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From: Stephen T. Maher [mailto:SMaher@shutts.com]

Sent: Wednesday, July 06, 2016 5:46 PM

To: Kristin Norse

Cc: Ana Romes

Subject: Comment on Appellate Rules Committee Three Year Cycle Report

I suggest that the Appellate Rules Committee take this opportunity to suggest changes to the strict font requirements contained in the Florida Rules of Appellate Procedure. There is evidence to suggest that the current strict typeface requirements, which were initially well-intentioned, are now a possible hindrance to better comprehension and retention of information contained in appellate briefs and petitions, especially briefs and petitions being read from a computer screen rather than from a paper filing. Our recent article makes this point in some detail and provides references that could be helpful. Thank you.

http://www.lawpracticetoday.org/article/the-quiet-revolution-in-brief-writing/

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July 28, 2016

Via Email

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The Florida Bar
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Re: Three-year cycle proposed amendment to FRAP 9.200(b)(4)

Dear Ms. Norse:

There are extensive changes in the three-year cycle proposed amendment. I had a difficult time locating the proposal on the Bar's website and have not fully reviewed all of the changes, but many of those changes look excellent.

I write to address only one proposal, which concerns the "statement of evidence." I will admit up front that I am not a big fan of the statement of evidence. From my experience, the statement is rarely successful and almost never provides the record needed for a reversal. It is difficult for the courts to administer even when both sides have lawyers and everyone cooperates. If I were amending the rule, I might prefer to make the statement less available in civil courts of record where a standard record and transcript is an option fully available for a party that makes arrangements for it at the appropriate time.

But the proposed amendments make this rule worse, not better. It will encourage people not to bother with court reporters and it places many additional burdens on both the trial and appellate courts. When the party seeks to avoid the cost of court reporting, this revised rule essentially shifts those costs to court system.

Let me list some specific concerns in the order that they arise within the proposed amendment. At the end of this letter, I have provided a copy of that amendment.

1. "Unavailable." This is old language, but what makes a transcript "unavailable"? I can't afford to buy it? In most DCAs, two-thirds of all cases involve a prisoner or pro se litigant who cannot afford a transcript.

2. 10 days or 20 days to serve. The appellant has 10 days to create the statement. What percentage of lawyers will get this done in 10 days? Pro se litigants never will. The appellee has 20 days when it may not even know what the issues on appeal will be. After *Special v. West Boca Medical Center*, 160 So. 3d 1251 (Fla. 2015), the appellee may now have some obligations to provide additional record to prove an error harmless, but the 20 day period will not work for that purpose.

3. Supplemental record statement on leave of court. If I am right, or even half right about #2, "the court" will actually be in charge of administering times for statements. This is a burden on the court. But who is "the court"? I think the circuit and DCA have concurrent jurisdiction to do this under FRAP 9.600(a). The DCA wants to manage time, but the circuit court has the memory. How quickly will these motions be ruled upon?

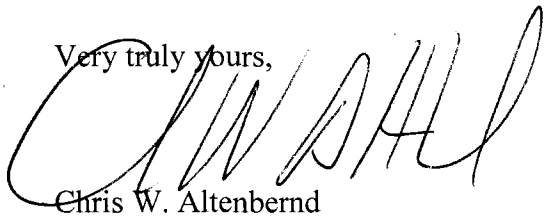
4. 10 days to object unless extension from the court. So, what happens if I blow the 10 days? Is the statement "deemed" correct? Do I waive a right to object? The proposed statement, if served within 10 days, is served before the appellees' appellate counsel may be of record, and that counsel may never be of record in the circuit court. Again, what court receives this service? I would assume this must be filed in the circuit court. Subsection (C) still has reference to a "lower tribunal," but that term is not used here. Even under the current rule, statements of evidence do not work well when the lower tribunal is not a circuit court.

5. 30 days to settle. I recognize that some circuit courts have taken forever to resolve a statement. Occasionally, I suspect a judge waits until memory fails. But settling and approving a statement of evidence is not a matter that will be easy to do without a face-to-face hearing. Can that be done in most circuits within 30 days? Is the distinction between lower tribunal and court in this subsection an indication that "court" means "appellate court"?

Appellate judges have an obligation to give litigants a chance for an adequate record. FRAP 9.200(f). Frankly, I was always a little confused as to whether I was supposed to tell folks to try for a statement of evidence if there was no transcript.

A statement of evidence works well for a minor evidentiary issue at a short hearing. Any event that lasts more than about one hour almost never can be adequately resolved in a statement. It seems to me that the committee might be better off to recognize the real limitations on this option and try to fashion a rule to help it work where it can work, and then try to limit its use in other settings.

Very truly yours,



Chris W. Altenbernd

108372537.1

(4~~5~~) **Statement of Evidence or Proceedings.**

(A) If no report of the proceedings was made, or if the transcript is unavailable, a party may prepare a statement of the evidence or proceedings from the best available means, including the party's recollection. ~~The statement shall be served on all other parties,~~If an appellant seeks to have the statement included in the initial record on appeal, the appellant shall serve the proposed statement on all other parties within 10 days of filing the notice of appeal. If an appellee seeks to have the statement included in the initial record on appeal, the appellee shall serve the proposed statement on all other parties within 20 days after the notice of appeal was filed. If a party seeks to have the statement included in a supplemental record, the party may do so at any time upon leave from the court and within such time as may be established by the court.

(B) A party who has any objections or proposed amendments to a proposed statement ~~may~~shall serve those objections or proposed amendments on all other parties ~~to it~~ within 10 days of service of the proposed statement, unless such time is extended by the court.

(C) ~~Thereafter, t~~The proposed statement and any objections or proposed amendments shall be filed with the lower tribunal for settlement and approval within 30 days of the initial service of the statement. As settled and approved, the final statement shall be included by the clerk of the lower tribunal in the initial record or, if authorized by the court, in a supplemental record.

(D) If the statement cannot be finalized within 30 days of the initial service, the party who initiated the statement shall request from the court such additional time as is reasonably necessary and shall state the reasons for the request. A response, if any, to such a motion for extension of time shall be served within 10 days of service of the motion. If the motion is granted, the court shall notify the lower tribunal and the parties of the due date of the final statement.

From: Laura Triplett [mailto:tripletl@flcourts.org]
Sent: Wednesday, June 29, 2016 10:16 PM
To: Telfer, Heather <HTelfer@floridabar.org>; Norse, Kristin <knorse@kmf-law.com>
Subject: RE: ACRC rule 9.170 proposed correction

Thank you for the links, Heather! Looking at the proposed amendment to 9.170(c), it looks like the new language does not address the internal inconsistency that Mary Beth is referring to. The amendment reads in part:

> **(c) Record; Alternative Appendix.** An appeal under this rule may proceed on a record prepared by the clerk of the lower tribunal or on appendices to the briefs, as elected by the parties within the time frames set forth in rule 9.200(a)(3) for designating the record. The clerk of the lower tribunal shall prepare a record on appeal in accordance with rule 9.200 unless the appellant directs that no record shall be prepared; a copy of such direction shall be served on the court when it is served on the clerk of the lower tribunal. However, any other party may

Mary Beth and I believe that the highlighted portion should instead be a reference to rule 9.200(a)(2), which sets forth the time frames for directing the clerk to include or exclude particular record documents on file in the trial court. Subsection (a)(3) covers stipulations and does not set forth a particular time frame apart from "the time prescribed for transmittal of the record," so it doesn't seem to make sense to refer to it in 9.170(c)'s context.

Laura Triplett

From: Telfer, Heather [mailto:HTelfer@floridabar.org]
Sent: June 29, 2016 4:29 PM
To: Laura Triplett <tripletl@flcourts.org>; Norse, Kristin <knorse@kmf-law.com>
Subject: RE: ACRC rule 9.170 proposed correction

Good Afternoon,

I think the Family Practice Subcommittee addressed this, but with amendments to Rule 9.170. Here is a link to the amendments in the cycle report. Do you think that would cover it? If not, I'll get it to the record on appeal subcommittee.

http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/82aab8f3cb5f9c0f85257fd1005121af!OpenDocument

http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/BF0CD8D1D54BFBA385257FC4005CA9CD/$FILE/ACRC%20Rules%20Legislative%20Format%2005%2027%2016.pdf?OpenElement

Thanks,

Heather

Heather Savage Telfer
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From: Laura Triplett [mailto:tripletl@flcourts.org]
Sent: Wednesday, June 29, 2016 4:16 PM
To: Norse, Kristin <knorse@kmf-law.com>
Cc: Telfer, Heather <HTelfer@floridabar.org>
Subject: ACRC rule 9.170 proposed correction

Kristin,

I talked with Courtney Brewer about the below suggestion, but she opined that it was outside of the current referral from the FLSC. She suggested that I pass it along to you and Heather as a separate referral. I think Mary Beth's suggestion is well taken.

Also, if there's room on the record subcommittee, is it too late to volunteer? Thanks! J

Laura Triplett

From: Mary Beth Kuenzel, Clerk
Sent: June 22, 2016 1:52 PM

To: Laura Triplett <tripletl@flcourts.org>
Subject: ACRC

Hey Laura,
Many congratulations on being appointed to the Appellate Court Rules Committee!

Here's a weird (possibly incorrect) internal reference in the appellate rules. In probate cases, the parties can travel on a record prepared by the circuit court clerk or on appendices. 9.170(c). They are supposed to "elect" one or the other "within the time frames set forth in rule 9.200(a)(3) for designating the record." But 9.200(a)(3) addresses stipulated statements used in lieu of records. So I'm thinking the reference should be to 9.200(a)(2), which begins: "Within 10 days of filing the notice of appeal, an appellant may direct the clerk to include or exclude . . . ."

I don't know if all suggestions have to go through the formal referral process, but I thought I would bring this to your attention. I imagine it's frustrating for circuit court clerks to go to the trouble and expense and compiling a record only to be told by the parties that they're going to rely on appendices.
mb

Comments on Appellate Rules changes – Part One

Rule 9.020(i)

This is the most important appellate rule, since it defines the way an order, in **<u>any</u>** court in Florida, becomes final – rendered -- for the purposes of appeal. There cannot be any uncertainty and the times must be crisp and without doubt. I have not had a chance to run my concerns past anyone currently on the ACRC, but I hope to do so before today's meeting. David may have some special thoughts as well. I do not want to bring this up for any final discussion today, but if you have a chance to review this this afternoon, great.

<u>First comment: filing "with" the Clerk or filing "by" the Clerk</u>

My first comment relates to the exact time that a document/order is deemed "rendered", particularly in a paper document situation. This issue has been battled for years, but in Casto v. Casto, 404 So.2d 1046 (Fla. 1981), the issue was seemingly ended by the Court's recognizing that the date of entry or rendition was the date that the Clerk physically entered the document on the Clerk's docket. Existing Rule 9.020 used the phrase "filed <u>with</u> the Clerk". Probably a better phrase would be filed **<u>BY</u>** the clerk, or docketed by the Clerk. But the new 9.020(i) uses "with" in most places. We might want to run that [preliminary question by the ACRC. The opening paragraph of (i) uses "filed with the Clerk." Filing with

the clerk is the act of the filer or Judge; filing BY the Clerk is the act of the Clerk, and that is the far more important time, and the one that has a date on a record – the docket.

However in 9.020(j), **Rendition of an Appellate Order**, the proposed addition picks up the existing language of the rule to say that rendition occurs when the paper is filed "**by** the clerk…" This is actually better and more accurate because simply filing "with" the clerk accomplishes nothing UNLESS the clerk then "files" or dockets the order. This is an inconsistency in language for which I don't see a reason. The second version is better; docketing would be even better, because it is the date that the clerk does something that triggers rendition and the appeal time. It is not the date that the filer does something. So, "filed BY the clerk" is far better throughout, and consistently, to "filed WITH the clerk."

Second comment: Possible confusion over what are "authorized motions"

9.020(i)(1) lists motions authorized to toll rendition. These are almost certainly just for trial court motions, but the rule doesn't say that. Some of the appellate authorized motions [e.g. for written opinion] are not listed.

9.020(j) deals with appellate rendition and ID's the authorized motions as being those in 9.330 and 9.331. That's fine.

It seems to me that, to avoid doubt, the title to 9.020(i)(1) should be changed to say "**Trial Court** Motions Tolling Rendition". Then each court has its motions defined in this rule clearly.

Rule 9.030 Jurisdiction

Rule adds a requirement that appeals to circuit courts be handled by three judges. Important and overdue, but no separate impact.

Rule 9.120 Discretionary review

Deletes requirement of an appendix with the order/decision. No separate effect.

Rule 9.140 Criminal appeals

Rule deals with criminal appeals and the attorneys and record. Small wording changes to what attorneys are called, and defining who has to notify the reporter, with some new definitional language for types of reporters. No separate effect.

Rule 9.141 Collateral criminal appeals

Change adds appeals pursuant to Rule 3.802. No separate impact or effect.

Rule 9.146 Juvenile appeals

Rule first cleans up terms for the different kinds of authorized reporters who need to get the designations to the reporter.

Rule also adds a procedure for ineffective assistance of counsel in TPR cases. I don't think there is any separate effect elsewhere.

Rule 9.180 Workers' Comp appeals

The changes to the rule only deal with the wording to describe the court reporter. No separate effects are noted.

In reading the existing language in 9.180(f)(6)(C), the rule directs that the reporter "deliver" the transcript "in sufficient time" for clerk to insert information. It seems that this time definition is distinctly undefined and I would address this concern to the ACRC.

9.200 The Record

The proposed changed simply use new terminology to define the reporter, consistent with the earlier changes above. No separate effect is noted.