useless labor.[279] When a class of interlocutory orders is placed on the Rule 9.130 list, certiorari becomes irrelevant; a litigant need not argue the jurisdictional basis of the court to hear the case, and the court need not expend its time on deciding the question. Moreover, attorneys can advise clients with greater certainty as to the clients' appellate options, a most precious opportunity.[280]

Third, the standard of review in a Rule 9.130 proceeding will be the same standard of review applied in a plenary appeal. The standard of review in certiorari—altered by the need to show a "departure from essential requirements of the law"—is both more difficult for the petitioner and less clear. The result of review in a certiorari proceeding may differ from the result in a plenary appeal. This inconsistency is not likely to promote the goals of a fair, predictable, and efficient adjudication.[281]

Still, the Rule 2.140 process cannot replace certiorari. Certiorari proceedings allow three district court judges to consider their jurisdiction to review a particular order within thirty days of the

278. *See id.* at 2.140(b)(5) (describing the open-forum process for amending court rules, which provides a stark contrast to a district court's case-by-case basis for determining whether an order departs from the essential requirements of law).

279. Fla. R. App. P. 9.130 comm. nn.

280. "One does not need to expatiate upon the value of certainty in a developed legal system. Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable." Benjamin N. Cardozo, *The Growth of the Law* 3 (2d prtg., Greenwood Press 1975).

281. For instance, on plenary appeal, "[t]he standard of review for the denial of a continuance is abuse of discretion." *Fasig v. Fasig*, 830 So. 2d 839, 841 (Fla. 2d Dist. App. 2002). But, on certiorari review, while the abuse of discretion standard is acknowledged, the abuse must rise to a level that creates irreparable harm. *See e.g. SSJ Mercy Health Sys., Inc. v. Posey*, 756 So. 2d 177, 179 (Fla. 4th Dist. App. 2000) (explaining that "[a]lthough ordinarily an order denying continuance does not present the prospect of irreparable harm necessary for the exercise of certiorari jurisdiction, . . . and this court regularly dismisses petitions seeking such relief, in this case we believe that forcing counsel to choose between effectively representing his client and caring for his wife in her final days creates the potential for harm that cannot be remedied on plenary appeal").

rendering of that order.[282] By contrast, the same three judges have no power to amend Rule 9.130 to provide the court with the jurisdiction needed to review that same order; only the Supreme Court holds the power to alter Rule 9.130 in the course of deciding a case.[283] And that power is no help to a trial court litigant. Pursuant to the Rule 2.140 process, the Appellate Rules Committee can recommend an emergency rule change to the Supreme Court, and that application may be accepted and considered in an expedited manner.[284] But again, the process is too deliberative to be immediately useful to an individual litigant. Thus, for most litigants, certiorari remains the sole avenue for interlocutory relief.

B. The Chronicle of the Work of the Appellate Rules Committee and the Supreme Court Shows the Rule 2.140 Process Is a Success

Rule 2.140 provides the Bar and Bench the continuous opportunity to consider whether developments in the law—outside the context and procedural requirements of a particular lawsuit—show a need for change in the interlocutory jurisdiction of the district courts. The rule process has been used to:

- clarify the district courts' jurisdiction over partial final judgments;[285]
- expand the district courts' interlocutory jurisdiction;[286]

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282. Florida Rule of Appellate Procedure 9.100(c) requires the petitioner to file his or her petition "within [thirty] days of rendition of the order to be reviewed."

283. Fla. R. Jud. Admin. 2.140(d). And it has done so. *Mandico*, 605 So. 2d at 854–855.

284. Fla. R. Jud. Admin. 2.140(e). This procedure has been employed successfully, as well. *Amend. to Fla. R. of App. P. 9.130*, 663 So. 2d 1314, 1314–1315 (Fla. 1995) (granting The Florida Bar's emergency petition to amend Rule 9.130 to include specified family law orders).

285. *The Fla. Bar Re: R. of App. P.*, 463 So. 2d 1114, 1116 (Fla. 1984). In 1985, the Supreme Court approved rule changes to clarify the district courts' jurisdiction over partial final judgments. *Id.*

286. *In re Amends. to Fla. R. of App. P.*, 84 So. 3d 192, 195 (Fla. 2011) (permitting interlocutory review of orders that determine the issue of forum non conveniens); *In re Amends. to Fla. R. of App. P.*, 2 So. 3d 89, 92 (Fla. 2008) (permitting interlocutory review of orders that concern writs of replevin, garnishment, or attachment, and orders that determine the entitlement of a party to an appraisal under an insurance policy); *In re Amends. to Fla. R. of App. P.*, 894 So. 2d 202, 215 (Fla. 2005) (permitting interlocutory review of orders determining that a governmental entity has taken action that has inordinately burdened real property within the meaning of Florida Statutes Section 70.001(6)(a)); *In re Amends. to Fla. R. of App. P.*, 609 So. 2d 516, 517 (Fla. 1992) (permitting review of orders that grant or deny the certification of a class and orders regarding the appointment of a

- allow the Supreme Court to act on an emergency basis to conform the district courts' jurisdiction over orders concerning worker's compensation immunity;[287]
- quickly conform the district courts' interlocutory jurisdiction to changes to Family Law Rules of Procedure;[288]
- adopt a new rule regarding procedures for appeal of orders denying immunity in federal civil rights cases consistent with federal procedure;[289]
- remove classes of orders that may be immediately reviewed and so, narrow the district courts' jurisdiction.[290]

The deliberative process of Rule 2.140 is a time-tested success. The process is deliberative, transparent, and firmly rooted in the Florida Constitution. This process is ideal for identifying interlocutory orders that should be immediately reviewable. It is well suited to resolve interdistrict conflicts as to whether a class of orders qualifies for certiorari, in favor of immediate review, by the expedient process of amending Rule 9.130 to include the class of orders at issue.

Because the rule process is deliberative and applicable to entire classes of orders, it is not the appropriate forum for resolving jurisdictional questions as to a particular case. Attorneys or

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receiver or the termination of a receivership); *The Fla. Bar re: R. of App. P.*, 463 So. 2d at 1116 (permitting interlocutory review of non-final orders that determine whether a party is entitled to arbitration).

287. *Mandico*, 605 So. 2d at 854–855 (using its emergency rulemaking power to amend Rule 9.130 to provide the district courts with jurisdiction to review orders that determine a party is not entitled to worker's compensation immunity as a matter of law).

288. In 1995, the Supreme Court responded to an emergency petition from the Appellate Court Rules Committee to amend Rule 9.130 to allow interlocutory review of orders under Florida Family Law Rule of Procedure 12.540 because of the recent adoption of the Family Law Rules of Procedure. *Amend. to Fla. R. of App. P. 9.130*, 663 So. 2d at 1314–1315.

289. In 1996, "Subdivision (a)(3)(C)(viii) was added in response to the [S]upreme [C]ourt's request in *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994) . . . direct[ing] the [Appellate Rules] [C]ommittee to propose a new rule regarding procedures for appeal of orders denying immunity in federal civil rights cases consistent with federal procedure." Fla. R. App. P. 9.130 advisory comm. nn. (1996 Amendment). Rule 9.130 was thereafter amended to permit district courts to review orders that rule, as a matter of law, a party is not entitled to absolute or qualified immunity in a civil rights claim arising under federal law. *Id.*

290. *In re Amends. to Fla. R. of App. P.*, 780 So. 2d 834, 860 (Fla. 2000) (constricting jurisdiction of the district courts under Rule 9.130 by eliminating their jurisdiction over orders that resolve the issue of liability in favor of a party seeking affirmative relief).

any member of the public who sees the repeating jurisdictional problems can advance proposals to the Committee to include certain classes of orders that they see regularly as candidates for inclusion in Rule 9.130. The Appellate Rules Committee can screen these proposals for suitability and recommend or deny them after its deliberations.

Proponents (and opponents) of a particular proposal to include a class of orders in the list of Rule 9.130 orders can use the functional approach to support their position. Is the order one from which the district court can determine, with a high level of confidence from the limited record available, that the circuit court has committed an error? Can the district court confidently state that the circuit court's "error is so detrimental to the goal of providing a fair, consistent, accurate, and even-handed dispute[-]resolution process that it should use its resources to interfere in the trial court proceeding to correct the problem"?[291] An affirmative answer to these two questions means that a class of orders is a fair candidate for inclusion in the Rule 9.130 list.

We have seen from the record of achievement of the Appellate Rules Committee that it is particularly well suited to respond to these proposals and provide an answer for litigants in future years, one that fulfills the avowed purpose of Rule 9.130, to avoid "useless labor."[292]

V. CONCLUSION

Certiorari jurisdiction should remain a flexible tool for practitioners to seek review of non-final orders that otherwise escape appellate review. The certiorari standard should remain loosely defined and malleable to provide the courts discretion to grant the writ. Abandoning the current certiorari standard in favor of the functional restatement may open a Pandora's box that would unleash confusion and uncertainty by undoing over half a century of certiorari precedent. However, the functional restatement is a powerful test to identify orders that should be immediately reviewed. Those classes of orders that pass the functional restatement test will be prime candidates for inclusion in Rule 9.130, which has a well-developed rulemaking process that would pro-

291. Altenbernd & Marcario II, *supra* n. 15, at 14.
292. Fla. R. App. P. 9.130 advisory comm. nn.

vide transparency and result in certainty and uniformity. For this reason, the Florida Supreme Court (in its rulemaking capacity) and The Florida Bar's Appellate Rules Committee should consider using the functional restatement to screen and evaluate further amendments to Rule 9.130.

NO MORE LIP SERVICE: WHY FLORIDA APPELLATE RULES SHOULD ALLOW FOR NON-FINAL APPEAL OF ORDERS GRANTING DISQUALIFICATION OF A PARTY'S ATTORNEY

Mark Miller*

The United States Supreme Court has long recognized that our American system of justice provides individuals with "the right to retain the attorney of their choice to represent their interests in judicial proceedings."[1] Florida appellate courts protect that right by allowing a litigant who loses an attorney because the trial court granted the opposition's motion to disqualify to petition the appellate courts for a writ of certiorari to immediately review the trial court's order disqualifying the litigant's attorney.[2] This Article suggests that lower court decisions regarding the disqualification of counsel should be reviewable by non-final appeal under Florida Rule of Appellate Procedure 9.130, which would allow de novo review of a decision to grant disqualification of a party's chosen counsel, rather than the more deferential certiorari standard.[3]

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1. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 441 (1985) (Brennan, J., concurring).

2. *See Frye v. Ironstone Bank*, 69 So. 3d 1046, 1049 (Fla. 2d Dist. App. 2011) (stating that "[o]rders granting or denying motions to disqualify a party's attorney are reviewable by certiorari") (citing *Gonzalez ex rel. Colonial Bank v. Chillura*, 892 So. 2d 1075, 1076 (Fla. 2d Dist. App. 2004)); *Pinebrook Towne House Ass'n, Inc. v. C.E. O'Dell & Assocs., Inc.*, 725 So. 2d 431, 433 (Fla. 2d Dist. App. 1999) (concluding that "[o]rders that grant or deny motions to disqualify a party's attorney are properly reviewed by certiorari").

3. Florida Rule of Appellate Procedure 9.130 "applies to appeals to the district courts of appeal of the non-final orders [enumerated in the rule] and to appeals to the circuit court of non-final orders when provided by general law." Fla. R. App. P. 9.130 (2006).

Certiorari review for a motion to disqualify counsel examines two factors: (1) whether the lower court departed from the "essential requirements of law"; and (2) whether the error may "result in prejudice that cannot be fully rectified by plenary appeal."[4] Commentators have noted, however, that Florida's district courts merely pay lip service to this standard and instead review these cases de novo.[5] It troubles both the courts and litigants for the courts to use certiorari as the vehicle to review these cases while employing a standard of review not applicable to certiorari cases.[6]

Given that the courts have looked at these cases and recognized that the issue is a legal one to be answered de novo, this Article suggests changing the manner in which these cases reach the appellate courts, rather than trying to change, as a matter of Florida procedure, the standards that the appellate courts apply. The courts have picked a de novo standard of review. The rules should be changed to reflect that reality. Accordingly, this Article suggests that lower court decisions regarding the disqualification of counsel ought to be reviewable by non-final appeal under Florida Rule of Appellate Procedure 9.130.

This Article discusses the manner in which the courts *say* they evaluate these cases and then looks at how they *actually* evaluate these cases. The Article then concludes by suggesting that non-final appellate review would better serve Florida's litigants. Officially adopting this non-final standard would codify the actual, correct standard of review in these cases, rather than pay lip service to a certiorari standard that courts do not actually follow.

I. BACKGROUND

Disputes involving the potential disqualification of a party's chosen counsel present a conflict between two interests: "(1) the

4. *Gen. Accident Ins. Co. v. Borg-Warner Acceptance Corp.*, 483 So. 2d 505, 506 (Fla. 4th Dist. App. 1986).

5. Chris W. Altenbernd & Jamie Marcario, *Certiorari Review of Nonfinal Orders: Trying On a Functional Certiorari Wardrobe, Part II*, 86 Fla. B.J. 14, 14 (Mar. 2012) (reporting that while trial courts claim to apply the correct standard, the reality is that this is "more flowery rhetoric than functional rationale") [hereinafter Altenbernd & Marcario II].

6. *Id.* at n. 4 (suggesting that orders granting or denying a motion to disqualify counsel should be reviewable by non-final appeal under Florida Rule of Appellate Procedure 9.130).

right to choose one's own counsel, and (2) the protection of the judicial system's appearance of fairness."[7] Florida courts have explained that they view motions for disqualification with skepticism because disqualification infringes on a party's right to employ a chosen lawyer.[8] Because the right to one's own counsel serves as one of the bedrocks of our American justice system, the courts should only disqualify counsel in rare circumstances.[9] Nevertheless,

> [l]ike so many other ethical considerations in the practice of law, perceptions are of the utmost importance. . . . [T]he possibility that such an advantage did accrue warrants resort to this drastic remedy for the sake of the appearance of justice, if not justice itself, and the public's interest in the integrity of the judicial process.[10]

The motion to disqualify opposing counsel generally arises in two circumstances: (1) where counsel for one party is a fact witness to the underlying dispute and thus may need to serve as both counsel and witness at trial;[11] and (2) where counsel for one party previously served, or currently serves, as counsel for the adverse party in the same or a related matter, the former client's

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7. *Health Care & Ret. Corp. of Am., Inc. v. Bradley*, 944 So. 2d at 508, 510–511 (Fla. 4th Dist. App. 2006).

8. *Coral Reef of Key Biscayne Devs., Inc. v. Lloyd's Underwriters at London*, 911 So. 2d 155, 157 (Fla. 3d Dist. App. 2005).

9. *Gen. Accident Ins. Co.*, 483 So. 2d at 506 (holding that disqualification is an "extraordinary remedy and should be resorted to sparingly"); *Singer Is., Ltd. v. Budget Constr. Co.*, 714 So. 2d 651, 652 (Fla. 4th Dist. App. 1998) (same).

10. *Gen. Accident Ins. Co.*, 483 So. 2d at 506.

11. R. Regulating Fla. Bar 4-3.7 (Fla. Bar 2006). This rule provides:

> (a) *When Lawyer May Testify.* A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
>
> (3) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (4) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) *Other Members of Law Firm as Witnesses.* A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by [R]ule 4-1.7 or 4-1.9.

Id.

interests are adverse to the current client, and the former client did not consent.[12] In these latter cases, the courts must determine whether

> (1) an attorney-client relationship existed, thereby giving rise to an irrefutable presumption that confidences were disclosed during the relationship, and (2) the matter in which the law firm subsequently represented the interest adverse to the former client was the same or substantially related to the matter in which it represented the former client.[13]

Courts must take care in evaluating these motions and reviewing orders that arise from them because "[t]he temptation to file a motion to disqualify is often strongest in contentious civil litigation in which bitterness between the parties runs high."[14] Arthur Burger has succinctly explained the danger of such a motion:

> In such "grudge matches," for example, litigation between former business partners—each of whom feels betrayed by the other—or in lawsuits alleging fraudulent conduct, a motion to disqualify offers an attorney the allure of striking a pose as the enforcer of virtue, placing the ethics and integrity of the other side up to scrutiny. Embittered litigants are sometimes enticed by the prospect that such a motion will sow dissension between an adversary and the adversary's lawyer, or otherwise disrupt an adversary's litigation plans. Unfortunately, some litigants love this kind of pyrotechnics and urge their lawyers to charge forward, eager to wreak havoc on their opponents.[15]

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12. R. Regulating Fla. Bar 4-1.9 (Fla. Bar 2010). This rule provides in pertinent part:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent;

(b) use information relating to the representation to the disadvantage of the former client except as these rules would permit with respect to a client or when the information has become generally known . . . .

Id.; *see also* R. Regulating Fla. Bar 4-1.10 (Fla. Bar 2011) (providing the rule governing imputation of conflicts of interest).

13. *State Farm Mut. Automobile Ins. Co. v. K.A.W.*, 575 So. 2d 630, 633 (Fla. 1991).

14. Arthur D. Burger, *That Motion to Disqualify: Trying to Get Rid of the Opposing Counsel May Cause Worse Problems*, 29 Leg. Times (July 17, 2006).

15. *Id.*

Seen in this context, a court's standard of review in properly analyzing these often heated disputes must be understandable and transparent to the litigants and attorneys who rely upon the resulting opinions to guide their decision in filing these motions. Unfortunately, as will be shown below, Florida appellate courts say one thing but do another when they evaluate these cases, which creates some uncertainty.[16] Thus, the need for change has arisen.

II. FLORIDA COURTS AND LIP SERVICE TO THE CERTIORARI STANDARD

As previously explained, orders granting or denying motions to disqualify a party's attorney are reviewable by certiorari.[17] As in any other certiorari petition, the proper review is premised upon whether the lower court departed from the "essential requirements of law[,] which may result in prejudice that cannot be fully rectified by plenary appeal."[18] Every district court of appeal in Florida has explained that it reviews these attorney-disqualification orders using the certiorari standard.[19] This Article argues that while courts *say* they apply the certiorari standard, they do not *actually* apply the standard. A review of three cases from three different districts demonstrates that the appellate courts actually review de novo whether a trial court properly ruled upon a motion to disqualify, rather than using the proper certiorari standard.

16. *See* Altenbernd & Marcario II, *supra* n. 5, at 1 (discussing the divergence between the standard that Florida courts *say* they apply and the standard that they *actually* apply).

17. *E.g. Chillura*, 892 So. 2d at 1076; *Pinebrook Towne House Ass'n*, 725 So. 2d at 433; *Campbell v. Am. Pioneer Sav. Bank*, 565 So. 2d 417, 417–418 (Fla. 4th Dist. App. 1990) (granting certiorari relief where the lower court incorrectly denied a motion to disqualify opposing counsel).

18. *Gen. Accident Ins. Co.*, 483 So. 2d at 506.

19. *E.g. Simon DeBartolo Group, Inc. v. Bratley*, 741 So. 2d 1254, 1255 (Fla. 1st Dist. App. 1999); *Chillura*, 892 So. 2d at 1079 (employing the standard in the Second District Court of Appeal); *Contl. Cas. Co. v. Przewoznik*, 55 So. 3d 690, 691 (Fla. 3d Dist. App. 2011); *Bradley*, 944 So. 2d at 510 (using the standard in the Fourth District Court of Appeal); *Whitener v. First Union Nat'l Bank of Fla.*, 901 So. 2d 366, 370 (Fla. 5th Dist. App. 2005).

A. In *Frye*, the Second District Court of Appeal Applied De Novo Review of an Order Denying a Motion to Disqualify

In *Frye*, the petitioner sought "review by certiorari of an order denying his motion to disqualify [respondent's] counsel" in respondent's suit regarding the petitioner's alleged breach of a loan guaranty.[20] The question presented was whether the respondent's counsel should have been disqualified from representing the respondent in the guaranty suit when the respondent's counsel also represented the petitioner's former lawyer in a legal malpractice action that the petitioner brought against his former attorney.[21]

In overturning the trial court's order that denied the motion to disqualify, the Second District Court of Appeal noted the proper standard of review—that the petitioner was entitled to relief if he could "establish that the circuit court departed from the essential requirements of the law" in a manner that would cause irreparable injury in denying his motion.[22] But the court's analysis amounted to applying the law de novo. The court found that the circuit court applied the wrong legal rule to the petitioner's motion for disqualification and that this was "a departure from the essential requirements of the law."[23] The Florida Supreme Court has explained, however, that an "erroneous" conclusion of law is not *ipso facto* a departure from the essential requirements of the law.[24] That is, certiorari should not be granted simply because a trial court applies the wrong legal rule.[25] Absent a deeper analysis than that set out in *Frye*, it appears that this is exactly what the Second District did. The Second District saw an error of law and corrected it, regardless of

20. *Frye*, 69 So. 3d at 1047.

21. *Id.* The action for legal malpractice included claims for matters related to the petitioner's former lawyer's representation of the petitioner in the defense of the respondent's claims. *Id.*

22. *Id.* at 1049.

23. *Id.* at 1053.

24. *Custer Med. Ctr. v. United Automobile Ins. Co.*, 62 So. 3d 1086, 1093 (Fla. 2010).

25. *Id.* "[B]efore a district court may exercise certiorari jurisdiction to review a decision of a circuit court acting in its appellate capacity, the district court must analyze and develop 'why the [relevant] circuit court's decision constituted a denial of procedural due process, application of incorrect law, or a miscarriage of justice.'" *Id.* (quoting *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 683 (Fla. 2000)).

whether the injury was actually irreparable or could be rectified on full appeal.[26]

B. The *Bradley* Court Reviews and Grants an Arguably Premature Petition for Writ of Certiorari

In *Health Care & Retirement Corp. of America, Inc. v. Bradley*,[27] the Fourth District Court of Appeal likewise implicitly reviewed a certiorari petition de novo—and granted it.[28] The petitioner, Health Care and Retirement Corporation of America (Manor Care), sought certiorari review of a lower court order denying its motion to disqualify opposing counsel.[29]

The underlying lawsuit alleged that incidences of nursing-home neglect, which occurred from January 2002 to September 2005 at a Manor Care facility, resulted in the death of a resident.[30] "The respondent . . . as personal representative of the decedent's estate, hired the law firm of Gordon & Doner, P.A. to pursue her case, [which the firm] filed by complaint on August 24, 2005."[31]

Scott Fischer represented Manor Care from February 2001 to December 2004 in matters concerning nursing-home incidents at the very facility at issue in the lawsuit while working for the law firm of Cole, Scott & Kissane, P.A. (Cole Scott).[32] Fischer left Cole Scott in December 2004 and began working at Gordon & Doner the following week.[33] Fischer became "actively involved in litigating Bradley's suit against his former client, Manor Care."[34] In response, Manor Care moved to disqualify Fischer and Gordon & Doner.[35]

To rebut Manor Care's disqualification motion, Gordon & Doner argued that Fischer had not received any confidential information regarding Manor Care during Fischer's four-year rep-

26. *Frye*, 69 So. 3d at 1054.
27. 944 So. 2d 508.
28. *Id.* at 513.
29. *Id.* at 509.
30. *Id.*
31. *Id.*
32. *Id.* at 509–510.
33. *Id.* at 510.
34. *Id.*
35. *Id.*

resentation.[36] The trial court agreed and denied the motion, finding that Fischer did not receive confidential information from Manor Care that was relevant to this case.[37] The Fourth District Court of Appeal noted, however, that the trial court order "d[id] not reveal whether the lower court applied, or intended to apply, either Rule [Regulating the Florida Bar] 4-1.9 or Rule 4-1.10 to the facts of this case, thus complicating [the appellate court's] review."[38]

Like the Second District Court of Appeal in *Frye*, the Fourth District Court of Appeal mentioned the correct standard of review but then turned to whether the trial court erred in applying the law without evaluating whether it was the kind of irreparable error that could be fixed on plenary appeal.[39] The appellate court granted certiorari, concluding that the trial court "erred in failing to apply Bar Rule 4-1.0, and thus failed to apply the irrefutable presumption."[40] But the lower court had not even determined whether Fischer's representation of Manor Care was the "'same or a substantially related matter,'" which is required to grant an order on a motion for disqualification of counsel.[41] That is, the Fourth District Court of Appeal could have simply relinquished jurisdiction and allowed the lower court to answer the unanswered second question—whether the representation was "'in the

36. *Id.* The trial court concluded that Manor Care had failed to demonstrate "clearly and convincingly" that Fischer's representation would "interfere with the fair and impartial administration of justice." *Id.*

37. *Id.* Rule 4-1.6 states that an attorney's duty of confidentiality continues "after the termination of the attorney-client relationship." *Id.* (referencing R. Regulating Fla. Bar 4-1.6 (Fla. Bar 2006)). The trial court found that Fischer learned no confidences that were material to the case at bar during his time at Cole Scott. *Id.* Accordingly, Manor Care failed its burden to demonstrate "that the newly associated attorney acquired confidential information during his prior representation of the client in the same or substantially related matter." *Id.*

38. *Id.* Rule Regulating the Florida Bar 4-1.9 governs conflicts of interest regarding former clients. Rule 4-1.10 governs the imputation of conflicts of interest regarding the imputation of conflicts to all lawyers in a firm and former clients of a newly associated lawyer. R. Regulating Fla. Bar 4-1.10.

39. *Compare Bradley*, 944 So. 2d at 510 (reciting the certiorari standard without considering whether the issue could be rectified by plenary appeal) *with Frye*, 69 So. 3d at 1049 (same).

40. *Bradley*, 944 So. 2d at 513.

41. *Id.* (quoting R. Regulating Fla. Bar 4-1.9(a)). The Fourth District also declined to determine whether the representation was the "'in the same or a substantially related matter,'" which the court deemed to be the "second factor," because the trial court had failed to apply the irrefutable presumption (the first factor). *Id.* (quoting R. Regulating Fla. Bar 4-1.9(a)).

same or a substantially related matter'"[42]—and perhaps avoided appellate review altogether. This is a proper goal, given that avoiding piecemeal appellate review is almost always preferable.[43]

Instead, the Fourth District Court of Appeal granted relief simply "[b]ecause the lower court *erred* in failing to apply Bar Rule 4-1.9."[44] While this was certainly an error of law, it was hardly an error that amounted to a departure from the essential requirements of law that causes irreparable injury. The error did not amount to a departure from the essential requirements of the law because it remains unclear, after the opinion, whether Fischer even represented Manor Care in the same or a substantially related matter, as demonstrated by the Court having remanded the case with instructions to hold any hearings necessary to address that second question.[45]

If Fischer did not represent Manor Care in the same or a substantially related matter, then his continuing as counsel for the plaintiffs would have not only been acceptable, but a matter of right.[46] In that event, then the trial court's decision to deny the motion to disqualify was correct (albeit, premature) even if the trial court was right for the wrong reason.[47]

In other words, the Fourth District Court of Appeal could not have concluded that the trial judge departed from the essential requirements of law based on the record before it at the time it decided *Bradley*. Because the court granted certiorari, however, the reader must infer that the court did consider the error a departure from the essential requirements of the law that could

42. *Id.* (quoting R. Regulating Fla. Bar 4-1.9(a)).

43. *See Williams v. Oken*, 62 So. 3d 1129, 1134 (Fla. 2011) (noting that "[t]his Court has limited certiorari as a matter of policy to avoid piecemeal review of pretrial orders") (citing *Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214 (Fla. 1998)).

44. *Bradley*, 944 So. 2d at 513 (emphasis added).

45. *Health Care & Ret. Corp. of Am., Inc. v. Bradley*, 961 So. 2d 1071, 1074 (Fla. 4th Dist. App. 2007). After the original Fourth District Court of Appeal decision was remanded, the lower court again denied the motion for disqualification. This denial was subsequently appealed back to the Fourth District Court of Appeal, which then concluded that Fischer did not represent Manor Care in any substantially related matters. *Id.*

46. *See Koller*, 472 U.S. at 441 (Brennan, J., concurring) (noting that "individuals have the right to retain the attorney of their choice to represent their interests in judicial proceedings").

47. James A. Herb & Jay L. Kauffman, *Tales of the Tipsy Coachman: Being Right for the Wrong Reason—The Tipsy Coachman Is Alive and Well and Living in Florida*, 81 Fla. B.J. 11, 11 (2007).

not be remedied on plenary appeal. To avoid that conundrum, the court should have dismissed the petition without prejudice and noted in that order that the parties needed to address the second prong of the motion to disqualify test before either party could seek review of the decision via certiorari petition.[48] If that procedure sounds rather convoluted, please note that it is the certiorari review that makes the process convoluted. If the petitioner could have appealed the case as a non-final order appeal, then the court could have corrected the legal error without exaggerating the error into a departure from the essential requirements of the law.

C. The *Przewoznik* Court Says That the Trial Court Misinterpreted the Law and Grants Certiorari

In *Continental Casualty Co. v. Przewoznik*,[49] the Third District Court of Appeal began the opinion by immediately recasting the appellate standard of review for petitions for writ of certiorari.[50] Although perhaps just an argument about semantics, the Third District Court of Appeal stated that "'certiorari is the proper method to obtain review of a disqualification order because denying a party counsel of his or her choice is a *material* injury without appellate remedy.'"[51] The Third District did not, however, discuss whether the lower court departed from the essential requirements of the law.

Instead, the Third District delved into a factual scenario involving a sunken vessel and an insurance dispute over the amounts paid by the insurance company for the loss of the vessel.[52] The attorney for the insurance company petitioner had previously represented a different insurance company in a prior damage claim for the same vessel.[53] The lower court decided that this circumstance involved an appearance of impropriety that warranted disqualification.[54] This impropriety arose from opposing counsel's thorough familiarity with the prior damage claim, as

48. *K.A.W.*, 575 So. 2d at 633.
49. 55 So. 3d 690.
50. *Id.* at 691.
51. *Id.* (quoting *Event Firm, LLC v. Augustin*, 985 So. 2d 1174, 1175 (Fla. 3d Dist. App. 2008)) (emphasis added).
52. *Id.*
53. *Id.*
54. *Id.* at 692.

a result of having represented the predecessor insurance company that the respondents used to insure the vessel.[55] In making that determination, the trial court relied upon *Kenn Air Corp. v. Gainesville–Alachua County Regional Airport Authority*.[56]

The Third District disagreed with the trial court's interpretation of *Kenn Air* and reversed.[57] The court ruled that the boat owners did not have standing to complain about the fact that its insurance company's counsel had previously worked for a different insurance company that they had used to insure the boat.[58] Although it is easy to say that the Third District answered the question correctly as a matter of law, it is hard to see where the lower court "departed from the essential requirements of the law."[59] A departure from the essential requirements of the law, of course, is much more than just incorrectly applying the law.[60] But the Third District determined without explanation that an incorrect application of the law amounted to a departure from the requirements of the law.[61] As discussed previously,[62] however, misinterpretation of the law is generally not enough to grant a petition of certiorari.[63] "Rather, a district court should exercise its

55. *Id.* at 691–692, 694.

56. *Id.* at 691–693 (citing 593 So. 2d 1219 (Fla. 1st Dist. App. 1992)). The *Kenn Air* court explained that "'consideration of the public's perception of the integrity of the bar, and the appearance of impropriety that arises in situations in which an attorney switches sides'" are relevant considerations in adjudging a motion to disqualify counsel. *Id.* at 693 (quoting *Kenn Air*, 593 So. 2d at 1223).

57. *Id.* at 692, 694.

58. *Id.* at 694.

59. *Id.*; *see Custer Med. Ctr.*, 62 So. 3d at 1092 (noting that a district court's consideration of a writ of certiorari "is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law, or, as otherwise stated, departed from the essential requirements of law") (citation omitted) (internal quotation marks omitted).

60. *See Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000) (stating that "the departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error").

61. *See Przewoznik*, 55 So. 3d at 694 (rejecting the trial court's decision, which was based on the attorney's alleged representation of another insurance company in a prior action regarding the same sunken vessel, because the case did "not involve circumstances where the law firm either disclosed confidences learned from representing [r]espondents or switched sides in violation of the Rules of Professional Conduct").

62. *See supra* pt. II(A) (discussing how certiorari review for disqualification motions actually appears more akin to de novo review).

63. This is because "a circuit court appellate decision made according to the forms of law and the rules prescribed for rendering it, *although it may be erroneous in its conclusion* as to what the law is as applied to facts, is *not* a departure from the essential requirements of law remediable by certiorari." *Custer Med. Ctr.*, 62 So. 3d at 1093.

discretion to grant [certiorari] review only when the lower tribunal has violated a clearly established principle of law resulting in a miscarriage of justice."[64] In other words, as a matter of de novo review, the Third District Court of Appeal's determination made sense.[65] As a matter of certiorari review, however, the determination flew in the face of the purported standard of review.[66] In order to demonstrate that the error amounted to a departure from the essential requirements of the law, the court should have clarified that the loss of counsel, based on the incorrect application of *Kenn*, amounted to manifest injustice from which irreparable injury would arise but for certiorari relief. Without that clarification, *Przewoznik* reads as if the Court applied de novo review and nothing more.

III. THE COURTS' PRACTICES COMPEL A CHANGE TO THE MANNER IN WHICH THESE CASES ARE REVIEWED

The discussion above demonstrates that Florida's appellate courts have tried to respect explicitly the proper certiorari standard of review while implicitly reviewing the decision of whether to disqualify counsel de novo. The decision to describe the standard as one of certiorari while actually adopting a de novo standard is understandable, given that the standard of review for common law certiorari is a matter of ongoing controversy in the courts[67] and that the right to counsel of one's own choice is worthy of the utmost protection.[68]

That being said, the more reasonable way to protect the right to choose one's counsel is to move the appellate avenue for review from a petition for a writ of certiorari to Florida Rule of Appellate Procedure 9.130, which identifies the interlocutory orders that are immediately appealable without waiting for a final order.[69]

64. *Id.* at 1092.

65. This conclusion makes sense because counsel for the two insurance companies was in no position to gather confidential information from the boat owners. He never represented them, thus there was no attorney-client privileged information at stake.

66. *See* Altenbernd & Marcario II, *supra* n. 5, at 1 (explaining that while district courts of appeal claim to apply the certiorari standard for review of disqualification motions, the courts appear to review de novo).

67. *See generally* Sylvia H. Walbolt & Leah A. Sevi, *The "Essential Requirements of the Law"—When Are They Violated?* 85 Fla. B.J. 21 (Mar. 2011) (providing an overview of the role of common law certiorari in Florida courts).

68. *Koller*, 472 U.S. at 441 (Brennan, J., concurring).

69. Fla. R. App. P. 9.130(a)(3).

The Florida Supreme Court has exclusive authority to establish the types of non-final orders appealable under this rule.[70] Over the years, the number of non-final orders appealable pursuant to Rule 9.130 has grown,[71] with each addition having its own reason for inclusion as an appealable non-final order, each likely worth its own article.[72]

The Florida Supreme Court has yet to enhance the protection of the right to pick one's counsel by way of adding it to Rule 9.130,[73] which would codify disqualification-motion orders as immediately appealable interlocutory orders.[74] Although the courts correctly protect this right via certiorari so as to ensure that the right to choose one's own attorney and the protection of the judicial system's appearance of fairness are properly weighed as soon as possible, that does not mean that certiorari is the best way to address these competing concerns.

First, protecting the right by way of certiorari while using an unspoken de novo standard of review invites unwitting judicial mischief. As Judge Altenbernd and Jamie Marcario put it: "as applied to non[-]final orders in pending circuit court cases, the current [certiorari] test is inherently unpredictable because it contains no objective standards and often requires each judge to inject his or her own unstated policies into these proceedings."[75] That unpredictability is exacerbated when the courts willingly set aside the ambiguous standard and adopt their own de novo standard more or less *sub silentio*. One purpose of legal opinions is to force the court to explain with clarity why the court ruled in the manner it did, so as to engender confidence in the rule of

70. *R. J. B. v. State*, 408 So. 2d 1048, 1050 (Fla. 1982).

71. For example, in 2000, the Florida Supreme Court amended Rule 9.130 to include appellate review of certain lower court decisions. *Amends. to Fla. R. of App. P.*, 780 So. 2d 834, 838 (Fla. 2000).

72. *See e.g.* Fla. R. App. P. 9.130(a)(3) (listing the trial court orders subject to interlocutory appeal).

73. *Id.*

74. Codifying disqualification motions under Rule 9.130 would permit immediate appeal of an order ruling on a motion to disqualify counsel. *Id.* This would provide more certainty in the appeal when compared to the certiorari process, which is inherently unpredictable and devoid of an objective standard. Chris W. Altenbernd & Jamie Marcario, *Certiorari Review of Nonfinal Orders: Does One Size Really Fit All? Part I*, 86 Fla. B.J. 21 (Feb. 2012) [hereinafter Altenbernd & Marcario I]; *see Frye*, 69 So. 3d at 1049 (noting that "[o]rders granting or denying motions to disqualify a party's attorney are reviewable by certiorari").

75. Altenbernd & Marcario I, *supra* n. 74, at 21.

law.[76] When a court says it has adopted one standard but in fact has applied another, the attorneys and even clients can read the opinion and deduce that what was said is different from what was done, and the system of justice loses the sheen of principle and impartiality that legal opinions are meant to burnish, not dull.[77]

Second, for the law to be seen as fair, the law must appear reliable and readily understandable to the litigants and the attorneys charged with following the law.[78] A trial judge's improper balancing of the right to counsel against the need for the appearance of fairness in the judicial system can hardly be said to be a departure from the essential requirements of the law, but that is what the appellate courts must say under the current system to review these orders. It is better to move this type of order, which balances important concerns worthy of immediate appeal, into the realm of orders that are appealable under Rule 9.130, and then employ the de novo review standard applied to these orders.[79] By doing so, the litigants and attorneys will be on notice that the order is subject to de novo review, rather than the stricter certiorari review. Thus, parties will not be lulled to a false

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76. Fed. Jud. Ctr., *Judicial Writing Manual* vii (4th Ed. 1991) (available at http://www.fjc.gov/public/pdf.nsf/lookup/JudiWrit.pdf/$file/JudiWrit.pdf).

> It is therefore not enough that a decision be correct—it must also be fair and reasonable *and readily understood*. The burden of the judicial opinion is to explain and to persuade and to satisfy the world that the decision is principled and sound. What the court says, and how it says it, is as important as what the court decides.

Id. (emphasis added).

77. *Id.*

78. *See* P.S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* 23 (Clarendon Press 1987) (discussing the advantages of highly specific, detailed rules of law).

> [D]etailed and precise rules with high content formality are often found preferable to broad rules of very low content formality. Statutory codes governing the safety of industrial workplaces, for example[,] . . . often lay down in minute detail such matters as the precise dimensions of safety features . . . . Employers clearly must find most of these easier to understand and to comply with than the common law rules of reasonable care, and breach of them is also more easily provable.

Id.

79. *See* Altenbernd & Marcario I, *supra* n. 74, at 23 (discussing some of the issues arising during review of disqualification motions that result in the application of a de novo review standard).

sense of security by the mistaken belief that obtaining certiorari relief is supposed to be an unusual, extraordinary remedy.[80]

IV. CONCLUSION

Justice William Brennan of the Supreme Court of the United States once explained that

> [a] fundamental premise of the adversary system is that individuals have the right to retain the attorney of their choice to represent their interests in judicial proceedings. To be sure, that right is qualified. A court need not, for example, permit an individual to retain anyone at all, regardless of qualifications, to represent him [or her] in open court. Nor must a court continue to permit an individual to be represented by an attorney who by his [or her] misconduct in open court has threatened the integrity of the proceedings. Nonetheless, if an attorney is adequately qualified and has not otherwise acted so as to justify disqualification, the client need not obtain the permission of the court or of his [or her] adversary to retain the attorney of his [or her] choice.[81]

Although the adversary should not have to give permission to allow a party to hire counsel, too often an adversary—perhaps scrupulous, perhaps not—will resort to a motion to disqualify counsel in order to advance a client's cause.[82] Recognizing the importance of such a motion, Florida courts have correctly taken steps to ensure that this issue is addressed before the case has reached a final order, and money has been spent, all to find out that the case should never have been tried in the first place because counsel should have been, or should not have been, disqualified. The Florida Supreme Court should improve this system of interlocutory review by changing the manner in which these orders are reviewed from writ of common law certiorari to non-final appeal through Florida Rule of Appellate Procedure 9.130. By doing so, the Court will bring more transparency and reliability to our State's justice system.

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80. *E.g. Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822 (Fla. 2004). In *Reeves*, the Florida Supreme Court held that a trial court's "simple denial of summary judgment" does not permit an appellate court to exercise its certiorari jurisdiction. *Id.*

81. *Koller*, 472 U.S. at 441 (Brennan, J., concurring).

82. *See* Burger, *supra* n. 14 (discussing the potential impacts of a motion to disqualify opposing counsel).

9.140 & 9.146 Proposed Rule Changes

Thomas Hall to T. Kent Wetherell 09/29/15 4:07PM
cc: Heather Telfer

Please see below.

Apparently this is big issue in the trial courts. Lawyers are interpreting the current rule language to mean they do not serve the court reporter with the designation of the court reporter. I think they think the clerk does it, but the clerk doesn't do it. Amy, who is general counsel for the 15th circuit, discussed with me yesterday and sent this email suggesting language although she is not married to the suggestion.

I made a couple of calls and this seems to be a problem in other circuits too.

I would suggest we assign to the appropriate committee to look at this. Let me know how I can help, if you agree.

From: Amy Borman [mailto:ABorman@pbcgov.org]
Sent: Monday, September 28, 2015 1:54 PM
To: Thomas Hall
Cc: Melissa Sotillo
Subject: 9.140 & 9.146 Proposed Rule Changes

Tom -

Thanks for taking the time to speak with us today. As mentioned, our court reporting office is running into a situation where attorneys are not serving it with a copy of the designation. Consequently, transcripts are not being sent to the clerk's office for timely submission to the District Court of Appeal. This is turn creates additional reports that must be filed explaining why the transcripts have not been timely filed.

Below are the appellate rules that would need to reviewed to address the issues of attorneys serving the court reporting office/court reporting with a copy of the designation. Rough suggestions are in red. This will create a electronic service issue on the court reporters.

Amy

<u>Rule 9.140</u>
(d) Withdrawal of Defense Counsel after Judgment and Sentence or after Appeal by State.
(1) The attorney of record for a defendant in a criminal proceeding shall not be relieved of any professional duties, or be permitted to withdraw as May 11, 2015 Florida Rules of Appellate Procedure 45 defense counsel of record, except with approval of the lower tribunal on good cause shown on written motion, until either the time has expired for filing an authorized notice of appeal and no such notice has been filed by the defendant or the state, or after the following have been completed:
(A) a notice of appeal or cross-appeal has been filed on behalf of the defendant or the state;
(B) a statement of judicial acts to be reviewed has been filed if a transcript will require the expenditure of public funds;
(C) the defendant's directions to the clerk have been filed, if necessary;
(D) designations to the approved court reporter or approved transcriptionist have been **served on the official court reporter** and filed for transcripts of those portions of the proceedings necessary to support

the issues on appeal or, if transcripts will require the expenditure of public funds for the defendant, of those portions of the proceedings necessary to support the statement of judicial acts to be reviewed; and…..

Rule 9.140

(2) Transcripts.
(A) If a defendant's designation of a transcript of proceedings requires expenditure of public funds, trial counsel for the defendant (in conjunction with appellate counsel, if possible) **shall serve**, within 10 days of filing the notice, a statement of judicial acts to be reviewed, and a designation to the approved court reporter or approved transcriptionist requiring preparation of only so much of the proceedings as fairly supports the issue raised.
(B) Either party may file motions in the lower tribunal to reduce or expand the transcripts.
(C) Except as permitted in subdivision (f)(2)(D) of this rule, the parties shall **serve a designation on** ~~designate~~ the approved court reporter or approved transcriptionist to file with the clerk of the lower tribunal the transcripts for the court and sufficient paper copies for all parties exempt from service by e-mail as set forth in the Florida Rules of Judicial Administration
(D) Non-indigent defendants represented by counsel ~~may~~ **shall serve a designation on** ~~designate~~ the approved court reporter or approved transcriptionist to prepare the transcripts. Counsel adopting this procedure shall, within 5 days of receipt of the transcripts from the approved court reporter or approved transcriptionist, file the transcripts. Counsel shall serve notice of the use of this procedure on the attorney general (or the state attorney in appeals to circuit court) and the clerk of the lower tribunal. Counsel shall attach a certificate to each transcript certifying that it is accurate and complete. When this procedure is used, the clerk of the lower tribunal upon conclusion of the appeal shall retain the transcript(s) for use as needed by the state in any collateral proceedings and shall not dispose of the transcripts without the consent of the Office of the Attorney General.
(E) In state appeals, the state shall **serve a designation on** ~~designate~~ the approved court reporter or approved transcriptionist to prepare and file with the clerk of the lower tribunal the transcripts and sufficient copies for all parties exempt from service by e-mail as set forth in the Florida Rules of Judicial Administration. Alternatively, the state may elect to use the procedure specified in subdivision (f)(2)(D) of this rule.
(F) The lower tribunal may by administrative order in publicly-funded cases direct the clerk of the lower tribunal rather than the approved court reporter or approved transcriptionist to prepare the necessary transcripts.

Rule 9.146

8 (B) Transcripts of Proceedings. The appellant shall serve ~~file~~ a designation on ~~to~~ the court reporter and file the designation with the clerk, including the name(s) of the individual court reporter(s), if applicable, with the notice of appeal. The designation shall be served on the court reporter on the date of filing and shall state that the appeal is from a final order of termination of parental rights or of dependency, and that the court reporter shall provide the transcript(s) designated within 20 days of the date of service. Within 20 days of the date of service of the designation, the court reporter shall transcribe and file with the clerk of the lower tribunal the transcripts and sufficient copies for all parties exempt from service by e-mail as set forth in the Florida Rules of Judicial Administration. If extraordinary reasons prevent the reporter from preparing the transcript(s) within the 20 days, the reporter shall request an extension of

time, shall state the number of additional days requested, and shall state the extraordinary reasons that would justify the extension.

Heather- please forward this email to the members of the criminal rules subcommittee and Betty Wheeler-

Thanks.

***

Subcommittee members-

We have one pending issue that we need to address concerning rule 9.140(f)(6). This issue arises as a result of the amendments to the criminal rules adopted by the Supreme Court in April. Upon issuance of the court's opinion, Chair Ufferman asked the subcommittee to consider whether rule 9.140(f)(6) needed to be amended in light of the court's addition in the criminal rules of a time period to request rehearing of an order disposing of a rule 3.800(b) motion. The subcommittee met and agreed that the appellate rule needed to be amended to give the clerk additional time to supplement the record with the 3.800(b) motion/order and we proposed two options for the full committee's consideration. During voting, a concern was raised with the language and the matter was referred back to the subcommittee for further work.

To refresh your recollection (and to bring new subcommittee members up to speed), the attached emails provide the background for the rule amendment as well as the proposed language and the concern that led to the proposed language being sent back to the subcommittee for further work.

By separate email, I will be asking Heather to coordinate a conference call to re-work the proposed language. Betty (Wheeler, I assume) raised the concerns with the proposed language and I will ask her to join the conference call as well.

Also, the committee that proposed the criminal rule amendments filed a motion for rehearing that, according to the Supreme Court's online docket, is still pending. Perhaps someone (Heather or Vice Chair Kristen Norse) could get a copy of the motion to determine whether this issue was brought to the Court's attention even though no language was provided by our committee. Chair Ufferman's attached email indicates that he was going to send a letter to the court advising them that we were working on the issue if it was not addressed in the committee's rehearing motion, but no such letter is on the docket, which might indicate that the issue was indeed noted in the committee's rehearing motion (and, thus, might be solved by the court on its own before we get around to doing so).

TKW

----- Message from Michael Greenberg <MGreenberg@flabar.org> on Mon, 22 Apr 2013 15:38:51 -0400 -----

To: "mgreenberg@flabar.org" <mgreenberg@flabar.org>, Judge Kent Wetherell <wetherellk@1dca.org>, "mdavis@p
<af@kubickidraper.com>, "wendyloquasto@flappeal.com" <wendyloquasto@flappeal.com>, "jacqulyn@macklawf
law.com>, "ken.nunnelley@myfloridalegal.com" <ken.nunnelley@myfloridalegal.com>, "spalmer@sao10.com" <s
"shea@sheappeals.com" <shea@sheappeals.com>, "dwight.slater@myfloridacfo.com" <dwight.slater@myflorida
cc: "Ufferman@uffermanlaw.com" <Ufferman@uffermanlaw.com>, Heather Telfer <HTelfer@flabar.org>
Subject: Review of New Rule Amendments

Dear Criminal Practice Subcommittee Members,

The Court issued an opinion approving some rule changes and rejecting others. Michael Ufferman is requesting that we review the approved rule changes and determine any ripple effect these changes may have on other appellate rules that the Court may have missed but can be pointed out in a motion for rehearing that is planned to be filed on Friday. Please see Michael's e-mail and attachments below and in your response also include Michael Ufferman. If possible we would like to have your comments before the end of the day tomorrow. Thank you.

Michael,

As we discussed on the phone, I am forwarding you the opinion from last Thursday and the links to what the ACRC submitted to the FSC. Judge Hankinson has asked us to review the FSC's opinion to ensure that there are no glitches in the proposed appellate rules (and I am forwarding Judge Hankinson's email to you in a separate email).

Please ask your subcommittee to review the FSC's opinion and the proposed appellate rules.

I would like the subcommittee to look at 2 things in particular.

First, when we submitted our proposals, we suggested that rule 9.140 be amended to clarify that the State can appeal rule 3.801, 3.850 and 3.851 orders. Although the FSC added rule 3.801 to the list of orders that the State can appeal, the FSC did not add 3.850 or 3.851 (even though the FSC did add agree with our suggestion to add rule 3.851 to the list of orders that a defendant can appeal). Should we ask the FSC to again consider making this change? I am concerned that if this change is not made, it will leave open an argument that the State cannot appeal rule 3.850 and 3.851 orders.

Second, the FSC adopted a rehearing window for rule 3.800(b) (i.e., a party can file a motion for rehearing within 15 days of the date that a trial court issues an order). However, under current rule 9.140(f)(6)(A), a clerk is directed to automatically supplement the record within 5 days of the date that a trial court rules on a rule 3.800(b) motion. Thus, the record will be supplemented before the expiration of the deadline for filing a motion for rehearing (and pursuant to rule 3.800(b)(2), the initial brief is due 10 days after the record is supplemented). I can think of a couple of ways to solve this: (1) the time period under 9.140(f)(6)(A) should be extended and a clerk should not supplement the record until after the deadline has passed for filing a motion for rehearing or (2) if a party files a motion for rehearing, the party should file a notice with the appellate court (similar to the notice that is now required when a party files a rule 3.800(b) motion).

http://www.floridasupremecourt.org/decisions/2013/sc11-1679.pdf

http://www.floridasupremecourt.org/clerk/comments/2011/11-1679_111011_Comment%20(AppellateCourtRulesCom).pdf

http://www.floridasupremecourt.org/clerk/comments/2011/11-1679_111011_Appendix%20B%20-%20Comment%20(AppellateCourtRulesCom).pdf

http://www.floridasupremecourt.org/clerk/comments/2011/11-1679_111011_Appendix%20E%20-%20Comment%20(AppellateCourtRulesCom).pdf

From: James Hankinson [mailto:HankinsonJ@leoncountyfl.gov]

Sent: Sunday, April 21, 2013 10:31 AM
To: 'ufferman@uffermanlaw.com'
Cc: Kevin Emas
Subject: Fwd: RE: yesterday opinion

Have you looked at the Supreme Court's recent ruling on the rule amendments? If not, I would ask that you do so. I am not as familiar with the appellate rules as with the criminal rules. Since they rejected some changes and accepted some changes, I want to make sure there aren't any inadvertent glitches in the appellate rules like the one noted below in the criminal rules. We have to file our petition for rehearing by Friday. We are just looking to identify inadvertent mistakes, not argue anything substantive.
Judge Hankinson

>>> Judge Kevin Emas <emask@flcourts.org> 4/19/2013 12:08 PM >>>
I just received a call from Elaine Neu, the general counsel for the 6th Circuit, and Melissa Landry, a staff attorney. They pointed out two issues which may require clarification/rehearing:
1. New Rule 3.801(b) now provides that a motion for correction of jail credit must be filed within one year from the date the sentence becomes final. However, because the Court did not adopt the recommended changes to 3.800(a), that rule continues to read:
"A court may at any time correct an illegal sentence imposed by it, or an incorrect calculation made by it in a sentencing scoresheet, or a sentence that does not grant proper credit for time served when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief…." This obviously needs to be changed to reflect that jail credit can only be corrected through 3.801 (which the commentary states, but is not expressly provided in the language of rule 3.801).
2. The Court added (on its own) the language in 3.800(b)(1)(B), which states: "The trial court's order disposing of the motion for rehearing shall be filed within 15 days of the response but not later than 40 days from the date of the order of which rehearing is sought. If no order is filed within 40 days, the motion is deemed denied." However, the Court did not expressly provide that a response to the motion for rehearing shall (or may) be filed or a timeframe within which the response to the motion is to be filed. If a response is to be required, it limits the amount of time a court will have to rule on the rehearing (since the court must rule within 40 days of the date of the order. So for example, if the motion for rehearing is filed 15 days after the order is filed, and the court, 5 days later, orders a response within 15 days, 35 days have now passed, leaving the court 5 days to rule on the motion for rehearing or it is deemed denied. (I'm not sure this last issue is appropriate for rehearing, but we should consider seeking clarification regarding the reference to a "response" in 3.800(b)(1)(B) since it is not referenced elsewhere within that subdivision).

Kevin Emas
Kevin Emas
Judge, Third District Court of Appeal
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Miami, FL 33175
(305) 229-3200 Ext. 3213
emask@flcourts.org

Michael C. Greenberg, Senior Attorney
The Florida Bar, Ft. Lauderdale Office
Lakeshore Plaza II, Suite 130
1300 Concord Terrace
Sunrise, FL 33323
(954) 835-2827
----- Message from Michael Ufferman <ufferman@uffermanlaw.com> on Tue, 30 Apr 2013 07:24:17 -0400 -----

To: Judge Kent Wetherell <wetherellk@1dca.org>
Subject: RE: Potential issues regarding the 2 proposals to fix rule 9.140(f)(6)

I don't know. The problem actually existed before the FSC's recent amendment – I think the amendment just brought the problem to our attention. If the rehearing motion does not mention the problem, then I will send a letter to Tom Hall explaining that the ACRC is aware of the problem and that we are working on a proposed solution.

Michael Ufferman
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www.uffermanlaw.com

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From: Judge Kent Wetherell [mailto:wetherellk@1dca.org]
Sent: Monday, April 29, 2013 8:38 PM
To: Michael Ufferman
Subject: Re: Potential issues regarding the 2 proposals to fix rule 9.140(f)(6)

I assume the steering committee is going to let the court know their rehearing language (which i still think is a bad idea to begin with) is going to cause a problem with 9.140f6 but then just tell them they don't have a solution yet?

On Apr 29, 2013, at 8:31 PM, "Michael Ufferman" <ufferman@uffermanlaw.com> wrote:

Betty Wheeler pointed out the following concerns regarding the two proposals:

Option A:
The clerk of circuit court shall automatically supplement the appellate record with any motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), any response, any motion for rehearing and response thereto, any resulting orders, and any amended sentence.

(i) The clerk shall electronically transmit the supplement to the appellate court within 15 days ofafter the filing of the order ruling on the rule 3.800(b)(2) motion, unless a timely motion for rehearing is filed. If an order is not filed within 60 days from the filing of the rule 3.800(b)(2) motion, this time shall run from the expiration of the 60 day period, and the clerk shall supplement the record with the rule 3.800(b)(2) motion and a statement that no order was timely filed.

(ii) If a timely motion for rehearing is filed, the supplement shall be transmitted within 5 days of the filing of the order disposing of the motion for rehearing. If an order disposing of the motion for rehearing is not filed within 40 days from the date of the order of which rehearing is sought, this time shall run from the expiration of the 40 day period, and the clerk shall include a statement in the supplement that no order on the motion for rehearing was timely filed.

Betty's concern is that subsection (i) does not cover the situation where no order is filed in 60 days but a motion for rehearing is then filed within 15 days of the day that the 60-day period expired (I may disagree with Betty, but it is nevertheless worthwhile to consider her concern to see if the proposal can be worded better).

Option B:

The clerk of the circuit court shall automatically supplement the appellate record with any motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), any response, any resulting order, and any amended sentence. The clerk shall electronically submittransmit the supplement to the appellate court within 520 days of the filing of the order ruling on the motion, if no motion for rehearing was filed or within 5 days of the filing of the order ruling on the motion for rehearing. If an order is not filed within 60 days from the filing of the motion, this time shall run from the expiration of the 60 day period, and the clerk shall supplement the record with the motion and a statement that no order was timely filed.

Betty's concern is that Option B does not include the language accounting for the 40-day period if no order is filed pursuant to a motion for rehearing.

Hopefully these concerns will be helpful when the Criminal Practice Subcommittee considers the best way to amend rule 9.140(f)(6).

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(i) The clerk shall electronically transmit the supplement to the appellate court within 15 days ~~of~~after the filing of the order ruling on the rule 3.800(b)(2) motion, unless a timely motion for rehearing is filed. If an order is not filed within 60 days from the filing of the rule 3.800(b)(2) motion, this time shall run from the expiration of the 60 day period, and the clerk shall supplement the record with the rule 3.800(b)(2) motion and a statement that no order was timely filed.

(ii) If a timely motion for rehearing is filed, the supplement shall be transmitted within 5 days of the filing of the order disposing of the motion for rehearing. If an order disposing of the motion for rehearing is not filed within 40 days from the date of the order of which rehearing is sought, this time shall run from the expiration of the 40 day period, and the clerk shall include a statement in the supplement that no order on the motion for rehearing was timely filed.

Betty's concern is that subsection (i) does not cover the situation where no order is filed in 60 days but a motion for rehearing is then filed within 15 days of the day that the 60-day period expired (I may disagree with Betty, but it is nevertheless worthwhile to consider her concern to see if the proposal can be worded better).

Option B:

The clerk of the circuit court shall automatically supplement the appellate record with any motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), any response, any resulting order, and any amended sentence. The clerk shall electronically submit~~transmit~~ the supplement to the appellate court within ~~5~~20 days of the filing of the order ruling on the motion, if no motion for rehearing was filed or within 5 days of the filing of the order ruling on the motion for rehearing. If an order is not filed within 60 days from the filing of the motion, this time shall run from the expiration of the 60 day period, and the clerk shall supplement the record with the motion and a statement that no order was timely filed.

Betty's concern is that Option B does not include the language accounting for the 40-day period if no order is filed pursuant to a motion for rehearing.

Hopefully these concerns will be helpful when the Criminal Practice Subcommittee considers the best way to amend rule 9.140(f)(6).

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FW: Appellate Rules

ewheeler to: Heather Telfer, wendyloquasto 09/03/2014 10:16 AM

Heather and Wendy – Please see the e-mail below from Lonn Weissblum, the new Clerk at the 4th DCA. I had communicated with him about revising the font and page requirements for briefs, so he had my name as a potential contact for ACRC. Please consider it as a referral.

Betty

Elizabeth C. Wheeler
Elizabeth C. Wheeler, P.A.
Post Office Box 2266
Orlando, FL 32802-2266
(407) 650-9008

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Appellate Practice
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From: Lonn Weissblum [mailto:WeissblumL@flcourts.org]
Sent: Wednesday, September 03, 2014 8:50 AM
To: ewheeler@ewheelerpa.com
Subject: Appellate Rules

Betty,

We had one more bit of feedback from a judge, so I wanted to pass it along:

Presently, Rule 9.141(b)(2)(A) and (B) provide that where a postconviction motion is summarily denied, the record consists only of the motion, response, reply, etc, and the order. It does not include the final judgment of conviction and sentence or the trial or anything else. It also does not require any of these documents to be indexed or paginated. This has been a source of great frustration for many years. Summary records are sometimes huge, and they can be a mess when not indexed or paginated. Also, it is often necessary to see the Final Judgment of conviction and sentencing documents. A trial transcript may also be necessary. I think that the rule should be revised to require pagination and indexing of all documents and for inclusion at the very least of the conviction and sentence, trial transcript or plea hearing, if available.

Lonn Weissblum
Clerk of the Court
Fourth District Court of Appeal
1525 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
(561) 242-2015
WeissblumL@flcourts.org

request for the ACRC to consider a rule amendment

Michael Ufferman to: 'Heather Telfer' 06/18/2014 10:54 AM

Hello Heather – I hope all is well with you!

I have a request for the ACRC to consider an amendment to rule 9.141. Generally, an appellant may filed directions to the clerk within 10 days of filing the notice of appeal. See Fla. R. App. P. 9.200(a)(3). However, it is not clear that this 10-day time period applies to appeals involving criminal postconviction cases following an evidentiary hearing. Rule 9.141(b)(3)(B)(ii) states that "Appellant may direct the clerk to include in the record any other documents that were before the lower tribunal at the hearing." Thus, the current version of rule 9.141(b)(3)(B)(ii) does not contain a time period for filing the directions.
I recently had a case (i.e., a criminal postconviction case following an evidentiary hearing) where I filed my directions to the clerk on the 9th day following the date that the notice of appeal was filed. However, the clerk had transmitted the record on appeal on the 8th day following the date that the notice of appeal was filed, and the clerk had not included in the record several items that I listed in my directions. The clerk subsequently called me and said that I would need to file a motion to supplement the record in the DCA. I asked why she filed the record before the 10th day, and she said that the 10-day time period for filing directions applies only to direct appeals – not postconviction appeals. Of course I disagree with her, but in order to clarify this matter, I suggest that rule 9.141(b)(3)(B)(ii) be amended to state" "Within 10 days of filing the notice of appeal , an appellant may direct the clerk to include in the record any other documents that were before the lower tribunal at the hearing." Such an amendment would resolve any confusion regarding the time period for filing directions in postconviction appeals and would make rule 9.141(b)(3)(B)(ii) consistent with rule 9.200(a)(3).

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ACRC 9.146 referral

Stephanie Zimmerman to: wendyloquasto 10/10/2014 09:47 AM

Cc: HTelfer

Wendy,

I propose that the Appellate Court Rules Committee examine whether Florida Rule of Appellate Procedure 9.146 needs to be revised (1) to be consistent with the other rules of appellate procedure, (2) to reflect the practice of the times, and (3) to ensure the procedures in the rule are still consistent with the purposes of the rule's intention of expedited review of dependency and termination of parental rights cases. After litigating these appeals, I have identified a few subsections that could be better. I suggest we at least consider the following:

Whether Rule 9.146(c)(1) should have language similar to Rule 9.310(f) to make clear that review of stay orders in the lower tribunal can be sought in appellate court. Currently, Rule 9.310(f) does not apply to allow appellate review of trial court denials of stay requests in dependency cases because Rule 9.310(f)'s scope is limited to orders entered "under this rule."

Whether Rule 9.146(c)(2) needs to include "or lower tribunal" to make it clear that either a stay order from the appellate court or the trial court can stay the proceeding pursuant to (c)(1). Right now, the subsection suggests that only appellate court orders can stay the proceedings, but requires that stay be sought first in the lower tribunal.

Whether Rule 9.146(f) needs to address confidentiality of electronically filed documents

Whether Rule 9.146(g)(4)(b) should address transmission of the record and create a uniform process when a parent's counsel moves to withdraw under either N.S.H. v. Department of Children & Family Services, 843 So. 2d 898 (Fla. 2003) or Ostrum v. Department of Health & Rehabilitative Services, 663 So. 2d 1359 (Fla. 4th DCA 1995). I understand that the five DCAs each have a different order used in these situations. Some of these order require automatic transmission of the record to the pro se parent. Some do not. I believe the disparity in practice is a result of the lack of guidance in the rule.

Thanks for the consideration,

Stephanie C. Zimmerman
Department of Children & Families
Children's Legal Services
Statewide Appeals Director
9393 N. Florida Ave, Suite 900
Tampa, FL 33612

From: Robert J. Hauser [mailto:hauser@Pankauskilawfirm.com]
Sent: Tuesday, April 14, 2015 3:00 PM
To: wendyloquasto@flappeal.com; thall@mills-appeals.com
Subject: ACRC issue

Dear ACRC Leadership:

I just received an order to show cause in a Rule 9.170 appeal telling me they want to dismiss because no record was transmitted by the lower court clerk.
Of course, no record is ever going to be prepared, by designation of the parties.
Both parties briefed this appeal quickly and submitted appendices in accordance with 9.170(c); a proper designation that no record is requested under Rule 9.170(c) was filed below.
However, in fairness to the clerk of the DCA, the rule we put in place as of 1/1/15 does not provide a mechanism to notify the clerk of the DCA that no record is expected.
Unless the DCA clerks can adapt to Rule 9.170 like they did with Rule 9.130 (where no record is expected); I think some the rule needs to call for notice from the parties or the lower court clerk letting the DCA know that no record is forthcoming pursuant to the direction of the parties. Otherwise they don't know what to expect.
In addition, I think Rule 9.170(c) should be amended to provide like 9.130(d) that the DCA may itself order a record to be transmitted at its election.

Thank you and good luck.

Rob Hauser

Robert J. Hauser
Shareholder
Board Certified by The Florida Bar in Appellate Practice

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ACRC – Potential Issues with Rule 9.190

A review of Rule 9.190, conducted by the chair and vice-chair of the Administrative Law Practice Subcommittee to make sure that its statutory references are correct and up-to-date, revealed the following potential issues that the ACRC may wish to consider:

1. Rule 9.190(c)(2)(A) and (B): Although technically correct, the wording of these subsections may confuse some. Specifically, both (A) and (B) reference section 120.569, Florida Statutes, without clarifying that (A) concerns the record in decisions which affect substantial interests involving disputed issues of material fact, and (B) concerns the record in decisions which affect substantial interests involving no disputed issue of material fact. The ACRC may wish to revisit the wording of these two subsections, or perhaps consider inserting a title at the beginning of each subsection.

2. Rule 9.190(c)(2)(D) and (E): (D) references "section 120.574 (summary proceeding)," when section 120.574, Florida Statutes, is entitled "Summary Hearing." (E) references "section 120.54 (rule adoption)," when section 120.54, Florida Statutes, is entitled "Rulemaking," and it is subsection (3) of that statute that specifically addresses administrative rule "adoption." The ACRC may wish to consider amending these two subsections to accurately reflect the statutory titles, and also to clarify whether the Rule is intended to reference section 120.54 in its entirety, or subsection (3) specifically.

3. Rule 9.190(e): This subsection concerns stays pending review, and states, in pertinent part, "The filing of a notice of administrative appeal or a petition seeking review of

administrative action shall not operate as a stay, except that such filing shall give rise to an automatic stay as provided in rule 9.310(b)(2) or chapter 120, Florida Statutes . . . ." However, Rule 9.310(b)(2) did away with the automatic stay for public bodies and public officers, except in public records and public meeting matters. The ACRC may wish to consider amending this subsection to more closely align with Rule 9.310(b)(2), if it feels that Rule 9.190(e) is confusing or does not accurately reflect the effect of Rule 9.310(b)(2).

From: Heather Telfer [mailto:HTelfer@flabar.org]
Sent: Monday, March 17, 2014 2:04 PM
To: Sanchez, Eduardo (USAFLS)
Subject: ACRC - New Referral

Good Afternoon,

Jodi Jennings suggested that ACRC may want to look into adding what needs to be filed, based on the Court, into the Rules. Before the e-filing opinion came out, Rule 9.210(g) detailed how many copies of pleadings each Court required. At this point, the Courts only want the one version, which is filed through the portal, but that isn't actually stated in the rules. Should the General Practice Subcommittee review this as well? Or the e-filing subcommittee?

Thanks,

Heather

Heather S. Telfer
Attorney Liaison - Rules
The Florida Bar
850-561-5702
htelfer@flabar.org

Heather,

Can you please log in this new referral from Rob Hauser and send it to the General Practice subcommittee?

Thanks,

Ed

From: Paul.Regensdorf@hklaw.com [mailto:Paul.Regensdorf@hklaw.com]
Sent: Tuesday, July 09, 2013 6:11 PM
To: hauser@beasleylaw.net; ufferman@uffermanlaw.com
Cc: Sanchez, Eduardo (USAFLS); wendyloquasto@flappeal.com
Subject: RE: ACRC Issue

Rob,

Believe it or not, I agree with you. Go figure.

BUT……you have erroneously sent your missive to two has-beens…or perhaps never-were's. Michael and I are done -- kaput -- old news on the ACRC.

However, to be a good do-bee, I have forwarded your concern to Ed Sanchez, Wendy Loquasto, and John Hamilton…the big-high-mucky-mucks for the ACRC in 2013-2014.

I'm afraid to endorse your concern for fear that will doom the chances of your request….so we'll just keep that quiet.

Hope all is well.

Paul

Paul Regensdorf | **Holland & Knight**
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From: Robert J. Hauser [mailto:hauser@beasleylaw.net]
Sent: Tuesday, July 09, 2013 6:04 PM
To: ufferman@uffermanlaw.com; Regensdorf, Paul R (JAX - X27398)
Subject: ACRC Issue

Gentlemen:

It has come to my attention that there is no clear direction in the appellate rules as to whether an appellant is limited to a single reply brief even if there are multiple answer briefs from multiple appellees. The use of the term "reply brief" implies to me that only a single reply brief may be submitted by any one appellant. I am also influenced by the Eleventh Circuit's "one lawyer, one brief" policy. On the other hand, because the reply brief is due a specific number of days after the service of the answer brief, the filing of separate answer briefs on behalf of multiple appellees at different times arguably implies that there will also be service of separate corresponding reply briefs at different times.

The Fourth DCA clerk's office has advised me that it will accept multiple reply briefs from a single litigant if there are multiple answer briefs. I believe this is an erroneous policy, but I have no case authority or official comments to the Rules supporting my view. To me, allowing multiple reply briefs merely creates confusion and an opportunity to quietly cheat on the page limitations without obtaining leave of court.

It seems to me that the Rules should be clarified as follows: absent a contrary order of the appellate court, (1) any one litigant is restricted to a single initial, answer or reply brief; (2) a reply brief that addresses the arguments in more than one answer brief should be due 20 days after service of the last answer brief; and (3) the normal page limitations apply. Alternatively, if multiple reply briefs are to be permitted, the Rules should clearly say so.

Best regards.

--Rob Hauser

Beasley Hauser Kramer & Galardi, P.A. | **Attorneys at Law**

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Wendy Loquasto brought up the idea of restricting PCAs in Workers' Compensation cases, specifically in cases in which constitutional grounds are raised. This was brought up at the Workers' Compensation Subcommittee meeting in January, 2014, not through email.

Elimination or Restriction of Per Curiam Affirmances

Leen, Craig to: 'Sanchez, Eduardo (USAFLS)' 03/18/2014 06:05 PM

Ed,

I would like the ACRC to consider whether per curiam affirmances should be eliminated or restricted (perhaps to at least require citation(s) demonstrating why the appeal does not require an opinion to resolve). It has been almost fourteen years since the last report on PCAs was done, and I believe there is sufficient experience to take another look at their elimination or restriction. I also do not believe that the rule allowing a party to request a written opinion has been a sufficient procedure for addressing PCAs, and that this rule should be reviewed as well to determine if the basis for requesting a written opinion should be expanded to include reasons other than that it would create a legitimate basis for Supreme Court review (i.e. if an opinion would provide guidance to the government or a party as to how to act; or if an opinion would clarify the law in an important area, etc.).

The prior report on PCAs is available at the link below:

http://www.floridasupremecourt.org/pub_info/documents/pca-report.pdf

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Please note: Florida has very broad public records laws. Many written communications to or from The Florida Bar regarding Bar business may be considered public records, which must be made available to anyone upon request. Your e-mail communications may therefore be subject to public disclosure.

Heather,
I would like the General Practice subcommittee to consider an amendment to rule 9.330. Currently, rule 9.330 states that a response to a motion for rehearing "may" be served within 10 days after a motion for rehearing is filed. In my experience, whether to file a response to a motion for rehearing – and what to argue in such a response – is a very difficult task. In criminal appeals, the State rarely files responses to motions for rehearing. I have adopted the same practice. By filing a response, there is a concern that you are putting more emphasis on the motion for rehearing than if you just ignored it. And other than arguing that the motion for rehearing is just an attempt to improperly reargue the facts, such a response generally just mirrors the language of the majority opinion. In other words, such responses – if they are even filed – are rarely ever helpful.

I think the approach contained in the federal rules of procedure is the better practice. Federal Rule of Appellate Procedure 40 states:

> (3) Answer. Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

I am hopeful that the subcommittee will consider amending rule 9.330 to include similar language (i.e., no response necessary unless requested by the court). If the subcommittee agrees, then similar language should also be considered for rule 9.331(d).

Michael Ufferman
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Referral for ACRC

Kristin Norse to: Wendy Loquasto (wendyloquasto@flappeal.com)

Cc: "Heather Telfer (HTelfer@flabar.org)", "wallaced@flcourts.org"

Chair Loquasto,

Judge Douglas Wallace of the Second District called me today with a matter that I believe should be referred to the Appellate Court Rules Committee for consideration.

Judge Wallace has been drafting an article on appellate rehearings en banc. In that process, he became aware of the recent amendment to Rule 9.331(d)(1) to state:

(d)(1) Generally. A rehearing en banc may be ordered by a district court of appeal on its own motion or on motion of a party. Within the time prescribed by rule 9.330, a party may move for an en banc rehearing solely on the grounds that the case <u>or issue</u> is of exceptional importance or that such consideration is necessary to maintain uniformity in the court's decisions. . . . .

What Judge Wallace discovered was that similar language appears in Rule 9.331(a) but was not amended to conform to the amendments of (d)(1). This presents an apparent conflict in the rule.

Rule 9.331(a) states in relevant part: "En banc hearings and rehearings shall not be ordered ***unless the case is of exceptional importance*** or unless
necessary to maintain uniformity in the court's decisions."

It would appear the same "or issue" language should be added to Rule 9.331(a) to prevent any conflict between the subsections.

Thank you,

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Heather,

Paul Regensdorf contacted us with two issues, one of which (raised by In re: Jane Doe 13-A) he has decided not to ask us to consider because it really involves a matter of court self-regulation concerning non-panel members' issuance of opinions concerning the full court's sua sponte denial of initial en banc hearing. The other issue (raised by Florida Carry v. UNF) concerns the provision of notice to litigants, and potentially the allowance of oral argument or additional briefing, or a request for such, when a court sua sponte decides to consider a case en banc on initial hearing under Rule 9.331(c). Can you log in this latter issue and send it to General Practice, or, if General Practice is too backed up, to Civil Practice?

Thanks,

Ed

From: Paul.Regensdorf@hklaw.com [mailto:Paul.Regensdorf@hklaw.com]
Sent: Monday, April 14, 2014 2:52 PM
To: Sanchez, Eduardo (USAFLS)
Subject: RE: Possible issue(s) for ACRC -- Rule 9.331(c) -- En Banc hearings on Court's own motion

Yes. At the very least, the parties to a case and their counsel, I think, should be notified when a Court on its own motion votes to take a case away from the panel and bring it to the en banc court.

What might be allowed or required will require your gurus to decide. A new OA would be nice. But even a supplemental brief on whatever caught the en banc court's eye would be refreshing.

Obviously I got blindsided in the UNF case and the many opinions go far and wide beyond the ideas in the parties briefs. I doubt that Clarence Darrow would have been able to stem that tide of pro-gun discussion, but it seemed very odd to have no notice and no opportunity to participate in what was obviously a very robust debate at the First DCA. When there is that degree of debate by a dozen or so judges who were not involved the last time the parties were involved, it would seem that common courtesy, if not, perhaps Due Process might suggest at least a notice.

I'll be happy to discuss this with any subcommittee you may assign the issue to, if you think it worthy.

Paul

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From: Sanchez, Eduardo (USAFLS) [mailto:Eduardo.I.Sanchez@usdoj.gov]
Sent: Monday, April 14, 2014 2:44 PM
To: Regensdorf, Paul R (JAX - X27398)
Subject: RE: Possible issue(s) for ACRC -- Rule 9.331(c) -- En Banc hearings on Court's own motion

As to the UNF issue, does your referral want us to consider requiring notice to counsel and the parties even when the Court chooses to decide the case without oral argument?

From: Paul.Regensdorf@hklaw.com [mailto:Paul.Regensdorf@hklaw.com]
Sent: Monday, April 14, 2014 2:00 PM
To: Sanchez, Eduardo (USAFLS)
Subject: RE: Possible issue(s) for ACRC -- Rule 9.331(c) -- En Banc hearings on Court's own motion

Correct. The other issue -- opinions by non-panel members on denial of en banc status -- is probably not regulated at all by FRAP. Interesting and it sharpened my resolve to write you on the UNF en banc case

As to the UNF case, I have yet to hear a person express anything except surprise that a full-blown en banc hearing, infighting and numerous opinions can happen w/o counsel AT LEAST being notified of the en banc consideration, with at least the chance to ask for another OA or brief. The rule implicitly allows it, but surely the better practice would be to allow the parties to participate in some way.

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> From: Sanchez, Eduardo (USAFLS) [mailto:Eduardo.I.Sanchez@usdoj.gov]
> Sent: Monday, April 14, 2014 1:47 PM
> To: Regensdorf, Paul R (JAX - X27398)
> Subject: RE: Possible issue(s) for ACRC -- Rule 9.331(c) -- En Banc hearings on Court's own motion
>
> Did you still want us to only look at the issue raised by Florida Carry v. UNF?
>
> From: Sanchez, Eduardo (USAFLS)
> Sent: Friday, April 11, 2014 6:58 PM
> To: 'Paul.Regensdorf@hklaw.com'
> Cc: wendyloquasto@flappeal.com
> Subject: RE: Possible issue(s) for ACRC -- Rule 9.331(c) -- En Banc hearings on Court's own motion

Are you sure you don't want the ACRC (or is this perhaps an issue of judicial self-regulation more apt for RJA) to consider your second issue? It sounds to me like Judge Padovano is asking for something to be done. I also find it exceedingly strange that the "dissentals," "concurrals," and "commentals" to hearing "not rehearing" en banc came after the panel decision was issued. They almost seem to be addressing rehearing rather than initial en banc hearing.

As to the first issue, is your concern just that they took the case en banc after oral argument so that only some of the members of the court participated in oral argument? Or are you suggesting that practitioners should be informed that a case is being considered en banc even if the court is going to decide it on the papers? While I understand the desire to know if the latter is occurring, I don't see how it affects anything that a lawyer or litigant would do. On the other hand, it seems troublesome that only some decision makers participate in oral argument. In most courts, when oral argument is held, don't judges who do not participate in oral argument also not participate in consideration of the case?

From: Paul.Regensdorf@hklaw.com [mailto:Paul.Regensdorf@hklaw.com]
Sent: Friday, April 11, 2014 5:29 PM
To: Sanchez, Eduardo (USAFLS)
Cc: wendyloquasto@flappeal.com
Subject: RE: Possible issue(s) for ACRC -- Rule 9.331(c) -- En Banc hearings on Court's own motion

Before dumping the Jane Doe abortion case from my screen, I looked at it again quickly, and I conclude that there is nothing we, the ACRC can or should be able to do with this interesting question of "dissentals" , "concurrals", and "commentals".

So while the question of whether the parties should know if a case is going en banc on the Court's own motion [Fla. Carry v. UNF] is worthy of some ACRC attention, the abortion case is probably not.

Paul

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From: Regensdorf, Paul R (JAX - X27398)
Sent: Friday, April 11, 2014 3:08 PM
To: 'Sanchez, Eduardo (USAFLS)'
Cc: wendyloquasto@flappeal.com
Subject: Possible issue(s) for ACRC -- Rule 9.331(c) -- En Banc hearings on Court's own motion

Ed,

Hope all continues to go well, with you and with the Committee I grew up with [or as some would say, that I grew up "a little bit" with.

Here's the short story. Each decision below is from the First DCA and involves high-tension political and judicial issues: the first gun rights and the second abortion. [I had the misfortune of being the losing attorney in the gun rights case -- Fla. Carry v. UNF].

First opinion Florida Carry v. UNF: case was briefed and argued as routine appeal, although issues broadened with an order from the Court immediately pre-OA that added or raised a State constitutional issue. Post-OA, the case languished for almost 9 months without any word [except for some supplemental briefs submitted as requested on the State constitutional grounds]. Without any notice to the parties or counsel, the full en banc Court weighed in, with many various opinions [75 pages in all] 9 months after oral argument.

As I said, I lost. This is not sour grapes because, after reading the many opinions there is little I could have done -- probably -- to change the ultimate course of the 1st DCA's will. [kinds like trying to make a landslide go uphill -- ain't a gonna happen]. That said, I was professionally upset that (1) I had no clue this was happening, and (2) I had no opportunity by way of brief or OA to address some of the many many concerns expressed in the various opinions. I do not think this is the way that en banc procedures should be administered, although there is absolutely nothing in the rule that stops this. All it says is that I cannot ask for this in advance. I would like the ACRC to consider looking into this Court-ordered en banc process to consider if there is a better way to spring it on the litigants and counsel than simply dumping a long thought out set of opinions before whom I have never had the chance to argue at all in any way.

The second opinion In re: Jane Doe 13-A: This is much more judge-centric. It totally deals with whether a Court should allow non-panel members to dissent from the denial of en banc status [on internal court vote]. This may have no "practice" component for lawyers and therefore, the Bar's Rules Committee may want or feel it has to take a pass. BUT, these cases -- both of them -- got to the attention of the en banc court because they were intensely interesting and important to the public at large and presumably no less so to the parties and the attorneys who had briefed and argued the case.

I would ask you to consider whether either [more likely the first] might benefit from the ACRC's review, aimed at bringing the litigants mandatorily into the en banc process [in Rule 9.331(c)] at some point BEFORE the final 75-page, multi-opinion decision is released 9 months later. It sort of seems fairer for the parties with the greatest interest.

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http://opinions.1dca.org/written/opinions2013/12-10-2013/12-2174.pdf En Banc ordered under 9.331(c) and held by the Court w/o notice to litigants until 75-page final package affirming trial court was published

http://opinions.1dca.org/written/Opinions2014/04-11-2014/13-5458_2.pdf En Banc [under 9.331(c)] rejected by the Court [presumably on its own motion]. Although Court DENIED en banc status, many in the minority NOT on the panel dissented from the denial of en banc status.

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TO: Heather Telfer, Wendy Loquasto
FROM: Elizabeth C. Wheeler
RE: Apparent conflict between appellate rules 9.110(g) and 9.350(b)

A recent review of these two rules indicates an apparently unintended conflict between them. Rule 9.110(g) states:

> An appellee may cross-appeal by serving a notice within 10 days of **service** of the appellant's timely filed notice of appeal or within the time prescribed for filing a notice of appeal, whichever is later.

(Emphasis supplied.) Rule 9.350(b) states:

> A proceeding of an appellant or petitioner may be dismissed before a decision on the merits by filing a notice of dismissal with the clerk of the court without affecting the proceedings filed by joinder or cross-appeal; provided that dismissal shall not be effective until 10 days after **filing** the notice of appeal or until 10 days after the time prescribed by rule 9.110(b), whichever is later.

(Emphasis supplied.) The 1977 Committee Note to Rule 9.350(b) explains the purpose of the rule:

> Subdivision (b) is intended to allow an appellant to dismiss the appeal but a timely perfected cross-appeal would continue. ***A voluntary dismissal would not be effective until after the time for joinder in appeal or cross-appeal.*** *This limitation was created so that an opposing party desiring to have adverse rulings reviewed by a cross-appeal cannot be trapped by a voluntary dismissal by the appellant after the appeal time has run, but before an appellee has filed the notice of joinder or cross-appeal*.

(Emphasis supplied.)

Reading 9.110(g) and 9.350(b) together, it appears that an appellee may filed a timely notice of cross-appeal within 10 days after **service** of the notice of appeal, but a dismissal by an appellant could be effective 10 days after **filing** of the notice of appeal. So long as the rules provide additional time to do something after service of a document, this conflict is at odds with the purpose of subdivision (b) as stated in the Committee Note.

The conflict arises because the provision in rule 9.110(b) that allows an appellee to file a notice of cross-appeal within 10 days after service of the notice of appeal actually gives the appellee 15 days to file a timely notice of cross-appeal. Because a dismissal under rule 9.350(b) can be

effective 10 days after filing of the notice of appeal, the appellant could conceivably dismiss the main appeal before the time for filing a notice of cross-appeal has run.[1]

Rule 9.360(a), which relates to joinder and is also affected by Rule 9.350(b), does not have a similar conflict. It states that a notice of joinder can be served no later than the latest of 10 days after service of a timely filed notice of appeal, within the time for filing a notice of appeal, or with the time prescribed in rule 9.100(c).

If the rules are changed so that additional time after service is no longer provided, this conflict would be eliminated. If that does not occur, the Appellate Court Rules Committee may want to propose an amendment to Rule 9.350(b) so that it reads similarly to Rule 9.360(a)(i) and (ii).

/s/ Elizabeth C. Wheeler

ECW/w

[1] For instance, if the appellant filed the notice of appeal 28 days after rendition of the appealed order, the appellant would have another 15 days (for a total of 43) within which to file a timely notice of cross-appeal. If the appellant filed a notice of dismissal 12 days after filing the notice of appeal, the dismissal would be immediately effective as that day would be the 10th day after the time prescribed by rule 9.110(b). The appellee should have had another 3 days within which to file a timely notice of cross-appeal, but would have been "trapped by a voluntary dismissal by the appellant after the appeal time has run, but before an appellee has filed the notice of . . . cross-appeal." *See* Fla. R. App. P. 9.350(b), 1977 Committee Note.

Proposal for a Rule Amendment – Rule 9.120(d)
Kristina Samuels to: Judge Kent Wetherell 09/24/2015 11:02 AM
Cc: Heather Telfer, Tom Hall

Dear Judge Wetherell:

I am writing to you in your capacity as Chair of the Appellate Court Rules Committee to ask the committee to consider proposing an amendment to Florida Rule of Appellate Procedure 9.120(d). I am writing as a member of The Florida Bar and this suggestion is not being made on behalf of the Court.

In a discretionary review case, the panel of justices that reviews the briefs on jurisdiction generally makes a decision not only about whether to grant discretionary review but whether oral argument should be conducted. Because the decision on oral argument is usually made so early in a discretionary review proceeding, it seems logical that the parties should express their position, if any, on oral argument in their jurisdictional briefs. An amendment similar to the following may be helpful to both the Florida Supreme Court and the parties:

> **(d) Briefs on Jurisdiction.** Petitioner's brief, limited solely to the issue of the supreme court's jurisdiction and accompanied by an appendix containing only a conformed copy of the decision of the district court of appeal, shall be served within 10 days of filing the notice. Respondent's brief on jurisdiction shall be served within 20 days after service of petitioner's brief. Formal requirements for both briefs are specified in rule 9.210. No reply brief shall be permitted. The briefs on jurisdiction may include a statement regarding whether oral argument is desired. If jurisdiction is invoked under rule 9.030(a)(2)(A)(v) (certifications of questions of great public importance by the district courts to the supreme court), no briefs on jurisdiction shall be filed.

Thank you for your time,
/s/ Kristina Samuels

cc:
Heather S. Telfer
Tom D. Hall

To: The Appellate Court Rules Committee

From: Judge Chris W. Altenbernd

July 25, 2013

Re: Proposed Amendments to the Appellate Rules

(Part of comments on 2014 Three-year cycle amendments)

* * *

While I have your attention:

Let me mention several other rules with issues--

FRAP 9.110(h) and (k) and (g). 9.110(h)--the first sentence of this rule is a perfect explanation of scope of review. The second sentence--which is similar to proposed 9.130(i) is nice information about appealing multiple orders, but it has nothing to do with scope of review. I wish we could rename/move that sentence.

More important, Rule 9.110(h) was created long before (k). The scope of review in (h) is wrong for many, if not all, (k) appeals. A (k) appeal only allows review of issues related to the separate matter resulting in the partial final order or of issue related to the party dismissed. The same is true of cross-appeals; in K appeals they are limited to issues tied to the partial final judgment. I wish this could be clarified in the rules or comments.

FRAP 9.210(b). It has always seemed odd to me that a brief has to "identify the issues" in the table of contents but it does not need to have "points on appeal." No self-respecting appellate attorney omits points on appeal. We spend hours training people how to write them. Briefs without them are a real annoyance for appellate judges. I wish they were mentioned in this rule.

If you go back to old 3.7, you will see that lawyers had to brief from "assignments of error." These were filed early in the appeal. The content of the brief's argument was structured around the assignments. They were intended to be comparable to points on appeal--but all appellate lawyers (including me) created expansive "assignments" and then tried to argue narrower points. At any rate the pre-1977 rules probably didn't mention points due to assignments. I wish we mentioned points now.

FRAP 9.360(a). "Parties." This "joinder" provision in the "Parties" rule is arguably misnamed and most folks seem to miss it. Under your definitions in 9.020, everybody in the trial court case joins the appeal as a party. Nobody needs to "join." They need to switch sides. They never figure out that they need to switch sides until more than 10 days after the notice of appeal. This is further complicated by the new filing fee requirement. I wish it were a "Changing Party Status" or even a "changing sides" rule and I wish the parties had a much longer period to do this--maybe as late as the date of the answer brief/response so long as they adopt the appellant's brief.

1. Civil Practice Subcommittee: The subcommittee's written report and meeting minutes are found at page 47 of the agenda packet. The Chair of the subcommittee, Jeff Kuntz, stated that there are two proposals ready for a full committee vote.

(a) **Rule 9.360** – Referral number 13-AC-18 from Judge Altenbernd regarding the terminology of "joinder" in the Parties rule. Duane Daiker, Carrie Ann Wozniak, and Tracy Gunn worked on the referral and proposal.

* * * * *

- Ms. DiFiore requested that something should be added in to this rule regarding changing the caption of a case, because she thinks there should be a requirement in the appellate rules to ensure that circuit courts sitting in their appellate capacity over county court cases actually change the caption upon receiving this notice. She also suggested that this issue could be addressed in a comment.
    - Mr. Kuntz stated that this suggestion should be a new proposal. Ms. DiFiore noted that she was just pointing out the problem, which could be addressed another day.
- Mr. Kuntz again pointed out the issue with "a" and "an," and the Chair stated that this issue could be cleaned up in the editorial phase.
- The Chair asked whether the subcommittee wanted to take this rule back in light of Ms. DiFiore's comments. Ms. DiFiore noted that she was simply expressing her concern regarding how this would play out at the circuit courts. She likes the rule and form and just wanted to bring her concern to the attention of the committee.
    - Mr. Hall noted that trial court clerks do not think of themselves as appellate courts that have to deal with these issues and so there is a potential for the types of issues Ms. DiFiore mentioned.

- Jim Nutt suggested that Ms. DiFiore's suggestion should be a new referral. Mr. Kuntz agreed.

- The Chair remarked that if there is going to be an additional comment, perhaps it should be included now.

- Judge Wetherell noted that these are just suggested forms and nothing would prohibit a party from filing a "Notice of Joinder and Request to Change the Case Style."

ACRC - Proposals Regarding Rule 9.370

1/26/15

Jeffrey T. Kuntz to: wendy loquasto, Heather Telfer

I have some issues/proposals relating to Rule 9.370. Please let me know if you have any questions.

- To be consistent with the case law, Rule 9.370 should be amended to specifically allow an amicus to appear in support of or opposition to a motion for rehearing, a motion for rehearing *en banc*, or a motion for certification to the Supreme Court of Florida.
  - *See, e.g.*, *Tampa Elec. Co. v. Garcia*, 767 So. 2d 428 (Fla. 2000), Order, Case Nos. SC95444; SC95445; SC95446 (Sept. 28, 2000) (issuing revised opinion and separate order allowing Enron North America to appear as amicus curiae on rehearing. (also available at http://www.floridasupremecourt.org/decisions/pre2004/ops/sc95444not.pdf (last visited Nov. 12, 2014))); *Lewis v. Bank of Pasco County*, 346 So. 2d 53, 54 (Fla. 1976); *Home Devco/Tivoli Isles LLC v. Silver*, 26 So. 3d 718, 719 (Fla. 4th DCA 2010); *Diaz v. State*, 884 So. 2d 299, 300 (Fla. 2d DCA 2004); *State v. Famiglietti*, 817 So. 2d 901, 902 (Fla. 3d DCA 2002) (*en banc*); *Demars v. Vill. of Sandalwood Lakes Homeowners Ass'n, Inc.*, 625 So. 2d 1219, 1220 (Fla. 4th DCA 1993); *P & N Inv. Corp. v. Florida Ranchettes, Inc.*, 220 So. 2d 451, 451 (Fla. 1st DCA 1968).
  - The appearance at this stage should be subject to the same rules, same requirements, and same consent/leave obligations, as an amicus appearing at the briefing stage.
  - If the rule is amended as suggested above, consideration should be given to whether any response should be allowed to the amicus brief. I would suggest that if a response is allowed, a comment be included to indicate that the general bar on a reply when dealing with motions precludes the amicus from filing a reply.

- Rule 9.370 should be amended to require a list at the beginning of any amicus brief providing the name of all persons, entities, companies, trusts, associations, lawyers, law firms, etc. that (a) provided financial support; and/or (b) assisted in the drafting or editing of the amicus brief. This should be considered a table and not count towards the page or word limits for any brief filed pursuant to this rule. As examples, (i) Fed. R. App. P. 29(c)(5); (ii) 11th Circuit Rule 26.1–1; and (iii) Rule 37.6, Rules of the Supreme Court of the United States.
  - As part of the consideration of amending the rule to require a disclosure, consideration should be given to whether the rule should specifically ban participation in the drafting or editing of the brief by any party or any lawyer for a party.
  - As part of the consideration of amending the rule to require a disclosure, consideration should be given to whether the rule should specifically ban financial contribution to the preparation of the brief by any party or any lawyer for a party.

Jeffrey T. Kuntz | Shareholder
GRAY | ROBINSON

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November 27, 2013

Ed and Heather,

I saw the attached administrative order from Chief Judge Shepherd of the Third DCA (requiring notices of related cases), and thought it was a good idea to add to the rules for all Florida appellate courts. I would think it would be a great help to the Court to know when there are related cases in order to conserve judicial resources and ensure consistent decisions. I also think it would be useful to litigants as well for a number of reasons, including that they may want to appear as an amicus in the other proceeding to assert their legal position in case that proceeding is determined first.

I hope you both have great Thanksgivings.

Best regards,
Craig

Craig E. Leen
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Please Note: Florida has a very broad Public Records Law. Most written communications to or from State and Local Officials regarding State or Local business are public records available to the public and media upon request. Your email communications may therefore be subject to public disclosure.

Please note: Florida has very broad public records laws. Many written communications to or from The Florida Bar regarding Bar business may be considered public records, which must be made available to anyone upon request. Your e-mail communications may therefore be subject to public disclosure.

ACRC referral

Michael Ufferman to: 'Heather Telfer' 10/04/2013 05:58 AM

Heather,
I would like the ACRC to consider amending rule 9.420(c) to remove the requirement that certain "initial documents" (i.e., notices of appeal) be served by both email and mail. If Florida is truly going paperless, and if every other document can be served and filed exclusively by electronic means, there is no reason for the requirement that notices of appeal be both emailed and mailed. The requirement that notices of appeal be mailed should be deleted.

Michael Ufferman
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Please note: Florida has very broad public records laws. Many written communications to or from The Florida Bar regarding Bar business may be considered public records, which must be made available to anyone upon request. Your e-mail communications may therefore be subject to public disclosure.

Matters for Civil Practice Subcommittee

File 12-AC-16:

D. Minor, Nonsubstantive Clarifications

3. In rule 9.130(f), add language clarifying that the lower tribunal *can* enter a final order with leave of the appellate court.

F. Provisions That May Need to be Updated

2. At its meeting on June 24, 2011, the ACRC voted to eliminate subdivision (a)(6) from rule 9.130—and to incorporate its language into subdivision (a)(3)(C)(vi). If it has not already been done, the reference to (a)(6) in subdivision (b) therefore probably needs to be changed, maybe merely by changing the reference to subdivision (a)(5). [I thought this had been done, but I didn't see any reference to it in any prior minutes of ACRC meetings.]

4. The ACRC previously voted to amend rule 9.130 to authorize cross-appeals in appeals from nonfinal orders. But the form "Notice of Cross-Appeal" in Form 9.900(b) is still limited to final orders. Does the form need to be changed? Or does a new form need to be created?

H. Major Substantive Restructuring, Rewording, or Changes

12. Should rule 9.500(b)(2) be amended to provide not only that the court "may appoint" amici in these proceedings but also that the court may "allow" them as well? If so, I'd suggest something like the following:

> (2) If the request is within that purview, the court may permit persons whose substantial interests may be affected to be heard on the questions presented through briefs, oral argument, or both. If the court decides ~~determines~~ to receive briefs or hear oral argument, it shall set the time for filing briefs, the date of argument, and the time allotted. The court may appoint or allow amicus curiae and prescribe their duties.

13. Should rule 9.510(c)(2) be amended to provide that the court may allow amici (and otherwise essentially mirror the language of rule 9.500(b)(2))? If so, I'd suggest something like the following:

> (2) If the request is within ~~the~~ that purview, the court may permit the attorney general and other interested persons to be heard on the questions presented through briefs, oral argument, or both. If the court decides to receive briefs or hear oral argument, it ~~will~~ shall establish ~~set~~ the time for filing briefs, the date of argument, and the time allotted. The court may appoint or allow amicus curiae and prescribe their duties.

17. Rule 9.130(a)(3)(C)(v) provides for immediate appellate review of nonfinal orders determining "that, as a matter of law, a party is not entitled to workers' compensation immunity." Because of the way the supreme court has interpreted that provision, the number of nonfinal orders that are immediately appealable under that provision is quite small. *See, e.g., Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812 (Fla. 2004); *Florida Dep't of Corrections v. Culver*, 716 So. 2d 768 (Fla. 1998); *H.C. Hodges Cash & Carry, Inc. v. Walton Dodge Crysler-Plymouth Jeep & Eagle*, 696 So. 2d 762 (Fla. 1997); *Pizza Hut of Am., Inc. v. Miller*, 696 So. 2d 340 (Fla. 1997); *Hastings v. Demming*, 694 So. 2d 718 (Fla. 1997); *Footstar Corp. v. Doe*, 932 So. 2d 1272 (Fla. 2d DCA 2006). But in *Reeves*, Justice Wells advocated an amendment to the rule that would make it somewhat more expansive. *See Reeves*, 889 So. 2d at 823 (Wells, J. concurring specially). His view was that the policy reasons discussed in the district court decision at issue—*Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d 857 (Fla. 2d DCA 2002)—were compelling enough to warrant an enlargement of the number of nonfinal orders that are immediately appealable under this subdivision. In his view, the subdivision should be amended to authorize interlocutory appellate of the scope described in *Breakers Palm Beach, Inc. v. Gloger*, 646 So. 2d 237 (Fla. 4th DCA 1994), and *Baker v. Ross*, 632 So. 2d 224 (Fla. 2d DCA 1994). Should rule 9.130(a)(3)(C)(v) be reevaluated to determine whether its scope should be enlarged?

----- Message from Ellie Neiberger <eneiberger@bmolaw.com> on Tue, 14 Apr 2015 19:56:16 +0000 -----

To: Lance Curry <lance.curry@hwhlaw.com>

cc: Zachary Lombardo <zacharylombardo@gmail.com>, 'Steve Kolbert' <steve.kolbert@gmail.com>

Subject: RE: Proposed Changes to Rule 9.800 [HWHLAW-FirmLive.FID749195]

Hi, Lance.

Thanks for considering our proposed changes to Rule 9.800. We have a few more suggestions, which are reflected in track changes in the attachment and described below.

ITEM ONE: 9.800(c) (County/Circuit Courts -- primary reporter)

- Or proposal suggests using the Florida Supplement as the primary reporter for state trial court cases. We have since learned that the Florida Supplement published a second series (Fla. Supp. 2d), and then ceased publication entirely in 1992. From what we gather, Florida Law Weekly Supplement is now the primary reporter for trial court decisions.

- We suggest rearranging the order-of-authorities to move Fla. Supp. down, and Fla. L. Weekly Supp. up.

ITEM TWO: 9.800(d)(3) (admin orders with subsequent history -- errant comma)

- Remove errant comma after the DOAH jurisdiction/year parenthetical (before the "Recommended Order" parenthetical).

ITEM THREE: 9.800(d)(4)(C) (Environmental and Land Use Reporter -- pagination)

- The E.R. F.A.L.R. uses a strange pagination system. Each case gets an assigned number, and then each is individually paginated. So in other words, the example we use -- 2013 E.R. F.A.L.R. 50 -- is the 50th case in the 2013 volume, and it starts on page 1. (And, again, the 49th case -- 2013 E.R. F.A.L.R. 49 -- also starts on page 1. As does the 48th case. Etc.)

- We suggest formatting E.R. F.A.L.R. like the F.P.E.R. reporter in 9.800(d)(4)(E): use the ¶ symbol to designate the case number, and provide a page number pinpoint citation.

ITEM FOUR: 9.800(d)(4) (administrative law reporters -- names)

- This reporter in 9.800(d)(4)(A) is actually entitled "Florida Administrative Law Reports" (not "Reporter")

- This reporter in 9.800(d)(4)(B) is actually entitled "Florida Career Service Reporter." ("Service" is singular.

- This reporter in 9.800(d)(4)(E) is actually entitled "Florida Public Employee Reporter" (four words). "Relations" is in the agency name, but not the reporter name.

- The reporter in 9.800(d)(4)(G) is really called "Florida Compensation Reports" (not "Reporter").

ITEM FIVE: 9.800(d)(4)(G) (Florida Compensation Reports -- abbreviation)

- At the top of each page of the Florida Compensation Reports, the series' own suggested citation format abbreviates the reporter as "F.C.R." In all other citation forms for administrative reporters, a single letter is used to abbreviate each word.

- For consistency, we suggest abbreviating Florida Compensation Reports as "F.C.R."

The new edition of the Florida Style Manual is not yet complete, but it should be soon. We'll be sure to let you know when it's finished.

Please let us know if you need anything else. Thanks!

Kind regards,

Ellie Neiberger
Attorney

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From: Lance Curry [mailto:lance.curry@hwhlaw.com]
Sent: Tuesday, April 07, 2015 1:43 PM
To: Ellie Neiberger
Subject: Proposed Changes to Rule 9.800 [HWHLAW-FirmLive.FID749195]

Ellie: I'm on the Appellate Court Rules Committee, and have been tasked with assessing the revisions you suggested to Rule 9.800. I need to go back through your letter, but I recall agreeing with the vast majority of your suggested changes. I wanted to reach out to you to see if anything, from your perspective, has changed since you wrote your letter to Wendy. Also, I wanted to see if FSU's law review had released a new edition of the Florida Style Manual. Thanks for your help on this.

Lance

Lance V. Curry, III

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October 21, 2014

By Email Only

Wendy S. Loquasto
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wendyloquasto@flappeal.com

RE: Proposed Revisions to Rule 9.800 of the Florida Rules of Appellate Procedure (Uniform Citation System)

Dear Wendy:

Here are the proposed revisions to Rule 9.800 of the Florida Rules of Appellate Procedure (Uniform Citation System) that we discussed the other week. While preparing a new edition of the Florida Style Manual, two members of FSU's law review, Steve Kolbert and Zach Lombardo, noticed that parts of the rule should be clarified or updated. I have worked with them over the past couple months to develop the proposed revisions, which we believe will make the rule more workable for practitioners (particularly because the changes account for the fact that many authorities are now available electronically). The proposed revisions are summarized below.

Subsection	Summary of Proposed Revisions
(a)-(c)	Currently, Florida Law Weekly must be cited if an opinion is not published in the preferred reporter (for Florida Supreme Court and district court opinions, the Southern Reporter; for circuit and county court decisions, Florida Supplement). If the opinion is not in Florida Law Weekly, the slip opinion must be cited. The proposed revisions would prefer citation to Westlaw or LexisNexis over citation to the slip opinion. This recognizes that Westlaw and LexisNexis are now commonly used. Because the format for citing to Westlaw and LexisNexis includes the same information as a slip opinion

citation, plus the unique Westlaw or LexisNexis identifier, it provides an easy way for Westlaw or LexisNexis users to find opinions, without making it more difficult for non-users to find slip opinion.

The paragraphs within the current version of subsection (a) are ordered past to present. This was reversed to conform to The Bluebook and the rest of Rule 9.800.

The example citation for a county court uses the abbreviation "cty." However, The Bluebook abbreviation for county is "cnty." Change made accordingly.

Subsection (c) would also be revised to specify that the first example is for citations to circuit court, and the second example is for citations to county court. Additionally, the paragraphs within subsection (c) would be indented so that they conform to the hierarchical structure of the Florida Rules of Appellate Procedure.

(d) This subsection would be completely replaced.

Revised subsection (d) is modeled after Bluebook Rule 14.3 (governing administrative decisions).

Current Rule 9.800(d)(3) uses a confusing format to cite administrative cases that move from an agency to DOAH and back, by placing two agencies and two dates in an ending parenthetical, without any indication as to whether the cited docket number is the agency docket number or the DOAH docket number. To avoid confusion, revised subsection (d) includes all the relevant information: the DOAH docket number, the agency docket number, the DOAH order date, the agency order date, the final order number, etc. Revised subsection (d) organizes this information pursuant to Bluebook Rule 10.7 (governing prior and subsequent case history).

Because agency final order numbers are useful for obtaining final orders directly from an agency, revised subsection (d) provides a way to insert these numbers into the citation.

Revised subsection (d) includes citation formats for several administrative law reporters missing from existing subsection (d), and includes changes to

the citation format for two reporters.

Because multiple entities publish their decisions in the Florida Public Employee Relations Reporter (e.g., the Public Employee Relations Commission itself, or PERC's general counsel), revised subsection (d) allows a citation to indicate which entity is publishing the decision.

Existing subsection (d)'s citation format for the Florida Public Service Commission Reporter is somewhat confusing. Currently, subsection (d) instructs users to cite the Florida Public Service Commission Reporter issue and page number, separated by a colon, without informing readers what the numbers before and after the colon mean. Instead, revised subsection (d) adopts Bluebook Rule 3.1(b), which would have users to spell out "No." to indicate the issue number, and use "at" to indicate a page number. Additionally, revised subsection (d) allows users to identify the entity publishing the opinion.

Finally, the subparagraphs within revised subsection (d) would be indented so that they conform to the hierarchical structure of the rules.

(e) Currently, the introduction to subsection (e) provides: "Florida Constitution (Year of adoption should be given if necessary to avoid confusion.)" It is not clear whether this refers to the year of adoption of a particular Constitution (i.e., the Constitution of 1838, or of 1865, or of 1868), or the year of adoption of a particular provision within the constitution. The proposed revision would clarify that the year should be included in an ending parenthetical if citing a constitutional provision as it previously existed (rather than as it currently exists).

Subsection (e) now numbers its individual paragraphs.

(f) Subsection (f) now numbers its individual paragraphs.

(g) Currently, subsection (g) provides for citation to Florida Statutes Annotated. This subsection was added before all court rules were available in stand-alone documents from the Florida Supreme Court and The Florida Bar websites. Since the primary sources are now readily available, they should be cited according to subsection (i). Therefore, the proposed revisions would remove Florida Statutes Annotated from Rule 9.800.

The proposed revisions would create a new subsection (g) to address citation to the Florida Administrative Code. Currently, the Florida Administrative Code is the only non-court rule included in subsection (i). Therefore, it is appropriate to set it apart in its own subsection.

The proposed Florida Administrative Code citation allows users to differentiate between the same rule as it exists on different dates, much as the Florida Statutes citation form allows users to differentiate between the same statute at it existed on different dates. Because the Florida Administrative Code is not published annually, users should identify different versions of the same rule by effective date.

(h) Because session laws have been published online since 1997, revised subsection (h) contains a separate form of citation for session laws enacted in 1997 or later. The year of the law is not independently included in the citation because the year is a part of the number of the law itself. The example citations for session laws earlier than 1997 are revised to include the year as the volume, as well as the page on which the cited law appears: [year] Laws of Fla. [page].

The date ranges in (h) overlapped in the years 1956-57. The revised subsection (h) corrects this.

(i) The proposed revisions would remove rules that no longer exist, add new rules, and add the full name of the rules before the corresponding abbreviations. The Florida Administrative Code, as discussed above, would be moved to its own subsection.

(j) The Attorney General's official title, as established by the Florida Constitution, is "attorney general," not "Florida Attorney General" or "Attorney General of Florida." *See* art. IV, § 4, Fla. Const. Accordingly, the citation form should read "Op. Att'y Gen.," which would stand for "Opinions of the Attorney General." To identify the fact that these opinions originate from *Florida's* attorney general, the proposed revision would follow the standard method of identifying a jurisdiction: placing the state abbreviation inside the ending parenthetical, before the date. This is the method used for, e.g., court opinions (Bluebook Rule 10) and legislative materials (Bluebook Rule 13).

(k)-(m)	The proposed revisions would make the rules for citing federal court opinions mirror the rules for citing Florida court opinions. Subsection (k)-(m) now number their individual paragraphs.
(n)	Subsection (n) now separates the two citation examples into independently numbered paragraphs.
(o)	The proposed revision would make the Florida Style Manual, rather than The Bluebook, controlling for all citations not covered in Rule 9.800. Only citations not covered in the Florida Style Manual would be governed by The Bluebook. The proposed revision would also delete the first sentence of paragraph (o), which states that pinpoint citations are preferred, but not required. Both the Florida Style Manual and The Bluebook rule require pinpoint citations, and apply by default.
(p)	The proposed revisions would delete paragraph (p), which requires case names to be italicized or underlined, because it is no different from the default rule that applies under the Florida Style Manual and The Bluebook.

Thank you for considering our proposed revisions. If we can provide you with anything else, please feel welcome to contact me (850-222-8611 or eneiberger@bmolaw.com), Steve (202-422-2588 or steve.kolbert@gmail.com), or Zach (239-777-1836 or zwl12@my.fsu.edu).

Kind regards,

Ellie Neiberger

Enc.

cc: Steve Kolbert
Zach Lombardo

RULE 9.800. UNIFORM CITATION SYSTEM

This rule applies to all legal documents, including court opinions. Except for citations to case reporters, all citation forms should be spelled out in full if used as an integral part of a sentence either in the text or in footnotes. Abbreviated forms as shown in this rule should be used if the citation is intended to stand alone either in the text or in footnotes.

(a) Florida Supreme Court.

(1) 1887-Present: *Fenelon v. State*, 594 So. 2d 292 (Fla. 1992).

(2) 1846-1886: *Livingston v. L'Engle*, 22 Fla. 427 (1886).

~~(2) *Fenelon v. State*, 594 So. 2d 292 (Fla. 1992).~~

(3) For recent opinions not yet published in the Southern Reporter, cite to Florida Law Weekly: *Traylor v. State*, 17 Fla. L. Weekly S42 (Fla. Jan. 16, 1992). If not ~~therein~~in Florida Law Weekly, cite to LEXIS or Westlaw: *Davis v. State*, No. SC13-9, 2014 WL 5026390, at *1 (Fla. Oct. 9, 2014); *Johnston v. State*, No. SC09-839, 2010 Fla. LEXIS 62, at *1 (Fla. Jan. 21, 2010). If not in any of the above, cite to the slip opinion: *Medina v. State*, No. SC00-280 (Fla. Mar. 14, 2002).

(b) Florida District Courts of Appeal.

(1) *Sotolongo v. State*, 530 So. 2d 514 (Fla. 2d DCA 1988); *Buncayo v. Dribin*, 533 So. 2d 935 (Fla. 3d DCA 1988).

(2) For recent opinions not yet published in the Southern Reporter, cite to Florida Law Weekly: *Myers v. State*, 16 Fla. L. Weekly D1507 (Fla. 4th DCA June 5, 1991). ~~If not therein~~ If not in Florida Law Weekly, cite to LEXIS or Westlaw: *Myers v. State*, No. 90-1092, 1991 WL 92959, at *1 (Fla. 4th DCA June 5, 1991); *Minakan v. Husted*, No. 4D09-4439, 2010 Fla. App. LEXIS 288, at *1 (Fla. 4th DCA Jan. 20, 2010). If not in any of the above, cite to the slip opinion: *Fleming v. State*, No. 1D01-2734 (Fla. 1st DCA Mar. 6, 2002).

(c) Florida Circuit Courts and County Courts.

(1) Circuit Court: *Whidden v. Francis*, 27 Fla. Supp. 80 (Fla. 11th Cir. Ct. 1966).

(2) County Court: *State v. Alvarez*, 42 Fla. Supp. 83 (Fla. Dade ~~Cty~~Cnty. Ct. 1975).

(3) For opinions not published in Florida Supplement, cite to Florida Law Weekly Supplement: *State v. Campeau*, 16 Fla. L. Weekly Supp. C65 (Fla. 9th Cir. Ct. Nov. 7, 1990). ~~If not therein~~ If not in Florida Law Weekly Supplement, cite to LEXIS or Westlaw: *Berne v. State*, No. 2006-CA-9772-O, 2009 WL 8626616, at *1 (Fla. 9th Cir. Ct. Oct. 26, 2009). If not in any of the above, cite to the slip opinion: *State v. Campeau*, No. 90-4363 (Fla. 9th Cir. Ct. Nov. 7, 1990).

(d) Florida Administrative Agencies. ~~(Cite if not in Southern Reporter.)~~

~~(1) For decisions of the Public Employees Relations Commission: *Indian River Educ. Ass'n v. School Bd.*, 4 F.P.E.R. 4262 (1978).~~

~~(2) For decisions of the~~

(1) For agency final orders: *Dep't of Health v. Migicovsky*, No. 2011-16915 (Fla. Bd. of Med. Dec. 17, 2012) (Final Order No. DOH-12-2692-FOF-MQA).

(2) For decisions of the Division of Administrative Hearings: *Dep't of Fin. Servs., Div. of Ins. Agent & Agency Servs. v. Pearson*, No. 13-4478PL (Fla. DOAH Oct. 15, 2014) (Recommended Order).

(3) To cite a case's subsequent history at the agency and in the courts: *Dep't of Health v. Sabates*, No. 10-9430PL (Fla. DOAH June 23, 2011), (Recommended Order), *adopted with reduced penalty*, No. 2009-06686 (Fla. Bd. of Med. Aug. 29, 2011) (Final Order No. DOH-11-2101-FOF-MQA), *aff'd in part and rev'd in part*, 104 So. 3d 1227 (Fla. 4th DCA 2012).

(4) For decisions that are not available online but published in an administrative law reporter:

(A) The Florida Administrative Law Reporter: *Dep't of Health v. Sabates*, 34 F.A.L.R. 2378 (Fla. Bd. of Med. 2011).

(B) The Florida Career Services Reporter: *Arenas v. Dep't of Corr.*, 25 F.C.S.R. 309 (Fla. Pub. Emp. Rel. Comm'n 2010).

(C) The Environmental and Land Use Administrative Law Reporter: *In the matter of Riverview Pointe, Manatee Cnty.*, 2013 E.R. F.A.L.R. 50 (Fla. Dep't of Envtl. Prot. 2012).

(D) The Florida Department of Revenue Tax Reporter: *Technical Ass't Advm't 09A-049*, 2009 Tax F.A.L.R. 431 (Fla. Dep't of Rev. 2009).

(E) The Florida Public Employee Relations Reporter: *Delgado v. Sch. Dist. of Broward Cnty., Fla.*, 36 F.P.E.R. ¶ 207 (Fla. Pub. Emp. Rel. Comm'n Gen. Counsel 2010).

(F) The Florida Public Service Commission~~: *In re Application of Tampa Elec. Co.*, 81 F.P.S.C. 2:120 (1981).~~

~~(3) For decisions posted on the Division of Administrative Hearings' website: *Big Bend Hospice, Inc. v. Agency for Health Care Administration*, Case No. 01-4415 CON (Fla. DOAH Nov. 7, 2002; Fla. AHCA Apr. 8, 2003).~~

~~(4) For decisions that are not posted on the Division of Administrative Hearings' website but are reported in the Florida Administrative Law Reports: *Insurance Co. v. Dep't of Ins.*, 2 F.A.L.R. 648-A (Fla. Dep't of Ins. 1980).~~

~~(5) For orders that are not posted on the Division of Administrative Hearings' website or reported in one of the above reporters: *In re Town of Inglis Petition for Waiver*, Final Order No. 07-0590 (Fla. DEP Apr. 12, 2007) (available from the agency clerk).~~ Reporter: *In re: Nuclear Cost Recovery Clause*, 2013 F.P.S.C. no. 10, at 149 (Fla. Pub. Serv. Comm'n 2013).

(G) The Florida Compensation Reporter: *Whitney v. Mercy Hosp.*, 9 Fla. Comp. Rep. 373 (Fla. Indust. Rel. Comm'n 1976).

(H) The Florida Division of Administrative Hearings Reports: Fla. *Real Estate Comm'n v. Warrington*, 39 F.D.O.A.H. 747 (Fla. Real Estate Comm'n 1977).

(I) The Florida Administrative Reporter: *Cockrell v. Comptroller*, 12 F.A.R. 192 (Fla. Comptroller 1979).

(e) Florida Constitution. ~~(Year of adoption should be given if necessary to avoid confusion.)~~

(1) Current provision: Art. V, § 3(b)(3), Fla. Const.

(2) Historical provision: Art. III, § 19(c), Fla. Const. (2005).

(f) Florida Statutes (Official).

(1) § 350.34, Fla. Stat. (1973).

(2) § 120.53, Fla. Stat. (Supp. 1974).

~~**(g) Florida Statutes Annotated.** (To be used only for court-adopted rules, or references to other nonstatutory materials that do not appear in an official publication.)~~

(g) Florida Administrative Code.

~~32 Fla. Stat. Ann. 116 (Supp. 1975).~~Fla. Admin. Code R. 62D-2.014 (effective 2007).

(h) Florida Laws. (Cite if not in ~~Fla. Stat.~~Florida Statutes or if desired for clarity or adoption reference.)

(1) ~~After 1956~~1997-Present: Ch. 2001-01, § 3, Laws of Fla.

(2) 1957-1996: Ch. 74-177, § 5, ~~at 473,~~1974 Laws of Fla. 473

(~~2~~3) Before 1957: Ch. 22000, 1943 Laws of Fla. ~~(1943).~~172.

(i) Florida Rules.

Florida Rules of Civil Procedure: Fla. R. Civ. P. 1.180.

Florida Rules of Judicial Administration: Fla. R. Jud. Admin. 2.110.

Florida Rules of Criminal Procedure: Fla. R. Crim. P. 3.850.

~~Fla. R. Work. Comp. P. 4.113.~~

Florida Probate Rules: Fla. Prob. R. 5.120.

Florida Rules of Traffic Court: Fla. R. Traf. Ct. 6.165.

Florida Small Claims Rules: Fla. Sm. Cl. R. 7.070.

Florida Rules of Juvenile Procedure: Fla. R. Juv. P. 8.070.

Florida Rules of Appellate Procedure: Fla. R. App. P. 9.100.

Florida Rules of Mediation: Fla. R. Med. 10.100.

Florida Rules of Arbitration: Fla. R. Arb. 11.010.

Florida Family Law Rules of Procedure: Fla. Fam. L. R. P. 12.010.

~~Fla. Admin. Code R. 62D-2.014.~~

Rules Regulating the Florida Bar: R. Regulating Fla. Bar 1-3.2.

Florida Rules of Professional Conduct: Fla. R. Prof. Conduct 4-1.10.

Florida Judicial Code of Conduct: Fla. Code. Jud. Conduct, Canon 4B.

Florida Board of Bar Examiners Rules: Fla. Bd. Bar Exam. R. II.

Florida Bar Foundation By-Laws: Fla. Bar Found. By-Laws, art. 2.19(b).

Florida Bar Foundation Charter: Fla. Bar Found. Charter, art. III, § 3.4.

Florida Bar Integration Rules: Fla. Bar Integr. R., art. XI, § 11.09.

Florida Judicial Qualification Commission Rules: Fla. Jud. Qual. Comm'n R. 9.

Florida Standard Jury Instructions, Civil: Fla. Std. Jury Instr. (Civ.) ~~601.4.~~6.3(b).

Florida Standard Jury Instructions, Criminal: Fla. Std. Jury Instr. (Crim.) ~~2.03.~~2.3.

~~Fla. Std. Jury Instr. (Crim.) Robbery.~~

Florida Standards Imposing Lawyer Sanctions: Fla. Stds. Imposing Law. Sancs. 9.32(a).

Florida Bar Admission Rules: Fla. Bar Admiss. R. 3-23.1.

(j) Florida Attorney General Opinions.

Op. Att'y Gen. ~~Fla.~~ 73-178 (Fla. 1973).

(k) United States Supreme Court.

(1) *Sansone v. United States*, 380 U.S. 343 (1965).

(2) Cite to United States Reports, if published therein; otherwise cite to Supreme Court Reporter, Lawyer's Edition, or United States Law Week, in that order of preference. For opinions not published in these reporters, cite to Florida Law Weekly Federal: *California v. Hodari D.*, 13 Fla. L. Weekly Fed. S249 (U.S. Apr. 23, 1991). If not published in Florida Law Weekly Federal, cite to LEXIS or Westlaw: *Otter v. Lotta*, No. 14A374, 2014 WL 5025970, at *1 (U.S. Oct. 8, 2014).

If not in any of the above, cite to the slip opinion: *Frank v. Walker*, No. 14A352 (U.S. Oct. 9, 2014).

(*l*) Federal Courts of Appeals.

(1) *Gulf Oil Corp. v. Bivins*, 276 F.2d 753 (5th Cir. 1960).

(2) For opinions not published in the Federal Reporter, cite to Florida Law Weekly Federal: *Cunningham v. Zant*, 13 Fla. L. Weekly Fed. C591 (11th Cir. March 27, 1991). If not published in Florida Law Weekly Federal, cite to LEXIS or Westlaw: *Murphy v. Dulay*, No. 13–14637, 2014 WL 5072710, at *1 (11th Cir. Oct. 10, 2014). If not in any of the above, cite to the slip opinion: *Airtran Airways, Inc. v. Elem*, No. 13-14912 (11th Cir. Sept. 23, 2014).

(m) Federal District Courts.

(1) *Pugh v. Rainwater*, 332 F. Supp. 1107 (S.D. Fla. 1971).

(2) For opinions not published in the Federal Supplement, cite to Florida Law Weekly Federal: *Wasko v. Dugger*, 13 Fla. L. Weekly Fed. D183 (S.D. Fla. Apr. 2, 1991). If not published in Florida Law Weekly Federal, cite to LEXIS or Westlaw: *Taylor v. Crews*, No. 3:14-cv-205, 2014 WL 5035255, at *1 (M.D. Fla. Oct. 8, 2014). If not in any of the above, cite to the slip opinion: *Slay v. Hess*, No. 5:14-cv-264 (N.D. Fla. Oct. 10, 2014).

(n) United States Constitution.

(1) Art. IV, § 2, cl. 2, U.S. Const.

(2) Amend. V, U.S. Const.

(o) Other Citations. ~~When referring to specific material within a Florida court's opinion, pinpoint citation to the page of the Southern Reporter where that material occurs is optional, although preferred.~~ All other citations shall be in the form prescribed by the Florida Style Manual published by the Florida State University Law Review, Tallahassee, FL 32306. Citations not covered in this rule or in the Florida Style Manual shall be in the form prescribed by the latest edition of The Bluebook: A Uniform System of Citation, The Harvard Law Review Association, Gannett House, Cambridge, MA 02138. ~~Citations not covered in this rule or in The Bluebook shall be in the form prescribed by the Florida Style Manual published by the Florida State University Law Review, Tallahassee, FL 32306.~~

~~**(p) Case Names.** Case names shall be underscored (or italicized) in text and in footnotes.~~

Comments to Florida Rules of Appellate Procedure--Three Year Cycle Amendments
David Brunell to: 'eduardo.i.sanchez@usdoj.gov' 09/16/2013 03:29 PM

Dear Mr. Sanchez,

I write with some comments to the Florida Rules of Appellate Procedure—Three Year Cycle Amendments and recognize that these comments are untimely. While untimely, I hope they will provide some assistance for future revisions by the Committee.

First, regarding the revisions to Rule 9.110(l) governing premature appeals, the amendment cross-references Rule 9.020(h). While there remains an (h), I believe this rule is cross-referencing the rule regarding rendition of an order, which is now found in Rule 9.020(i).

Second, for what it's worth, I think moving the provision of 9.110(n) to a new Rule 9.147 aids clarity.

Third, I believe the amendments to Rule 9.320, as currently proposed, may cause some confusion. I think it may be better to move the last two sentences of the Rule, which are unchanged, to a new paragraph. As currently proposed, the existing provisions regarding time and the court's authority regarding changes to oral arguments appear to only apply to proceedings governed by Rule 9.146, rather than to apply to the rule at large, which I believe continues to be the substantive meaning.

Finally, I suggest a change Rule 9.800(h)(1). As currently drafted, courts are required, and counsel are requested (see Fla. R. App. P. 9.210(b)(8)) to include a page number for Laws of Florida passed after 1956. In a digital age where books are becoming scarcer and access to digital sources of law are in increasing availability to courts, counsel, and individuals, removing the page number requirement may assist users. Currently, the requirement forces a practitioner to use a book where the other rules, including the citation rules, do not. While continuing to use a page number, particularly for large sections of laws, may be a best practice, its requirement should probably be deleted.

Thank you for your attention to these comments.

Warmly,

David J. Brunell
Florida Bar # 92289
Staff Attorney
Second District Court of Appeal

Please note: Florida has very broad public records laws. Many written communications to or from The Florida Bar regarding Bar business may be considered public records, which must be made available to anyone upon request. Your e-mail communications may therefore be subject to public disclosure.

ACRC - New Referral 14-AC-03

01/16/2014 11:15 AM

From: Heather Telfer/The Florida Bar

To: cleen@coralgables.com

Good Morning,

My coworker, Ellen Sloyer, noticed that Rule 9.800 does not have a citation form for Standard Jury Instructions Contracts and Business. Can General Practice work on this?

Thanks,

Heather

Heather S. Telfer
Attorney Liaison - Rules
The Florida Bar
850-561-5702
htelfer@flabar.org

Referral

Elisha Page to: Heather Telfer 06/03/2014 01:10 PM

Hi Heather:

The Electronic Filing sub-committee recently completed a comprehensive review of the ACR to make them comport with the new electronic filing requirements. As part of that comprehensive review, the Electronic Filing sub-committee proposed an amendment to Rule 9.140(f)(5) as follows:

Except in death penalty cases, the court shall return the record to the lower tribunal, after final disposition of the appeal, any portions of the appellate record that were not electronically filed after final disposition of the appeal.

In January, the full committee voted to approve this proposed amendment.

Do you know if there was a similar proposed amendment for the current rule 9.200(g), which deals with the return of the record in civil cases? If not, I would like to refer it to the Electronic filing sub-committee for review.

Thanks so much,
--
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