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SEPTEMBER 27, 2013 MEETING
APPELLATE COURT RULES COMMITTEE
9:00 AM TO 12:00 PM

In Attendance:
Eduardo I. Sanchez, Chair
John Richard Hamilton, Vice Chair
Wendy S. Loquasto, Vice Chair
David M. Caldevilla, Secretary
Ceci Culpepper Berman
Marie Attaway Borland
Robin I. Bresky
Courtney Rebecca Brewer
Christopher Vincent Carlyle
Wendie Michelle Cooper
Sara-Jean Palmer
Hon. Marva Louise Crenshaw
Landis Vernon Curry, III
Duane Allan Daiker
Michael T. Davis
Dorothy Venable DiFiore
Rosemarie Elizabeth Farrell
Angela Carol Flowers
Hon. Jeffrey Dana Gillen
Marjorie Gadarian Graham
Tracy Raffles Gunn
Debra Potter Klaube
Elliot Burt Kula
Jeffrey Thomas Kuntz
Craig Edward Leen
Wendy Loquasto, Vice Chair
Jacqulyn Mack
Kristin Ann Norse
James Edward Nutt
Erin Jane O'Leary
Hon. Kathryn Senecal Pecko
Gigi Rollini
Sarah J. Rumph
Stephanie L. Serafin
Andrew McBride Stanton
Laura Keats Wendell
Richard Swank
Hon. T. Kent Wetherell, II
Elizabeth Cangelose Wheeler
Carrie Ann Wozniak
Stephanie Christina Zimmerman
Stephanie Silver

Appeared by Telephone:
Mihalea Cabulea
Frances Guasch De La Guardia
Robin Felicity Hazel
John Wesley Little, III
Elisha Naoli Page
Hon. Stephanie Williams Ray
Steven Lauren Seliger
Stefanie Renee Shelley
Dwight Oneal Slater
Robert Telfer
Excused:
Michael Davis
Christine Davis Graves
Michael Greenberg
Jack Reiter

2. Criminal Practice Subcommittee – The subcommittee's written report and minutes are found at page 227 of the agenda packet.

(a) Rule 9.140: The Chair, Judge Wetherell, stated that the subcommittee has one item ready for a vote by the full committee (i.e., a proposed amendment to Rule 9.140).

- Judge Wetherell stated that the Florida Supreme Court amended criminal rule 3.800 in April. That amendment revealed a potential conflict concerning the

record preparation time frame and the time frame for motions for rehearing. The subcommittee was asked to review it and make any recommended changes while the Supreme Court is considering the Criminal Court Steering Committee's report. Chairman Sanchez sent a letter to the Supreme Court, advising that we were aware of this conflict.

- Judge Wetherell stated that the subcommittee recommends language that essentially breaks the rule into pieces, and new language concerning the clerk's record transmission, which occurs automatically in these cases. This involves direct criminal appeals dealing with motions to correct sentencing errors that toll the rendition of the order for purposes of the appeal. The new rule language ties the transmission of the supplemental record for a Rule 3.800 motion, either to the ruling on the motion, or if there is a motion for rehearing filed, to the disposition of that motion.

- Judge Wetherell stated there is a deadline for the trial courts to rule on those motions. For the original motion, they have 60 days within which to grant or deny the motion to correct sentencing error. If they don't do so, then the motion is deemed denied and the record is transmitted, and the issue is preserved for review.

- Judge Wetherell stated that the amendment to the criminal rule essentially created a 40-day deadline for ruling on a motion for rehearing of the order denying the Rule 3.800 motion. So, the second language ties the transmission of the supplemental record by the Clerk to either the disposition of the rehearing motion or the end of the 40-day period.

- Judge Wetherell stated this is merely a technical amendment intended to address a conflict or an issue that was presented as part of the criminal rule amendment. He noted that Mr. Hamilton has some friendly amendments.

- Ultimately, Judge Wetherell requests the Committee to authorize the change, so that the Supreme Court can address this while considering the motion for rehearing rule. Alternatively, it would be in the next three-year cycle.

- Judge Wetherell did not know if this could be fast-tracked. He asked Tom Hall whether he thought it would be appropriate for us to send the Supreme Court a letter and mention that an amendment that may address issues related to another rule they are considering. Mr. Hall said that would be appropriate.

- Judge Wetherell moved for adoption of the proposed amendment to Rule 9.140 found at p. 2-3 of the agenda.

- Ms. Bresky asked for clarification as to where the 40-day time period came from. Judge Wetherell responded that it was consistent with the criminal rule, which gives the trial court a 40-day deadline to rule on the motion for rehearing.

- Mr. Hamilton identified some grammatical changes, which Judge Wetherell accepted as a friendly amendment. Mr. Hamilton proposed that a hyphen be inserted whenever there is a number followed by the words "day period." (For example, instead of "20 day period," it should say "20-day period.")

- Ms. Zimmerman asked Judge Wetherell a question. Subdivision (iii) states the clerk will transmit the supplement within 5 days after the filing of the order on the rehearing motion. Is it possible that that would happen while the 3.800(b)(2) motion is still pending or would this be resolved when that happens? Judge Wetherell stated that motion is deemed denied if not ruled upon during that timeframe. Once it is deem denied and not ruled upon within the 40 days, it is over at the trial court level.

- Mr. Curry noted that the proposed rule language will have a floating subdivision "A" and "B" without any headings, and this appears to be inconsistent with other rules. He suggested that subdivision (f)(6)(A) and (B) should be given headings.

- Judge Wetherell agreed. He suggested that the heading for (f)(6)(A) should be "Transmittal," and the heading for (f)(6)(B) should be "Transcripts."

- The Chairman called for a vote. The motion passed unanimously, with 48 votes in favor, and 0 votes against.

- **Approved Action: Rule 9.140 will be submitted for amendment, as follows:**

RULE 9.140. APPEAL PROCEEDINGS IN CRIMINAL CASES

(f) Record.

(6) Supplemental Record for Motion to Correct Sentencing Error Pursuant to Florida Rule of Criminal Procedure 3.800(b)(2).

(A) Transmittal.

(i) 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 resulting order, and any amended sentence. If a motion for rehearing is filed, the supplement shall also include the motion for rehearing, any response, and any resulting order.

(ii) The clerk shall electronically transmit the supplement to the appellate court within ~~5~~20 days ~~of~~after the filing of the order ~~ruling on~~ disposing of the rule 3.800(b)(2) motion, unless a motion for rehearing is filed. If an order is not filed within 60 days ~~from~~after the filing of the rule 3.800(b)(2) motion, and no motion for rehearing is filed, this ~~time~~ 20-day period shall run from the expiration of the 60-day period, and the clerk shall include a

statement in the supplement ~~the record with the motion and a statement~~ that no order on the rule 3.800(b)(2) motion was timely filed.

(iii) If a motion for rehearing is filed, the clerk shall electronically transmit the supplement to the appellate court within 5 days after 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 after the date of the order for which rehearing is sought, this 5-day period 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.

(B) Transcripts. If any appellate counsel determines that a transcript of a proceeding relating to such a motion is required to review the sentencing issue, appellate counsel shall, within 5 days from the transmittal of the supplement described in subdivision (A), designate those portions of the proceedings not on file deemed necessary for transcription and inclusion in the record. A copy of the designation shall be filed with the appellate court. The procedure for this supplementation shall be in accordance with this subdivision, except that counsel is not required to file a revised statement of judicial acts to be reviewed, the approved court reporter or approved transcriptionist shall deliver the transcript within 15 days, and the clerk shall supplement the record with the transcript within 5 days of its receipt.

3. General Practice Subcommittee – The subcommittee's written report and minutes are found at page 235 of the agenda packet.

- The Chair, Mr. Leen, stated the subcommittee had nine referrals that they worked on. They recommend going forward on two items today; they decided to take no action on two referrals; and they are still working on the remaining five referrals.
-

(a) Rule 9.010 and 9.020: Mr. Leen stated that Judge Pecko, Ms. Page and Mr. Nutt worked on the recommended amendment to Rule 9.010. Basically, this rule addresses language in Rule 9.020(h), which generally provides that the Rules of Judicial Administration apply to appellate proceedings, but that the Rules of Appellate Procedure take precedence. The amendment moves that language to Rule 9.010. The subcommittee felt this was the more appropriate place to put this language, and also has the added benefit of changing the rendition rule back to its prior subheading heading letter.

- Mr. Nutt pointed out that some of the underlining and strike-through does not appear on the proposed amendment language appearing in the agenda. The correct version is found at p. 235 of the agenda packet. This is basically mirroring the Rule 2.130, which states that the Rules of Appellate Procedure have superiority. They also changed the "rules of procedure" to "court rules." The subcommittee believes that the "rules of procedure" terminology is too narrow and restrictive. The subcommittee believes that the RJA should likewise change the terminology of their rule to conform with this.

- Mr. Hamilton suggested that we should not remove the cross-reference to Rule 2.130, and asked why it is being removed. Mr. Nutt responded that the phrase was duplicative as written, but agreed it would be a good idea to include some cross-reference to 2.130.

- Mr. Hamilton suggested keeping the cross-reference and changing the last sentence to read, "These rules shall supersede all conflicting statutes, and as provided in Florida Rule of Judicial Administration 2.130, all conflicting court rules." Mr. Nutt stated the subcommittee would accept that suggestion as a friendly amendment.

- Mr. Kula asked if the reference to "court rules" could create an ambiguity because our rules have a definition for "court." Mr. Nutt pointed out that Rule 2.120 defines "court rule" as a rule of practice or procedure. Mr. Kula suggested that might be a problem because the term is not defined by our rules. Mr. Nutt responded that the intent was to encompass all possible rules and to be more comprehensive by incorporating RJA's defined term. The cure could be to insert a comment stating "court rules as defined in Rule 2.120."

- Ms. Gunn suggested that another way to fix it might be to keep the existing language, and instead of saying "court rules," say the rules of practice or procedure, which is the language used in the RJA. She joins in Mr. Kula's concern because, for example, the Fourth DCA may have some specific rules and she is not sure that our rules would supersede those.

- Mr. Leen stated that the ACRC wants to make it clear that our rules supersede all statutes and all rules. He would accept "rules of practice or procedure," as a friendly amendment. The last sentence of Rule 9.010 would read, "These rules shall supersede all conflicting statutes, and as provided in Florida Rule of Judicial Administration 2.130, all conflicting rules of practice or procedure." That conforms with the definition in the RJA rules.

- The Chair called for a vote. The motion passed, with 48 votes in favor, and 1 vote against.

- **<u>Approved Action</u>: Rules 9.010 and 9.020 will be submitted for amendment, as follows:**

RULE 9.010. EFFECTIVE DATE; ~~AND~~ SCOPE; AND APPLICABILITY OF FLORIDA RULES OF JUDICIAL ADMINISTRATION

These rules, cited as "Florida Rules of Appellate Procedure," and abbreviated "Fla. R. App. P.," shall take effect at 12:01 a.m. on March 1, 1978. They shall govern all proceedings commenced on or after that date in the supreme court, the district courts of appeal, and the circuit courts in the exercise of the jurisdiction described by rule 9.030(c); provided that any appellate proceeding commenced before March 1, 1978, shall continue to its conclusion in the court in which it is then pending in accordance with the Florida Appellate Rules, 1962 Amendment. The Florida Rules of Judicial Administration are applicable in all proceedings governed by these rules, except as otherwise provided by these rules. These rules shall supersede all conflicting statutes and, as provided in Florida Rule of Judicial Administration 2.130, all conflicting rules of practice or procedure.

RULE 9.020. DEFINITIONS

The following terms have the meanings shown as used in these rules:

(a)-(g) [No change]

~~**(h) Applicability of Florida Rules of Judicial Administration**. 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.~~

~~(i)~~ (h) Rendition (of an Order). An order is rendered when a signed, written order is filed with the clerk of the lower tribunal. However, unless another applicable rule of procedure specifically provides to the contrary, if a final order has been entered and there has been filed in the lower tribunal an authorized and timely motion for new trial, for rehearing, for certification, to alter or amend, for judgment in accordance with prior motion for directed verdict, for arrest of judgment, to challenge the verdict, to correct a sentence or order of probation pursuant to Florida Rule of Criminal Procedure 3.800(b)(1), to withdraw a plea after sentencing pursuant to Florida Rule of Criminal Procedure 3.170(l), or to vacate an order based upon the recommendations of a hearing officer in accordance with Florida Family Law Rule of Procedure 12.491, the following exceptions apply:

(1) – (3) [No change]

~~(j)~~ (i) Rendition of an Appellate Order. If any timely and authorized motion under rule 9.330 or 9.331 is filed, the order shall not be deemed rendered as to any party until all of the motions are either abandoned or resolved by the filing of a written order.

JANUARY 24, 2014 MEETING
APPELLATE COURT RULES COMMITTEE
9:00 AM TO 12:00 PM

A. CALL TO ORDER –CHAIR EDUARDO I. SANCHEZ

At approximately 9:02 a.m., the Chair, Eduardo I. Sanchez, called to order the meeting of the Appellate Court Rules Committee (ACRC). The Chair welcomed members and noted that one guest, Tom Ward, was present. Later Tom Hall, the former Clerk of the Florida Supreme Court Clerk, joined the meeting as a guest. The following is an attendance roster of the ACRC members:

In Attendance: Eduardo I. Sanchez, Chair; John Richard Hamilton, Vice Chair; Wendy S. Loquasto, Vice Chair; David M. Caldevilla, Secretary; Ceci Culpepper Berman; Marie Attaway Borland; Robin I. Bresky; Courtney Rebecca Brewer; Mihaela Cabulea; Christopher Vincent Carlyle; Wendie Michelle Cooper; Hon. Marva Louise Crenshaw; Landis Vernon Curry, III; Duane Allan Daiker; Michael T. Davis; Frances Guasch De La Guardia; Dorothy Venable DiFiore; Angela Carol Flowers; Rosemarie Elizabeth Farrell; Hon. Jeffrey Dana Gillen; Marjorie Gadarian Graham; Christine Davis Graves; Michael C. Greenberg; Tracy Raffles Gunn; Robin Felicity Hazel; Elliot Burt Kula; Jeffrey Thomas Kuntz; Craig Edward Leen; Jacqueline Mack; Kristin Ann Norse; James Edward Nutt; Erin Jane O'Leary; Elisha Naoli Page; Hon. Kathryn Senecal Pecko; Hon. Stephanie Williams Ray; Gigi Rollini; Sarah J. Rumph; Steven Lauren Seliger; Stephanie L. Serafin; Stephanie Rebecca Silver; Dwight Oneal Slater; Andrew McBride Stanton; Robert J. Telfer III; Laura Keats Wendell; Hon. T. Kent Wetherell, II; Elizabeth Cangelose Wheeler; Carrie Ann Wozniak; Stephanie Christina Zimmerman

Absent: Margaret Diana Mathews, Bd. Liaison; Debra Potter Klauber; John Wesley Little, III; Sara-Jean Palmer; Jack Roy Reiter (excused); Stefanie Renee Shelley (excused)

(b) Referral 13-AC-23 – Mr. Leen stated that this item involves the uniform citation system under Rule 9.800(h)(2), and asked Christine Graves to make the presentation.

- Ms. Graves explained that the Subcommittee had a referral questioning whether Rule 9.800(h)(2) should continue to require the citation of a specific page number for "Florida Laws" (e.g., session laws), because Westlaw does not include page numbers and attorneys no longer buy the books. The Subcommittee recommended deleting the requirement of a pinpoint page number citation.

- David Caldevilla stated that the Florida Legislature has a website with PDF copies of the session laws, which include the same page numbers that appear in the hard copy. He did not know how many years the website goes back. Because the page numbers are available, he suggested there is no reason to change this rule.

- Mr. Hamilton said if the online version is easily accessible and does have the page number, then we should not change the rule. The pinpoint citations should be included whenever they are easily available and accessible.

- Ms. Loquasto agreed and stated that the website is "Online Sunshine" at www.leg.state.fl.us.

- Ms. Graves said that she does not think that a page citation should be required. Judge Wetherell agreed that the page citation should be eliminated because citation to the section of the law is available and sufficient.

- Courtney Brewer stated that the website only goes back to 1997.

- The Chair called for a vote. The Subcommittee's recommended language was approved with 42 votes in favor, 4 against, and 1 abstaining.

- **<u>Approved Action</u>: Rule 9.800(h)(2) will be submitted for amendment, as follows:**

RULE 9.800. UNIFORM CITATION SYSTEM

(a)-(g) [No change]

(h) Florida Laws. (Cite if not in Fla. Stat. or if desired for clarity or adoption reference.)

(1) After 1956: Ch. 74-177, § 5, ~~at 473,~~ Laws of Fla.

(2) Before 1957: Ch. 22000, Laws of Fla. (1943).

6. <u>Administrative Law Subcommittee</u>: The Subcommittee's written report and minutes are found at page 175 of the agenda packet. The Chair, Robert Telfer, stated that the Subcommittee had one referral with a proposed revision to Rule 9.190(c)(2).

(a) <u>Referral 13-AC-26</u>: Mr. Telfer explained that the proposed revision to Rule 9.190(c)(2) governs the content of the record for various administrative proceedings on appeal. The Subcommittee was asked to conduct review of the statutes referenced in the rule to determine if they were correct as a review had not be done in some time. Three members of the Subcommittee (Judge Wetherell, Gigi Rollini, and Dwight Slater) were appointed to review for possible revisions. Their report appears at page 186 of the agenda, which identifies some minor issues relating to the use of parentheticals after statutory references, which did not match the actual title of the statutes. They also identified the need to reorganize 9.290(c)(2) and create a separate subsection dealing with rulemaking. They eliminated the parentheticals and inserted headings for clarity. They did not change the particular items to be included in the record for each category. Additionally, they also did some reorganization without substantive changes, to make the rule easier to read and understand.

- The Chair opened the floor for discussion. Hearing no discussion, the Chair called for a vote, and the proposed amendment passed unanimously, with a vote of 47 in favor and 0 opposed.

- **Approved Action**: **Rule 9.190(c)(2) will be submitted for amendment, as follows:**

RULE 9.190 JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

(c) The Record.

(1) Generally. As further described in this rule, the record shall include only materials furnished to and reviewed by the lower tribunal in advance of the administrative action to be reviewed by the court.

(2) Review of Final Action Pursuant to the Administrative Procedure Act.

(A) Proceedings Involving Disputed Issues of Material Fact. In an appeal from any proceeding conducted pursuant to section 120.56 ~~(rule challenges)~~ or sections 120.569 ~~(decisions which affect substantial interests)~~ and 120.57(1), Florida Statutes, ~~(decisions which affect substantial interests involving disputed material facts)~~ the record shall consist of all notices, pleadings, motions, and intermediate rulings; evidence admitted; those matters officially recognized; proffers of proof and objections and rulings thereon; proposed findings and exceptions; any decision, opinion, order, or report by the presiding officer; all staff memoranda or data submitted to the presiding officer during the hearing or prior to its disposition, after notice of submission to all parties, except communications by advisory staff as permitted under section 120.66(1), Florida Statutes, if such communications are public records; all matters placed on the record after an ex parte communication; and the official transcript.

(B) **Proceedings Not Involving Disputed Issues of Material Fact.** In an appeal from any proceeding pursuant to sections 120.569 ~~(decisions which affect substantial interests)~~ and 120.57(2), Florida Statutes ~~(decisions which affect substantial interests involving no disputed issue of material fact)~~, the record shall consist of the notice and summary of grounds; evidence received; all written statements submitted; any decisions overruling objections; all matters placed on the record after an ex parte communication; the official transcript; and any decision, opinion, order, or report by the presiding officer.

(C) **Declaratory Statements**. In an appeal from any proceeding pursuant to section 120.565, Florida Statutes ~~(declaratory statements)~~, the record shall consist of the petition seeking a declaratory statement and any pleadings filed with the agency; all notices relating to the petition published in the Florida Administrative ~~Weekly~~Register; the declaratory statement issued by the agency or the agency's denial of the petition; and all matters listed in subdivision (c)(2)(A) or (c)(2)(B) of this rule, whichever is appropriate, if a hearing is held on the declaratory statement petition.

(D) **Summary Hearings.** In an appeal from any proceeding pursuant to section 120.574, Florida Statutes ~~(summary proceeding)~~, the record shall consist of all notices, pleadings, motions, and intermediate rulings; evidence

received; a statement of matters officially recognized; proffers of proof and

objections and rulings thereon; matters placed on the record after an ex parte communication; the written decision of the administrative law judge presiding at the final hearing; and the official transcript of the final hearing.

(E) **Challenges to Rules.**

(i) In an appeal from any proceeding conducted pursuant to section 120.56, Florida Statutes, the record shall consist of all notices, pleadings, motions, and intermediate rulings; evidence admitted; those matters

officially recognized; proffers of proof and objections and rulings thereon;

proposed findings and exceptions; any decision, opinion, order, or report by the presiding officer; all staff memoranda or data submitted to the presiding officer during the hearing or prior to its disposition, after notice of submission to all parties, except communications by advisory staff as permitted under section 120.66(1), Florida Statutes, if such communications are public records; all matters placed on the record after an ex parte communication; and the official transcript.

(ii) In an appeal from a rule adoption pursuant to sections 120.54 ~~(rule adoption)~~ 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 shall consist only of those documents from the rulemaking record compiled by the agency that materially address the constitutional issue. The agency's rulemaking record consists of all notices given for the proposed rule; any statement of estimated regulatory costs for the rule; a written summary of hearings on the proposed rule; the written comments and responses to written comments as required by sections 120.54 ~~(rule adoption)~~ and 120.541, Florida Statutes ~~(statement of estimated regulatory costs)~~; all notices and findings made pursuant to section 120.54(4), Florida Statutes; all materials filed by the agency with the Administrative Procedures Committee pursuant to section 120.54(3), Florida Statutes ~~(adoption of emergency rules)~~; all materials filed with the Department of State pursuant to section 120.54(3), Florida Statutes ~~(rule adoption procedure)~~; and all written inquiries from standing committees of the legislature concerning the rule.

(F) Immediate Final Orders. In an appeal from an immediate final order entered pursuant to section 120.569(2)(n), Florida Statutes, the record shall be compiled in an appendix pursuant to rule 9.220 and served with

the briefs.

(3)-(6) [No change]

(d)-(e) [No change]

1. Electronic Filing Subcommittee: The Subcommittee's written report and minutes are found at page 195 of the agenda packet. The Chair, Mr. Curry, stated the Subcommittee is

considering a couple of referrals and also investigating other matters, but for today, he has some minor amendments, which fall into three categories. The first group of amendments pertains to the use of the defined term "document" instead of "papers" or "paper form." The second group pertains to provisions dealing with the return of the record, which is an obsolete concept with the advent of electronic records. So, those rules should be amended to clarify that returning of the record only applies to portions of the record that have not been electronically submitted. The third group of amendments pertains to furnishing stamped envelopes to the appellate court for the return of orders.

(a) Paper vs. Documents: The first group of amendments involve Rules 9.125(g), 9.142(c)(10), 9.145(b), 9.146(e), 9.146(g)(2)(c), 9.410(a), 9.410(b)(3)(4), 9.420(c), 9.900(h). For the most part, those changes are changing the word "paper" to "documents." Further, Rules 9.420(c) and 9.900 will use the phrase "paper format."

- Mr. Hamilton and Mr. Caldevilla expressed concern about retaining the language pertaining to paper format at all in Rule 9.420(c), because all notices of appeal and initial petitions should be filed by solely electronic means. Mr. Curry responded that the Subcommittee is looking at that and there is some concern. Tom Hall also recognized that as an area that may need a change. In the administrative rule and several of the other rules, there is a requirement that the initial documents be served on paper. So, the Subcommittee is still investigating that.

- Ms. Farrell said at a prior meeting, there was a discussion about pro se appellants and their concerns. She thinks there still is an exemption from the electronic filing for an incarcerated pro se person. Mr. Curry responded that he would be willing to recall that particular rule from the proposal, for further consideration. The Chair said that he would not favor eliminating it at this juncture.

- The Chair called for a vote, and the proposed amendments to Rules 9.125(g), 9.142(c)(10), 9.145(b), 9.146(e), 9.146(g)(2)(c), 9.410(a), 9.410(b)(3)(4), 9.420(c), 9.900(h), Rules 9.420(c) and 9.900, passed unanimously with 47 votes in favor and 0 opposed.

- **Approved Action**: **Rules 9.125(g), 9.142(c)(10), 9.145(b), 9.146(e), 9.146(g)(2)(c), 9.410(a), 9.410(b)(3)(4), 9.420(c), 9.900(h), Rules 9.420(c) and 9.900 will be submitted for amendment, as follows:**

RULE 9.125. REVIEW OF TRIAL COURT ORDERS AND JUDGMENTS CERTIFIED BY THE DISTRICT COURTS OF APPEAL AS REQUIRING IMMEDIATE RESOLUTION BY THE SUPREME COURT

(g) Procedure When Supreme Court Accepts Jurisdiction. The jurisdiction of the supreme court attaches on rendition of the order accepting

jurisdiction. If the supreme court accepts jurisdiction, it shall so order and advise the parties, the clerk of the district court, and the clerk of the lower tribunal. The clerk of the court in possession of the record shall electronically transmit the record in the case to the supreme court within 10 days thereafter. The supreme court shall issue a briefing schedule and all ~~papers~~documents formerly required to be filed in the district court shall be filed in the supreme court. If the supreme court denies jurisdiction, it shall so order and advise the parties and the clerk of the district court.

RULE 9.142. PROCEDURE FOR REVIEW IN DEATH PENALTY CASES

(c) [No change]

(1)-(9) [No change]

(10) Other pleadings. The parties shall not file any other pleadings,

motions, replies or miscellaneous ~~papers~~documents without leave of court.

RULE 9.145. APPEAL PROCEEDINGS IN JUVENILE DELINQUENCY CASES

(d) References to Child. The appeal shall be entitled and docketed with

the initials, but not the name, of the child and the court case number. All

references to the child in briefs, other ~~papers~~documents, and the decision of the court shall be by initials.

RULE 9.146. APPEAL PROCEEDINGS IN JUVENILE DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS CASES AND CASES INVOLVING FAMILIES AND CHILDREN IN NEED OF SERVICES

(e) References to Child or Parents. When the parent or child is a party

to the appeal, the appeal shall be docketed and any ~~papers~~documents filed in the court shall be titled with the initials, but not the name, of the child or parent and the court case number. All references to the child or parent in briefs, other ~~papers~~documents, and the decision of the court shall be by initials.

(g) [No change]

(2) [No change]

(C) Directions to the Clerk, Duties of the Clerk, Preparation and Transmittal of the Record. The appellant shall file directions to the clerk with the notice of appeal. The clerk shall electronically transmit the record to the court within 5 days of the date the court reporter files the transcript(s) or, if a designation to the court reporter has not been filed, within 5 days of the filing of the notice of appeal. When the record is electronically transmitted to the court, the clerk shall simultaneously electronically transmit the record to the Department of Children and Family Services, the guardian ad litem, counsel appointed to represent any indigent parties, and shall simultaneously serve copies of the index to all non-indigent parties, and, upon their request, copies of the record or portions thereof. The clerk shall provide the record in paper format to all parties exempt from service by e-mail as set forth in the Florida Rules of Judicial Administration.

RULE 9.410. SANCTIONS

(a) Court's Motion. After 10 days' notice, on its own motion, the court may impose sanctions for any violation of these rules, or for the filing of any proceeding, motion, brief, or other ~~paper~~document that is frivolous or in bad faith. Such sanctions may include reprimand, contempt, striking of briefs or pleadings, dismissal of proceedings, costs, attorneys' fees, or other sanctions.

(b) [No change]

(1)-(2) [No change]

(3) Initial Service. A copy of a motion for attorneys' fees as a

sanction must initially be served only on the party against whom sanctions are sought. That motion shall be served no later than the time for serving any permitted response to a challenged ~~paper~~document or, if no response is permitted as of right, within 15 days after a challenged ~~paper~~document is served or a challenged claim, defense, contention, allegation, or denial is made at oral argument. A certificate of service that complies with rule 9.420(d) shall be taken as prima facie proof of the date of service. The certificate of filing should remain undated and unsigned.

(4) Filing and Final Service. If the challenged ~~paper~~document, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected within 21 days after service of the motion, the movant may file the motion for attorneys' fees as a sanction, as referenced in subdivision (3), with the court (a) no later than the time for service of the reply brief, if applicable, or (b) no later than 30 days after service of the motion. The movant shall serve upon all parties a copy of the motion filed with the court. A certificate of service of that copy which complies in substance with the form below shall be taken as prima facie proof of final service.

I certify that a copy of this previously served motion has been furnished to

..... (court) ..... by ..... hand delivery/mail/other delivery source ..... and has been furnished to ..... (name or names) ..... by ..... hand delivery/mail/other delivery source .....

/s/_____
Attorney for .....(name of party) .....
..... (address and phone number) .....
Florida Bar No.: _____

RULE 9.420. FILING; SERVICE OF COPIES; COMPUTATION OF TIME

(c) Method of Service. Service of every document filed in a proceeding

governed by these rules (including any briefs, motions, notices, responses,

petitions, and appendices) shall be made in conformity with the requirements of Florida Rule of Judicial Administration 2.516, except that the initial document filed in a proceeding governed by these rules (including any notice to invoke jurisdiction, notice of appeal, or petition for an original writ) shall be served both by e-mail pursuant to rule 2.516(b)(1) and in paper format pursuant to rule 2.516(b)(2).

RULE 9.900. FORMS

(h) Designation to Approved Court Reporter, Civil Court Reporter or Approved Transcriptionist.

IN THE . . . . . (NAME OF LOWER TRIBUNAL WHOSE ORDER IS TO BE REVIEWED). . . . .
Case No. _____

_____)
Plaintiff/Appellant,)
v. DESIGNATION TO APPROVED COURT REPORTER, CIVIL COURT REPORTER, OR APPROVED TRANSCRIPTIONIST, AND REPORTER'S OR APPROVED TRANSCRIPTIONIST'S ACKNOWLEDGEMENT

_____)
Defendant/Appellee.)
_____

I. DESIGNATION

Plaintiff/Appellant, _____, files this Designation to Approved Court Reporter, Civil Court Reporter, or Approved Transcriptionist and directs . . . . . (name of approved court reporter, civil court reporter, or approved transcriptionist) . . . . . to transcribe the following

portions of the trial proceedings to be used in this appeal [for cases where a party is exempt from service by electronic mail as set forth in the Florida Rules of Judicial Administration, state the following and provide paper copies of the transcript(s) in paper format]:

(b) Return of Record: Mr. Curry explained the next proposed amendment is to Rule 9.140, which deals with return of the record. Currently, the rule says that except in death penalty cases, the court shall return the record to the lower tribunal after final disposition of the appeal. The Subcommittee proposes to clarify that the court is only to return portions of the appellate record that were not electronically filed.

- The Chair opened the floor for comments. Hearing none, he called for a vote, and the amendment passed unanimously by a vote of 47 in favor and 0 opposed.

- **Approved Action**: **Rule 9.140 will be submitted for amendment, as follows:**
-

RULE 9.140. APPEAL PROCEEDINGS IN CRIMINAL CASES

(f) [No change]

(5) Return of Record. 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~~.

JUNE 27, 2014 MEETING
APPELLATE COURT RULES COMMITTEE

A. CALL TO ORDER –CHAIR EDUARDO I. SANCHEZ

On June 27, 2014, at approximately 9:11 a.m., the Chair, Eduardo I. Sanchez, called to order the meeting of the Appellate Court Rules Committee (ACRC). The following is an attendance roster:

In Attendance:

Eduardo I. Sanchez, Chair
John Richard Hamilton, Vice Chair
Wendy S. Loquasto, Vice Chair
David M. Caldevilla, Secretary
Ceci Culpepper Berman
Marie Attaway Borland
Robin I. Bresky
Courtney Rebecca Brewer
Mihaela Cabulea
Christopher Vincent Carlyle
Wendie Michelle Cooper
Hon. Marva Louise Crenshaw
Landis Vernon Curry, III
Duane Allan Daiker
Michael T. Davis
Frances Guasch De La Guardia
Dorothy Venable DiFiore
Rosemary Elizabeth Farrell
Angela Carol Flowers
Hon. Jeffrey Dana Gillen
Marjorie Gadarian Graham
Christine Davis Graves

Tracy Raffles Gunn
Robin Felicity Hazel
Debra Potter Klauber
Elliot Burt Kula
Jeffrey Thomas Kuntz
Craig Edward Leen
Kristin Ann Norse
James Edward Nutt
Elisha Naoli Page
Sara-Jean Palmer
Hon. Stephanie Williams Ray
Gigi Rollini
Sarah J. Rumph
Stefanie Renee Shelley
Stephanie Rebecca Silver
Dwight Oneal Slater
Andrew McBride Stanton
Robert J. Telfer III
Elizabeth Cangelose Wheeler
Carrie Ann Wozniak
Stephanie Christina Zimmerman

Appeared by Telephone:
Michael C. Greenburg
Hon. Kathryn S. Pecko
Steven Lauren Seliger
Hon. T. Kent Wetherell, II

Absent:
Margaret D. Matthews, Board Liaison
John Wesley Little, III
Jacqulyn Mack
Erin O'Leary (excused)
Jack Roy Reiter (excused)
Stephanie Serafin (excused)
Laura Keats Wendell

Guests:
Tom Hall, Incoming Member
Tom Ward, Incoming Member
Ivy Ginsberg, Incoming Member
David Luck, Incoming Member
Nikole Hiciano, Incoming Member
Hon. John Newton, Incoming Member (Phone)
Diane DeWolf, Incoming Member (Phone)
Andy Adler, Incoming Member (Phone)
Brandon Vesely, Incoming Member (Phone)
Hon. Joseph Lewis, Incoming Member
Jared Krubar
Dineen Wasylik

Referral 13-AC-18 – Ms. Berman stated that the Subcommittee's next item was a referral from Judge Altenbernd concerning the "joinder" provision of Rule 9.360(a). Ms. Berman asked Duane Daiker to present the Subcommittee's proposed amendment.

- Mr. Daiker explained that Rule 9.360 is titled "Parties," and subdivision (a) is titled, "Joinder." Judge Altenbernd originated this referral out of concern that the name of the rule is misleading, and it would be more accurate for the rule to address "switching sides." The Subcommittee ultimately agreed that the "Joinder" title is a little misleading. Joinder typically addresses situations where parties want to join in a proceeding, and the term originates in the civil rules. In contrast, the appellate rule accomplishes a realignment of the parties. In order to make the rules more accessible, and to make the meaning clearer to people who are not familiar with the rules, the Subcommittee agreed that "Realignment" would be a better title.
- Mr. Daiker next explained that the Subcommittee also proposes to change the first sentence of Rule 9.360(a) to make it clear that only an appellee can realign as an appellant. An appellant cannot realign as an appellee.

- Mr. Daiker next explained that Judge Altenbernd was also concerned about whether the time period for filing the notice should be longer. In order to maintain consistency with deadlines established by other rules, the Subcommittee decided not to change the time period. The courts routinely grant time extensions when there is no prejudice.

- Mr. Daiker next explained that the Subcommittee was also concerned that there may be confusion about where to file these notices. The language in the rule indicates that you file and pay the court where the petition or notice of appeal is filed, and under different circumstances, that is not necessarily the lower tribunal. That added some complexity to the rule, and it is not clear why the lower tribunal needs to be informed of a realignment of parties in an appeal. Also, the responsibility of collecting the fee is that of the appellate court.

- Mr. Daiker next explained that the Subcommittee consulted with Jim Birkhold, the Clerk of the Second DCA. Mr. Birkhold stated that he would prefer that the notice be filed in the appellate court. The Fifth DCA has adopted a local rule requiring these notices to be filed in the appellate court. To promote uniformity and efficiency, the notice of realignment should be filed with the appellate court. So, the Subcommittee recommends striking the last sentence of the rule so that it defaults to the notice being filed in the appellate court.

- Mr. Daiker next explained that changing the name of the rule and the notice to "Realignment" will have one "ripple effect" concerning collection of the filing fee. Section 35.22, Florida Statutes specifies a $295 filing fee for a "notice of joinder," and changing the name could have an impact on the Clerk's ability to collect these fees. When they spoke with Mr. Birkhold, he suggested that he would continue to collect the fee regardless of what the notice is called and they imagined that all other courts feel the same way, and that these inconsistencies happen from time to time. The Subcommittee thought this could be addressed in the Committee Note with a statement that any statutory fee that previously applied to filing a notice of joinder, would continue to apply to file a notice of realignment. They hope the Legislature, at some point, would change the statute to reflect the proper terminology. The Committee Note would also explain that the notice should be filed in the appellate court.

- Mr. Caldevilla stated that he believes changing the name from "joinder" to "realignment" would create confusion. We have a statute that says there is a filing fee for a "notice of joinder" and now we are going to call it something different. Some people may challenge the Clerk's statutory authority to charge the fee and that could generate unnecessary litigation, until we can coordinate with the Legislature to keep consistent terminology. He also opposes removing the provision that indicates a filing fee must be paid. Other rules have similar fee provisions for petitions, notices of appeal, notices of cross-appeal, and

other filings. So, he believes the fee provision should remain in this rule and not be moved into a Committee Note. He agrees the notice should be filed in the appellate court instead of the trial court, but thinks that requirement should be stated in the rule, not in the Committee Notes. He feels you should not have to look to Committee Notes to figure out what the rules mean. You should be able to look to the rule. He likes the concepts, but believes we should coordinate with the Legislature.

- Ms. Berman said the Subcommittee considered a lot of issues that Mr. Caldevilla raised, and thinks that some of the issues are better addressed in the Committee Note. With respect to the last sentence, they went back and forth at least 3 or 4 times with a sub-subcommittee concerning these issues. This rule looks a lot like the rule that governs filing a notice of cross-appeal. If the two rules are different, then people will wonder if they are meant to be different, and the Committee Note explains what is meant. Inconsistency with the Legislature happens from time to time. It is possible that someone could challenge it, but the potential for litigation should not prevent us from changing the rule. We have different appellate courts doing different things and she thinks it is a good amendment.

- Mr. Daiker stated that one does not have to look to the Committee Note to know where to file this notice. If the rule does not specify otherwise, the default is to file all papers in the appellate court. The Committee Note is just a clarification of that.

- The Chair agreed that Rule 9.020 basically addresses that.
- Mr. Hall stated that he believes there will be a practical problem, when the rule comes into effect. He says currently there is no choice on the portal website for filing a "notice of realignment" in the appellate courts. Currently, when you click that you are filing a "notice of joinder," the computer automatically calculates the filing fee. A "notice of realignment" is not going to calculate that you owe the fee. So, that practical issue must be resolved with the portal. Likewise, as Mr. Caldevilla said, whether the Portal Authority Board has any authority to make a fee due upon the filing of a "notice of realignment" presents a legal issue.

- The Chair asked Mr. Hall if he thinks there is enough time during the three-year cycle to address these issues with the Legislature and the courts, so that both the rule and the statute can change contemporaneously.

- Mr. Hall said there is enough time. The computer system receives quarterly updates, and can be changed in anticipation of when a rule change takes effect. To get the statute amended, the court system's district administrative office

would have to request someone in the Legislature to sponsor a bill. This is typically done annually, but whether it would actually happen is a different thing. Filing fees collected by the appellate court are transferred into the general revenue fund. While everyone would agree, it could be given a low priority and never get changed.

- Ms. Wheeler suggested that perhaps we could keep the "notice of joinder" name in place, but change the rule to explain that "an appellee or respondent who desires to realign as an appellant/petitioner shall serve a notice of joinder" instead of the current rule language which states "shall serve a notice to that effect ...." This would avoid the need for any legislative changes.

- Mr. Leen stated that he believes the last sentence of the rule should not be stricken.

- Tracy Gunn said that she worked on the sub-subcommittee and agreed with Ms. Wheeler's suggestion. She is not sure if it was thought all the way through that the statute would have to actually be changed on the issue of the authority to collect the fee. Ms. Gunn also pointed out that the cross-appeal rule actually does have a filing fee provision in it. So, she believes it would promote consistency to keep the filing fee provision. We should strike the provision which states "in the same manner as the petition or in the notice of appeal," because that is what may be filed in the trial court as supposed to the appellate court.

- Judge Gillen stated that when he practiced as an appellate lawyer, he filed notices of realignment even though they weren't called notices of realignment, and he relied upon the case law. He did it under the authority of Rule 9.360. So, he is more or less agreeing with the previous comments. He also pointed out that the Subcommittee did not underline some of the proposed amendment on page 4 of the agenda.

- The Chair clarified that the title "Realignment as Appellant or Petitioner", and the phrase, "An appellee or respondent who desires to realign as an appellant or petitioner", should be underlined in the agenda packet because that is new language. Mr. Daiker and Ms. Berman agreed.

- Ms. Graham said she thinks the rule should be sent back to the Subcommittee to consider these issues, as opposed to re-drafting the rule at this juncture.

- Mr. Nutt likes the changes, but wants to know if there is another way to address the issues. He would like to know if there is a process to get legislative change.

Perhaps we can approve an effective date contingent upon legislative action.

- The Chair agreed with Mr. Hall's prior remarks. He has talked with others and the Bar does have some lobbying efforts, but it is not our rule, it is the Court's rule. Therefore, it is the Court who is deciding this or not, and it is their terminology not ours. So, if the Court chooses to go forward with this, they would have to flag that issue for consultation with the Legislature. Although we can make the effective date contingent upon legislative approval, the change may never become effective.

- Ms. Gunn stated we should remember why this was referred to us in the first place, which was to explain to people that a realignment can be accomplished with this notice. If we keep the notice of joinder language, that will maintain compliance with the statute and avoid any lack of authority to collect the fee, and if there is case law addressing a "notice of joinder," people can still find that. She thinks this will accomplish the purpose by including the explanation of what the rule actually does and thereby eliminating the possibility that non-parties will think they can "join in" an appeal.

- Robin Hazel agrees with Ms. Gunn. Ms. Hazel thinks there is a need to avoid giving non-parties the impression that they can join in an appeal when that is not possible. Although she is not in favor of keeping the term "joinder," she understands there are fee issues to address as well. So, if the term "joinder" is left in, there should be an explanation.

- The Chair said he believes there are some concrete suggestions for friendly amendments. He asks if this should be sent back to the Subcommittee.

- Ms. Berman responds that we could go forward with the friendly amendments that Ms. Gunn and Ms. Wheeler offered. The Committee Note would have to change as well. She thinks the changes could be made now without going back to the Subcommittee. But, if it's too much, it can be sent back.

- The Chair calls for a straw poll vote for conceptual direction on the friendly amendments. The question is whether the rule and Committee Note should retain the "notice of joinder," whether the rule should retain the provision requiring payment of the filing fee, and whether the rule should eliminate identification of the court in which to file the notice. There were 37 votes in favor, and 8 votes opposed.

- **<u>Action Item</u>: This item was remanded to the Subcommittee for further**

drafting.

General Practice Subcommittee – The Subcommittee's written report and minutes are found at pages 77-123 of the agenda packet. The Subcommittee Chair, Craig Leen, stated that the Subcommittee has six referrals to address.

(a) Referral 12-AC-26 – This referral proposes to create a new subpart (c)(4) to Rule 9.030, which would state, "Three judges shall constitute a panel for each matter within the circuit court's jurisdiction under this rule." The Subcommittee's proposal was presented by the Subcommittee Vice Chair, Dorothy DiFiore.

- Ms. DiFiore stated that it is not a good situation to have a single circuit court judge reviewing the decision of a county court judge, when those same judges work together in the same building, have lunch together, etc. The fact that county court jurisdiction is less than $15,000, does not mean that the legal issues are not serious. It is often difficult to get a district court of appeal to accept a certified question, even if you think it is of great public importance. When cases are not certified to the district court of appeal, depending which county you are practicing in, much of the county court precedence is being decided by single circuit court judges in their appellate capacity. For example, in Orange County you get a three-judge circuit court appellate panel, but if your case is in Osceola County, then you only get a single circuit court judge assigned to your appeal. In Hillsborough County, you get a three-judge circuit court appellate panel, but not in Levy County.

- Ms. DiFiore stated she did a survey and found that about half of the courts have administrative orders requiring three circuit judges to sit on an appeal from the county court. However, there are inconsistencies. For example, there may be three judges assigned to a full appeal, but only one judge assigned to a petition for writ.

- Ms. DiFiore stated that in deciding an appeal, it is important to have diversity of opinions from multiple judges. The proposed rule does not try to address how the circuit courts would accomplish the three-judge panels administratively, but she believes that the use of teleconference technology could be used.

- Mr. Leen stated that having a single circuit court judge conducting a de novo review of a county court's decision lacks respect for county judges by allowing one judge to substitute his/her judgment for another judge. Similarly, when the circuit court is reviewing the decisions of collegial bodies, such as city councils and county commissions, you have a single circuit court judge substituting his or her judgment for the collegial body. He believes it should take two judges to reverse the decision

of a city or county board, or a county court judge.

- Mr. Caldevilla stated that he handles a lot of appeals from the county court to the circuit court. Three judge panels are great, but this could be financially burdensome for smaller counties. He also thinks that maybe the rule should state that three judge panels will be required in all counties that have at least "X" number of circuit judges available, and in the counties with less circuit judges, three judge panels are discretionary. He added that he believes there is a big problem growing at the circuit court level with inconsistencies between circuit court panels, and he believes that an "en banc" review rule should be available in circuit court appeals.

- Ms. Cabulea is concerned about the way the proposed rule refers to "the circuit court's jurisdiction under this rule." She believes that subsection (c)(4) of Rule 9.030 circumscribes the appellate jurisdiction of the circuit courts, and the way the proposed rule is written, it shifts the focus from jurisdiction to the panel. She recommended the focus of the proposed rule be shifted back to jurisdiction to preserve the symmetry of the subsections – i.e., "jurisdiction under this rule shall be exercised by a panel of three judges." She is also concerned that this rule might be burdensome in the smaller circuits. She also asked whether this is an issue that should be addressed by the RJA, or whether this issue should be handled by motions to the court.

- Mr. Hall stated that a few years ago, the Supreme Court looked at this issue, conducted a study, and the circuit and county judges objected to it. He feels they will run into that same problem again.

- Ms. DiFiore said the Subcommittee is aware of the opposition, but that occurred about 15 years ago. The Subcommittee thought those issues could be resolved with better technology.

- Mr. Hall suggested that it should be floated to the Circuit Court Judges Conference. The Chief Judges meet periodically and it might be good to see how much opposition exists. He also mentioned that he and Judge Griffin from the Fifth DCA teach appellate practice to circuit judges who sit in the appellate capacity, and he totally agrees that one judge panels are very problematic. However, passing this proposed rule will require a lot of work and support.

- Mr. Hamilton suggested that if this is the right thing to do, we should not be concerned about the possibility of getting opposition.

- Judge Crenshaw asked if any consideration was given to the different circuits that

for example have three-judge panels, in civil and not criminal. For example, Hillsborough has always had three-judge panels in civil matters, but not in criminal matters. Ms. DiFiore responded that they attempted to find as many administrative orders as they could. She was not aware of the difference between criminal and civil because that was not always clearly stated in the administrative orders. Ms. DiFiore said that since she has been practicing, they had to fight to get the three-judge panels in Hillsborough County. This has been a process of the counties reacting to it. When the county court's jurisdiction was raised up to the $15,000 limit and the volume of cases that were being litigated on important issues in county court expanded, then most of the larger jurisdictions responded with three-judge panels. This may have been in response to local appellate lawyers and appellate practice sections requesting it. Also, she cannot fathom why a criminal appeal would not be entitled to a three-judge panel with less protection than a civil case.

- Another committee member [name unknown] agreed with Ms. DiFiore. He said they looked at this issue briefly after 2001, by writing a letter or two, and they decided against it because of the volume. Even in misdemeanor cases, there are many Rule 3.850 cases which get appealed to the circuit court. He thinks it is probably worse now, than it was then.

- Mr. Leen stated that county court judges can sit as circuit judges by designation. Also, he is very concerned about one judge substituting his or her judgment over another judge. Also, he opposed the suggestion to change the jurisdictional language in the proposed rule.

- Mr. Hall also stated that this proposed rule will require changes to the e-filing portal. Currently, there is no current way for a three-judge panel sitting at the circuit level to issue a joint opinion. Whereas, at the appellate level, the clerk issues the opinions through the portal.

- The Chair called for a vote on the proposed amendment. The amendment passed with 32 votes in favor, and 9 votes in opposition.

- **<u>Action Item</u>: Rule 9.030(c)(4) will be submitted for amendment, as follows:**

RULE 9.030 JURISDICTION OF COURTS

(a) – (b) [No change]

(c) Jurisdiction of Circuit Courts.

(1) – (3) [No change]

(4) *Panels*. Three judges shall constitute a panel for each matter within the circuit court's jurisdiction under this rule.

b) Referral 14-AC-03 – Mr. Leen stated that this item involves inserting a new uniform citation in Rule 9.800(i) for the Florida Standard Jury Instructions in contact and business cases.

- The Chair called for a vote. The amendment passed unanimously.

- **Action Item**: **Rule 9.800(i) will be submitted for amendment, as follows:**

RULE 9.800 UNIFORM CITATION SYSTEM

(a)-(h) [No change]

(i) Florida Rules.

. . . .

Fla. Std. Jury Instr. (Cont. & Bus.)

. . . .

(j)-(p) [No change]

(c) Referral 13-AC-27: This item proposes to create a new Rule 9.380, which will allow a party to file a notice of related case, and a corresponding new form under Rule 9.900(j). Mr. Leen stated that this item previously came before the Committee as a mandatory rule, but the Committee rejected it and voted to remand it to the Subcommittee to restate it as a permissive rule. The Subcommittee has done so.

- Mr. Leen stated there are some friendly amendments to the rule. First, the title should state, "NOTICE OF RELATED CASE," in all caps. Second, the proposed form should say "in the name of the appellate court" instead of "in the name of the lower tribunal." Third, both the rule and the form should refer to Rule 9.900(j) instead of (k).

- Based on the Committee's prior vote, the Subcommittee has narrowed the rule substantially, and also made it permissive. As a result, this proposed rule would now allow people to file notices of related cases, which are not currently authorized by any rule. The Subcommittee has addressed concerns that the prior version of the proposed rule imposed a substantial mandatory burden on counsel to identify cases. As revised,

the proposed rule is permissive and filing such a notice will not be met with a motion to strike, because the notice will now be permitted. The other concern is that the notice should not be used to present argument, and so, they are proposing a corresponding form for the notice.

- Mr. Caldevilla stated that the party filing the notice should have the opportunity to provide a brief explanation as to why the cited case is related. However, after Mr. Hamilton pointed out that this is addressed in the proposed form, Mr. Caldevilla withdrew his remarks.

- Mr. Hall stated that he supports the proposed rule. As a former Clerk of the Court, he believes it would be very helpful for appellate courts to get this notice of related case. However, he thinks the rule still needs some work. The part about the "similar legal issue" could be a case that has no relation to your case at all. So, he thinks the proposed rule language is overbroad. As a Clerk, he once saw a notice of related case, which cited to *Marbury vs. Madison*. The court is generally looking for true related cases, which stem from the case below.

- Ms. Loquasto opposed the amendment because she thinks it is already covered in docketing statements, or can be covered within the appellate briefs.

- Andrew Stanton asked if anyone looked at the administrative orders in the district courts of appeal, to see how this proposed rule will act in tandem.

- Mr. Leen said this proposed rule was originally based on the Third DCA's administrative order, and was made much more permissive. He thinks the rule and any administrative order will still have to act tandem. Parties will still have to comply with any particular administrative orders. This proposal simply provides a uniform rule that allows any party to file a notice. As to the "similar legal issue" language, it would be permissive and the notice will not allow much argument.

- Jeffrey Kuntz stated that he favors the proposed rule, and in his experience, the Third DCA has strong feelings that these notices should be filed.

- Ms. Berman expressed concerns that the proposed rule is permissive but has timing requirements. It seems strange that a party is permitted to file this, but if the party chooses to do so, it must be filed within this time frame. What happens if it is filed outside of the time frame?

- Mr. Leen responded that if you are going to file the notice, then you should do it

promptly. The rule will allow you to file the notice within 20 days after ascertaining the existence of a related case, but that sentence can be stricken from the proposed rule.

- Sarah Palmer stated that in trial courts, cases are considered to be related if they have the same parties. She wonders if this rule should allow a notice of related case "or issues." She thinks this would help the courts that do issue tracking.

- Mr. Kuntz asked, what do the DCAs want? Mr. Leen stated there was a report at the last meeting. His recollection is that most of the courts want the appellants to file docketing statements, and some did not require the appellee to do anything. Some are very narrow. The idea was to have a uniform rule throughout the state.

- Mr. Leen accepted Ms. Palmer's suggestion to call it a "Notice of Related Case or Issue" as a friendly amendment.

- Judge Gillen made a friendly amendment suggesting that the second sentence of the rule be deleted. Mr. Leen accepted.

- The Chair called for a vote, and clarified that the title of the rule will be "Notice of Related Case or Issue." The first sentence will read, "A party is permitted to file a notice of related case or issue, informing the court…." The second sentence will be deleted. In the form, the name of the lower tribunal is changed to the name of the appellate court, and "Notice of Related Case" is changed to "Notice of Related Case or Issue." There were 29 votes in favor, and 11 votes against. The proposed rules passed.

- **Action Item**: **Rule 9.380 and 9.900(k) will be submitted for approval, as follows:**

RULE 9.380 NOTICE OF RELATED CASE OR ISSUE

A party is permitted to file a notice of related case or issue informing the court of a pending, related case arising out of the same proceeding in the lower tribunal or involving a similar issue of law. The notice shall include only information identifying the related case. The notice shall not contain argument and shall be in substantially the form prescribed by rule 9.900(j).

RULE 9.900 FORMS

(j) Notice of Related Case or Issue

IN THE ... (NAME OF THE APPELLATE COURT) ...

Case No. _____

_____,)

Petitioner/Appellant,)

_____)

v.) NOTICE OF RELATED

_____) CASE OR ISSUE

_____,)

Respondent/Appellee.)

_____)

NOTICE IS GIVEN of (enter case style and number), pending in (enter name of court), which is related to this matter because (identify the same facts from which both matters arise, or the similar legal issue being addressed in both matters).

_____

Attorney for ... (name of party)...

... (address, e-mail, and phone number)....

Florida Bar No. ....

[***Secretary's Note*** – During the preparation of these minutes, the undersigned noted that the foregoing references in Rule 9.900(j) to "Plaintiff/Appellant" and "Defendant/Appellee" should be replaced with "Petitioner/Appellant" and "Respondent/Appellee," respectively. The undersigned contacted the incoming Chair, Wendy Loquasto, and Ms. Loquasto stated this will be corrected as a scrivener's error pursuant to IOP, Article III.k.]

(d) Referral 14-AC-13: This item relates to Rule 9.331 concerning en banc proceedings and was referred by Paul Regensdorf. The Subcommittee's proposed amendment was presented by Mr. Curry.

- Mr. Curry stated that the proposed amendment would require the district courts of appeal to notify the parties that a proceeding will be determined en banc. Mr. Regensdorf had a case that was argued before a three-judge panel of the First DCA,

but the subsequent decision was entered by the entire court sitting en banc, with various opinions. This rule change would not require the court to allow supplemental briefing or any kind of new hearing, but will merely require the court to notify the parties of matters being considered on an en banc basis. Once the parties receive that notification, they are free to take whatever action they choose, such as filing a motion to submit supplemental briefs and the courts will be free to rule on such motions as they deem appropriate. The amendment is somewhat related to due process, but it is also intended to give appellate counsel the ability to inform clients about what is going on, and what is to be expected, and to evaluate options.

- Mr. Curry explained that there are also concerns as to what will happen if the court fails to provide the notice required by this proposed amendment. He explained that the worst case scenario would probably be for a party to request the opportunity to submit supplemental briefing, and the court subsequently maintaining the same en banc decision. He does not think that failure to provide the notice would invalidate an en banc decision.

- Mr. Caldevilla stated that he likes the idea. He would also like to receive notice identifying the judges on non-en banc panels where oral argument is waived. He would like to know who is deciding the case and the ability to advise his clients. He does not understand why that is kept a secret. In addition, he noted that the en banc rule only applies to appeals in district courts of appeal. There is no en banc rule that applies to circuit courts acting in their appellate capacity, and he thinks we should consider adopting a rule designed to maintain uniformity and consistency in circuit court appellate decisions. So, he suggested that we should request the Subcommittee to consider drafting a similar rule for circuit court appeals. The Chair stated that will have to be a new referral, which can be addressed later.

- Mr. Hall pointed out a technical issue in the existing rule language, which erroneously suggests that a majority of the judges "order" that a proceeding will be determined en banc. He said there is no "order" done, so why not change that?

- The Chair stated that it is a good rule, but unless it is tied to briefing, it really serves no purpose merely to be given notice. If you know that your case is being decided en banc, you should be given the opportunity to brief the issues in the context of the court not being bound by its pre-existing opinions. So, he thinks the notice requirement should be linked to an opportunity to provide additional briefing.

- Mr. Curry responded that the current rule does not require prior notice that the case will be considered en banc, and does not provide the opportunity to request additional briefing. So, this proposed amendment gives the parties a new opportunity to file a motion for supplemental briefing which is not available under

the existing rule.

- The Chair suggested that the rule should identify a time table.

- Mr. Hall expressed concern that litigants will next want to know if the court is considering en banc review before the court actually decides whether to proceed en banc.

- Mr. Leen accepted Mr. Hall's friendly amendment to change the word "order" to "decide." However, he does not want to include the right to have a supplemental briefing.

- Wendie Cooper stated that she does juvenile dependency work, where they typically have expedited decisions. She had a case that took 18 months after oral argument to get the decision. In dealing with children and adopted parents, it would have been nice to receive notice to get an idea of what was taking so long. So, she favors the amendment.

- Ms. Loquasto said she had a similar experience. She waited a year for a decision, and it wasn't until she received the court's decision that she learned for the first time that it was decided en banc and receded from prior case law. When she subsequently filed a motion for rehearing that included a request to submit supplemental briefing, that motion was denied.

- Judge Ray stated that the First DCA's IOPs stated that an order may be entered at the discretion of the court, advising a party for the determination to consider the case en banc with or without delay, and that one-third or more of the participating judges can grant supplemental briefing. She doesn't see any reason why they should not inform the parties.

- The Chair called for a vote. The proposed amendment passed, with 37 votes in favor and 4 votes opposed.

- **<u>Action Item</u>: The proposed amendment to Rule 9.331(a) will be submitted for approval, as follows:**

RULE 9.331. DETERMINATION OF CAUSES IN A DISTRICT COURT OF APPEAL EN BANC

(a) En Banc Proceedings: Generally. A majority of the participating judges of a district court of appeal ~~participating~~ may ~~order~~ decide that a proceeding pending before the court be determined en banc. If a majority of the participating judges decides that a proceeding will be determined en banc, the district court of appeal shall promptly notify the parties that the proceeding will be determined en banc. A district court of appeal en banc shall consist of the judges in regular active service on the court. 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. The en banc decision shall be by a majority of the active judges actually participating and voting on the case. In the event of a tie vote, the panel decision of the district court shall stand as the decision of the court. If there is no panel decision, a tie vote will affirm the trial court decision.

[***Secretary's Note***: Despite Mr. Hall's friendly amendment to change the word "order" to "decide," the fourth sentence of Rule 9.331(a) was not changed and will continue to state, "En banc hearings and rehearings shall not be ordered unless...." To maintain consistency with the new amendment, the ACRC may want to consider changing the word "ordered" in the fourth sentence to "conducted" or a similar word.]

(e) Referral 13-AC-15: The next item was a proposed amendment to Rule 9.210, which will create a "one attorney, one brief" limitation on the number of appellate briefs that can be filed. The Subcommittee's proposal was presented by Christine Graves.

- Ms. Graves explained that this proposal was discussed at a prior ACRC meeting, and was sent back to the Subcommittee for additional consideration. The referral was based on the confusion and inconsistencies in the internal procedures of different appellate courts, as to the appropriate number of briefs that can be filed when there are more than two parties in the case. For example, if there are two initial briefs, but one appellee, does the appellee file one answer brief or two? After much debate about the previously proposed language, a straw vote was taken to see if there was agreement that the rule should limit one attorney to one brief, or one party to one brief. The straw vote overwhelmingly favored that the rule should make this clear.

- Ms. Graves stated that the Subcommittee tried to revise the language in a way to address the ACRC's prior concerns and to model this amendment after the federal rule.

- Ms. Graves stated that the proposed amendment will also insert a new subdivision (a)(6) in Rule 9.210, which makes clear that an attorney representing more than one party in an appeal can only file one brief. Also, in subdivision (f), the last sentence is intended to clarify the deadline for serving a responsive brief when multiple initial briefs or answer briefs are filed shall be "within 20 days after the initial or

answer brief is served or should have been served." However, pursuant to a friendly amendment, that language is being revised to state, "In any appeal or cross-appeal, if more than one initial or answer brief is authorized, the responsive brief shall be served within 20 days after the last initial or answer brief was served or could have been timely served, whichever is later."

- Ms. Norse stated that the proposed amendment states "Unless otherwise *directed* by the court." However, other portions of the rule say, "unless otherwise *ordered* by the court." So, she offers a friendly amendment to use the phrase "Unless otherwise ordered by the court," which seems to be the language usually used.

- Ms. Zimmerman expressed concerned with respect to the phrase "and one combined appendix." Her understanding is that Rule 9.220 authorizes an appellant to file one appendix with an initial brief, and one appendix with a reply brief. She proposes a friendly amendment to delete the words, "in one combined appendix." That way, under Rule 9.220, they can file an appendix with the one brief.

- Mr. Leen accepted the friendly amendments.

- With respect to the last sentence of proposed subparagraph (f) which would say, "could have been timely served," Mr. Hall asks why not say "when it was due"?

- Mr. Nutt proposes that it should say, "after the date for serving the last or initial answer brief."

- Mr. Hamilton says there is potential for abuse in that situation. Assume that you have two appellants, one who files a brief very quickly, and the other is represented by separate counsel who says they will file their own brief, but on day 19 or 20, doesn't file the brief. In that situation, the appellee will be stuck with the earlier time frame.

- Ms. Flowers expressed concerned about an unintended consequence. Assume that one large law firm is representing one of the parties and they are the appellee in the appeal (Corporation A). However, you have one other case in the pipeline, and the final order is issued three months later. That same law firm is again representing a party, but a different corporation (Corporation B). The second case goes on appeal and the court chooses to consolidate the two cases. So, now you have the same law firm representing Corporation A as appellee and representing Corporation B in (appeal two), which is now consolidated. She asks if this rule could apply to restrict the attorney to only filing one brief in a consolidated case, even if they represent two different parties from two different underlying causes of action.

- Ms. Graves responded, "yes." If the two appeals are consolidated for all purposes, then the effect of this rule would be that you have one brief because the case is being considered together as one case. However, this rule would not prevent anyone from filing a motion for more pages.

- Mr. Caldevilla asked whether (a)(6) should say "shall file only one" instead of "may file only one". Mr. Leen responded that he wants to keep the word "may."

- The Chair called for a vote, and the proposed amendment was approved, with 25 votes in favor and 14 votes opposed.

- **Action Item**: **The proposed amendment to Rule 9.210 will be submitted for approval, as follows:**

RULE 9.210. BRIEFS

(a) Generally.

(1)-(5) [No change]

(6) Unless otherwise ordered by the court, an attorney representing more than one party in an appeal may file only one initial or answer brief and one reply brief, if authorized, which will include argument as to all of the parties represented by the attorney in that appeal. A single party responding to more than one brief, or represented by more than one attorney, is similarly bound.

(b) – (e) [No change]

(f) Times for Service of Brief. The times for serving jurisdiction and initial briefs are prescribed by rules 9.110, 9.120, 9.130, and 9.140. Unless otherwise required, the answer brief shall be served within 20 days after service of the initial brief; the reply brief, if any, shall be served within 20 days after service of the answer brief; and the cross-reply brief, if any, shall be served within 20 days thereafter. In any appeal or cross-appeal, if more than one initial or answer brief is authorized, the responsive brief shall be served within 20 days after the last initial or answer brief was served or could have been timely served, whichever is later.

OCTOBER 17, 2014 MEETING MINUTES
APPELLATE COURT RULES COMMITTEE
8:00 AM TO 12:00 PM

A. CALL TO ORDER – CHAIR WENDY S. LOQUASTO

At approximately 8:06 a.m. on October 17, 2014, the Chair, Wendy S. Loquasto, called to order the meeting of the Appellate Court Rules Committee (ACRC). The Chair welcomed members and guests. The following is an attendance roster:

In attendance:
Wendy S. Loquasto, Chair
Thomas D. Hall, Vice Chair
Craig Edward Leen, Vice Chair
Hon. T. Kent Wetherell II, Vice Chair
Courtney Rebecca Brewer, Secretary
Margaret Diane Mathews, Board Liaison
Ceci Culpepper Berman
Robin I. Bresky
Wendie Michelle Cooper
Hon. Marva Louise Crenshaw
Landis Vernon Curry III
Duane Allan Daiker
Diane G. DeWolf
Dorothy Venable DiFiore
Angela Carol Flowers
Ivy R. Ginsberg
Christine Davis Graves
Tracy Raffles Gunn
Nikole Hiciano
Elliot Burt Kula
Jeffrey Thomas Kuntz
Hon. Joseph Lewis, Jr.
Kristin Ann Norse
James Edward Nutt
Erin Jane O'Leary
Sara-Jean Palmer
Hon. Kathryn Senecal Pecko
Hon. Stephanie Williams Ray
Gigi Rollini
Stephanie L. Serafin
Andrew McBride Stanton
Thomas Steven Ward
Elizabeth Cangelose Wheeler
Carrie Ann Wozniak
Stephanie Christina Zimmerman

Appeared by telephone:
Andrew L. Adler
Michael T. Davis
Rosemary Elizabeth Farrell
Michael C. Greenberg
Robin Felicity Hazel
Hon. John D. Campbell Newton II
Jack Roy Reiter
Sarah J. Rumph
Steven Lauren Seliger
Stephanie Rebecca Silver
Brandon Stuart Vesely

Absent:
Marie Attaway Borland (excused)
Mihaela Cabulea (excused)
Christopher Vincent Carlyle (excused)
Marjorie Gadarian Graham (excused)
John Wesley Little III
David Lanier Luck (excused)
Dwight Oneal Slater

Guests:
Sean Desmond
Meredith Charbula, Liaison from Criminal Procedure Rules Committee

(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.

- Mr. Daiker explained Judge Altenbernd's concern that Rule 9.360's use of the term "joinder" is a mistitle or misleading. Instead, the rule is really a "switching sides rule" that should make clear that what really happens when this notice is filed is a realignment, not a joining in. The proposal makes clear that it is a one-way realignment, only an appellee or respondent can become an appellant or petitioner.

- Mr. Daiker also noted that the proposed amendment takes out language in the rule that provides this notice shall be filed "in the same manner as the petition or notice of appeal," in accordance with the preferences of the DCA clerks who would like these notices filed there. This change is also consistent with the local rule in the Fifth DCA.

- Mr. Daiker noted that this proposal was presented at the last committee meeting and had been returned to the subcommittee because a concern had developed over simply changing the term "joinder" to "realignment" because fee requirements in the Florida Statutes are described using the term "joinder." Thus, the proposed amendment does not drop the term "joinder" but adds in the more precise "realignment" language as well.

- A new suggested form was also proposed, entitled "Notice of Joinder."

- The Chair noted that she likes the proposed amendment that addresses previous concerns, but the form says "desires to realign as a [Appellant/Petitioner]," and the "a" should be "an" or "a(n)."

- The Chair also did not like the use of the word "desires" on the form and wondered if there was not a better term to use there: "choose" or "elect."

    - Mr. Daiker noted that the language on the form is consistent with the terminology in the rule. He would accept a change of "desires" to "elects," but the rule would also have to be changed. He just wants to be sure it is clear that a party has the right to do this.

    - Stephanie Zimmerman asked whether the rule and form could just use the term "realigns" instead of "chooses" or "desires." Mr. Daiker stated that Ms. Zimmerman's proposal would create an issue with the rule language. The Chair stated that there has to be something in the rule that explains that it is left to the party to choose or elect to realign, but that she would be ok with the form simply saying "realigns." After Mr. Daiker pointed out that the rule and form should be consistent, the Chair rejected Ms. Zimmerman's suggested amendment to her amendment.

    - Mr. Daiker accepted the "elects" amendment to the rule and form.

- Craig Leen liked the proposal, but expressed his concern at how this might play out in federal litigation, where parties must file notices of joinder in another party's notice of removal within a certain amount of time to avoid the case being returned to state court. He presented a hypothetical case in which a county and 3 individual police officers are represented by separate counsel on the same side and the county appeals first. If the appeal is pending and one of the officers wants to also appeal, would that situation be covered by this rule and accurately characterized as a "realignment"? Mr. Daiker responded that this situation would be covered.

- Mr. Leen's second concern regarding this proposal was in the context of a petition for mandamus or certiorari relief that affects other parties that were not in the case below? It seems there should be some ability for those entities to become part of the case at the appellate level. Mr. Kuntz replied that there are very limited circumstances where that could happen and that a party would have to seek leave of court in those instances in any event.

    - Mr. Leen stated that then the rule should perhaps make clear that it cannot be used in such a circumstance to allow a party to enter a case at the appellate court. Mr. Daiker explained that these concerns were the problem with using the term "joinder," because it is not meant to allow a non-party to join a case. Mr. Leen's concern would not be permitted by this proposal.

    - Mr. Leen stated that he was fine with the proposed amendment and wanted to make sure his concern was on the record.

- Mr. Kuntz asked the Chair to clarify her friendly amendment. Ms. Loquasto explained that the form and rule would use the word "elects" or "chooses" in place of "desires." Mr. Kuntz pondered whether "desires" is used because the Court might reject the notice. The Chair responded that this is a notice, not a motion, and not something seeking the Court's permission.

    - Mr. Hall stated that using the term "desires," wants," or anything else is appropriate because you are talking about what you want to do. He has never seen a notice of joinder rejected.

- Gigi Rollini wanted to clarify what happens to the status of a party who has realigned at the district court if the case goes up to the Florida Supreme Court, especially if there is pass-through. Mr. Hall responded that the party remains aligned in the district court, but they have to file their own notice to invoke or alignment notice at the Florida Supreme Court, or else they become a respondent.

- Mr. Kuntz noted that you cannot change the case caption without a court's permission; there has to be a motion filed, even if you file a notice of realignment. Mr. Hall responded that the court automatically enters an order and changes the style when it receives these notices.

- Tom Ward remarked that he liked the friendly amendment to the friendly amendment regarding simply using the word "realigns." Why should you have to announce a desire, when it just happens upon filing? Mr. Leen pointed out that "elects" is the same and indicates that by filing it, the election has occurred. He felt that the form and rule should be consistent.

- Dottie DiFiore asked whether the form should indicate that it is a "Notice of Joinder for Realignment." Mr. Daiker responded that the subcommittee did not change the name of the form from "Notice of Joinder" because it wanted to leave it consistent with the statute on fees.

- 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."

- Andrew Stanton commented that he likes the change from "desires" to "elects," but there are 8-10 other places where the term "desire" is used. He suggested an ad hoc committee might be needed to make the change universal.

- Mr. Hall noted that any changes are going to take a while for the ePortal selections to adopt. The Chair noted that the committee recognized that issue, but wanted to update the rule nevertheless so it was clear what the rule referred to.

- The Chair called for a vote on the proposed amendment. The amendment passed unanimously, 42-0.

- **Action Item: Rule 9.360(a) will be submitted for amendment, as follows:**

RULE 9.360. PARTIES

(a) Joinder for Realignment as Appellant or Petitioner. An ~~party to the cause in the lower tribunal respondent or~~ appellee or respondent who elects ~~desires~~ to ~~join in a proceeding~~ realign as an ~~petitioner or~~ appellant or petitioner shall serve a notice ~~to that effect~~ of joinder no later than the latest of the following: (i) within 10 days of service of a timely filed ~~petition or~~ notice of appeal or petition; (ii) within the time prescribed for filing a notice of appeal; or (iii) within the time prescribed in rule 9.100(c). The notice of joinder, accompanied by any filing fees prescribed by law, shall be filed either before service or immediately thereafter ~~in the same manner as the petition or notice of appeal~~.

(b) NO CHANGE.

(c) NO CHANGE.

* * *

2014 Amendment. The title of subdivision (a) was amended to clarify that the joinder permitted by this rule is only for the purpose of realigning existing parties to the appeal. The required notice pursuant to subdivision (a) retains the original terminology and continues to be referred to as a "notice of joinder" consistent with the existing statutory scheme to collect a fee for filing such a notice. Subdivision (a) was also

amended to remove the prior directions for filing the notice "in the same manner as the petition or notice of appeal," so that a notice of realignment is now properly filed in the appellate court.

* * *

RULE 9.900. FORMS

* * *

(k) Notice of Joinder.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

_____ DISTRICT

Case No. _____

_____,)

Appellant/Petitioner,)

_____)

v. _____) NOTICE OF JOINDER

_____)

_____,)

Appellee/Respondent.)

_____)

_____)

NOTICE IS GIVEN that _____,

[Appellee/Respondent] elects ~~desires~~ to realign as an [Appellant/Petitioner] in this action, in accordance with rule 9.360(a).

_____

Attorney for . . . (name of party) . . .

(address, e-mail address, and phone number)
. . .

Florida Bar No. ……...

(b) **Rule 9.500(b)(2)** – Referral number 12-AC-16 from John Hamilton regarding proceedings where the Governor seeks an advisory opinion. Mr. Kuntz noted that the committee has dealt with this proposal a few times. Mr. Nutt worked on the project, along with Rob Telfer and Mr. Kuntz.

- Mr. Nutt advised that Rule 9.500(b)(2) currently is inconsistent with the language in the Florida Constitution. This amendment therefore reflects a modification to the language for consistency's sake and also cleans up the language and adds citations to the constitutional provisions.

- Mr. Kuntz inquired whether Ms. Telfer would be able to clean up comma issues in the proposal. Ms. Telfer responded that the committee needed to determine for consistency's sake whether the rules should say "section X of the Florida Constitution" or "section X, Florida Constitution." She would appreciate guidance as to which way we would want to go.

    - Lance Curry responded that the Bluebook or Florida Style Guide allows either way in textual sentences, so we do not need to be consistent.

- The Chair called for a vote on the proposed amendment and it passed unanimously, 42-0.

- **Action Item: Rule 9.500(b) will be submitted for amendment, as follows:**

RULE 9.500. ADVISORY OPINIONS TO GOVERNOR

(a) Filing. A request by the governor for an advisory opinion from the justices of the supreme court on a question affecting gubernatorial powers and duties shall be in writing. The request shall be filed with the clerk of the supreme court.

(b) Procedure. As soon as practicable after the filing of the request, the justices shall determine whether the request is within the purview of article IV, section 1(c)~~,~~ of the Florida Constitution, and proceed as follows:

(1) If 4 justices concur that the question is not within ~~that purview~~the purview of article IV, section 1(c) of the Florida Constitution, the governor shall be advised forthwith in writing and a copy shall be filed in the clerk's office.

(2) If the request is within ~~that~~the purview of article IV, section 1(c) of the Florida Constitution, the court ~~may~~shall ~~permit persons whose substantial interests may be affected to be heard~~permit, subject to its rules of procedure, interested persons to be heard on the questions presented through briefs, oral argument, or both. ~~If the court 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 amicus curiae and prescribe their duties.~~

(3) The justices shall file their opinions in the clerk's office not earlier than 10 days from the filing and docketing of the request, unless in their judgment the delay would cause public injury. The governor shall be advised forthwith in writing. ~~Copies shall be delivered to the governor.~~

(c) **Rule 9.510(c)** – Same as previous item, except regarding advisory opinions to the Attorney General.

- Mr. Kuntz explained that identical changes as those just approved are recommended for this rule.
- The Chair noted that under the suggested amendment, there would be no words after section (c). Ms. Telfer noted that, though not favored, this has happened in the rules before and is acceptable.
    - Mr. Hall clarified that while there is no text under (c), it would still contain the title "Procedure."
- The Chair called for discussion and, hearing none, called for a vote on the proposed amendment. It passed unanimously, 41-0.
- **Action Item: Rule 9.510(c) will be submitted for amendment, as follows:**

RULE 9.510. ADVISORY OPINIONS TO ATTORNEY GENERAL

(a) Filing. A request by the attorney general for an advisory opinion from the justices of the supreme court concerning the validity of an initiative petition for the amendment of the Florida Constitution shall be in writing. The request shall be filed with the clerk of the supreme court.

(b) [No change]

(c) Procedure. ~~The justices must initially determine whether the request is within the purview of article V, section 3(b)(10), Florida Constitution, and proceed as follows:~~

~~(1) If 4 justices concur that the request is not within that purview, the attorney general will be advised immediately in writing and a copy will be filed in the clerk's office.~~

~~(2)~~(1) ~~If the request is within the purview, t~~The court ~~may~~shall permit, ~~the attorney general and other interested persons to be heard~~subject to its rules of procedure, 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 establish the time for filing briefs, the date of argument, and the time allotted.~~

(2) The justices shall render their opinions no later than April 1st of the year in which the initiative is to be submitted to the voters pursuant to article XI, section 5 of the Florida Constitution.

(a) **Rule 9.141(b)(2)(A), (B)** – Referral number 14-AC-25 from Lonn Weissblum, Clerk of the Court of the Fourth DCA, regards the index and pagination of a record when a trial court summarily rules on a postconviction motion.

- Ms. Norse explained that the rule currently says that the record should not be indexed and paginated in these cases, which is problematic. The appellate court ends up with large records that are just a series of documents thrown together. This proposal was not controversial and with current technology, should not be that difficult for trial courts to do.

- Ms. Norse also noted that Mr. Weissblum suggested that the transcripts of any hearings should be included. But the subcommittee noted that the rule only requires the record to include items the trial court considered. Since a trial court might not consider the transcripts of or arguments made at a hearing, it was not proper to include the transcripts in a record.

- The Chair called for discussion, and, hearing none, called for a vote on the proposed amendment. It passed unanimously, 43-0.

- **Action Item: Rule 9.141 will be submitted for amendment, as follows:**

RULE 9.141. REVIEW PROCEEDINGS IN COLLATERAL OR POSTCONVICTION CRIMINAL CASES

(a) [No change]

(b) Appeals from Post-Conviction Proceedings Under Florida

Rule of Criminal Procedure 3.800(a), 3.801, 3.850, or 3.853.

(1) [No change]

(2) Summary Grant or Denial of Motion Without Evidentiary Hearing.

(A) [No change]

(B) ~~Unless directed otherwise by the court, t~~The clerk of the lower tribunal shall ~~not~~ index ~~or~~and paginate the record ~~or~~and send copies of the index ~~or~~and record to the parties.

(C)-(D) [No change]

(3) [No change]

(c)-(d) [No change]

(b) **Rule 9.141(b)(3)(B)(ii)** – Referral number 14-AC-19 from Michael Ufferman seeks to specify the amount of time an appellant in a postconviction appeal has to direct the clerk of the lower tribunal to include certain documents in the appellate record.

- Ms. Norse noted that Mr. Ufferman ran into an issue where a trial court clerk compiled the record before the expiration of the 10 days provided by the rules for filing directions to the clerk had run. This led to a debate about whether the 10-day rule to file directions to the clerk applies in postconviction cases. The subcommittee discussed how common it is for a clerk to prepare a record before the ten-day period ran, but concluded that with electronic records, that problem could become more common.

- The Chair called for discussion and, hearing none, called for a vote on the proposed amendment. It passed unanimously, 44-0.

- **Action Item: Rule 9.141 will be submitted for amendment, as follows:**

RULE 9.141. REVIEW PROCEEDINGS IN COLLATERAL OR POSTCONVICTION CRIMINAL CASES

(a) [No change]

(b) Appeals from Post-Conviction Proceedings Under Florida Rule of Criminal Procedure 3.800(a), 3.801, 3.850, or 3.853.

(1)-(2) [No change]

(3) Grant or Denial of Motion after Evidentiary Hearing.

(A) [No change]

(B) Record.

(i) [No change]

(ii) Within 10 days of filing the notice of appeal, the ~~A~~appellant may direct the clerk to include in the record any other documents that were before the lower tribunal at the hearing. If the clerk is directed to include in the record a previously prepared appellate record involving the appellant, the clerk need not reindex or repaginate it.

- Ms. Gunn noted that since David Luck could not attend the meeting because of oral argument and wanted to coordinate with the criminal subcommittee before presenting, the subcommittee was going to table discussion and voting on a proposed amendment to Rule 9.140.

- Ms. Gunn recognized Tom Ward and Carrie Ann Wozniak to discuss their proposed amendments regarding motions to enforce settlement:

(a) **Rule 9.130(a)(3)** – Referral number 13-AC-16 sprung from a series of law review articles suggesting that certiorari review was inconsistent or inadequate to address certain recurring issues, including motions to enforce settlement. Mr. Ward, Ms. Wozniak, and John Little examined the potential amendments regarding appeals from orders on motions to enforce settlement.

  - Mr. Ward explained that the sub-subcommittee kept in mind the underlying principle that settlements are to be encouraged under Florida law. With that in mind, the project was most concerned with providing a route to appeal to those parties who thought they had a settlement and then are told that they actually have to keep litigating.

  - The sub-subcommittee started out looking only at orders regarding enforcing settlements but expanded to orders regarding motions to set aside settlements. Therefore, the sub-subcommittee examined potential non-final appeals in four different types of scenarios:

    - Orders granting a motion to enforce settlement

    - Orders denying a motion to enforce settlement

- Orders granting a motion to set aside a settlement
- Orders denying a motion to set aside a settlement

- Mr. Ward noted that two of these orders would result in final orders, making an avenue for appeal in the rule on non-final orders unnecessary.

- Turning first to orders regarding settlement enforcement, Mr. Ward noted that these motions occur when either party thinks there is a settlement. The parties are entitled to an evidentiary hearing upon filing a motion. Case law indicates that certiorari review does not lie to review these issues; litigants must wait till the end of the case.

- Mr. Ward noted that if an order grants a motion to enforce settlement, it will come at the end of the case and will presumably be a final order, so orders granting these motions would not need to be included in this amendment.

  - Mr. Ward noted that even if an order granting a motion to enforce a settlement agreement only is as to some of the parties in the litigation, Rule 9.110(k) would make it an appealable, final order as to those parties affected.

- As to orders denying motions to enforce settlement, Mr. Ward explained that these would not be immediately appealable unless they were in one of the non-final appealable orders covered by Rule 9.130. To resolve whether these orders should therefore be added to Rule 9.130, the sub-subcommittee focused on two concerns:

  - Whether adding this to Rule 9.130 would be burdensome for the appellate courts? There are not any statistics available on this and it is impossible to know how often these motions are denied but the party does not appeal because there is no avenue for doing so. But Mr. Ward noted that the sub-subcommittee thought about the fact that there is a remedy to a party whose motion to enforce settlement is denied: an appeal once a final order is obtained. Appellate courts are going to get these appeals in the long run anyway.

  - Is there a potential for abusive delay tactics? This concern was highlighted quite a bit in discussions at the subcommittee level. Parties could use this non-final appeal to slow down litigation, first at the trial court level and then by taking an immediate appeal. The sub-subcommittee was concerned that permitting an avenue for non-final appeal would give leverage to a party that might perceive it is losing in pending litigation to delay.

- Thus, the sub-subcommittee did not propose an amendment to address orders denying motions to enforce a settlement agreement.

- Mr. Ward next turned to orders regarding motions to set aside settlement agreements. Orders denying such motions would result in the case remaining closed and settled and would be final orders subject to appeal.

- As for orders granting motions to set aside settlement agreements, Mr. Ward explained that an amendment to add these orders in to the category of immediately appealable non-final orders would be appropriate to cover the gap created by the fact that a 1.540 motion filed within a year of the judgment is immediately appealable while the same bases for setting aside a settlement (e.g., fraud, excusable neglect, clerical mistake) discovered outside the year would not.

  - In these instances, parties would be dragged back into litigation when they thought they were done.

- Ms. Wozniak noted that the sub-subcommittee researched whether cert petitions were granted in these cases and could not find any dealing with settlement agreements. While there was a 5th DCA case that granted cert relief to reinstate a settlement agreement, it dealt more with a jurisdictional analysis of a sanctions issue.

- Mr. Ward noted that another major concern of the subcommittee is akin to statute of limitations issues. There would be some prejudice caused in forcing the defense to litigate issues regarding an already-established settlement agreement resulting from a combination of lapse of time, defective memory, or death of a witness, for example. Thus, getting an immediate appellate ruling on whether the settlement has been properly set aside would save the parties from dealing with those issues if they were ultimately unnecessary.

- The Chair thanked the sub-subcommittee for its work on this issue. She thought the research showed there were lots of good reasons for doing this.

- Ms. Wheeler recommended that the language should be changed to allow an appeal of an order "setting aside a settlement" rather than "granting a motion to set aside a settlement."

- Ms. Wheeler also had a conceptual problem with not including an order denying a motion to enforce a settlement, because the policy concerns of an immediate appeal are the same there as with an order granting a motion to set aside a settlement.

- Mr. Ward noted that initially the sub-subcommittee had the same reaction. But he noted that in the context of the denial of a motion to enforce settlement, there would already be litigation pending, so there would not be the concern regarding a party being dragged back into court for a matter it long thought was resolved. Whereas in a motion to set aside a settlement agreement, the parties may have been well past litigation, and so an immediate appeal addresses concerns beyond unnecessary litigation and presents elevated policy issues requiring immediate resolution.

- Ms. Wheeler inquired whether the sub-subcommittee considered a personal injury case where the parties thought the case was settled pre-suit, yet one of the parties brought suit years later, claiming no settlement even existed. The presence of a settlement agreement would be raised as an affirmative defense and then raised as a motion for summary judgment, and when denied, the party would be subject to litigation when it thought it had a settlement agreement in place.

- Ms. Gunn noted that the subcommittee was familiar with those concerns and had them in mind when proposing this amendment. But the subcommittee determined that Ms. Wheeler's concerns were no different than the denial of any other affirmative defense, which also is not subject to immediate appeals under Rule 9.130. The subcommittee could not differentiate between the harm caused by the denial of a motion to enforce settlement and any other denial of summary judgment. On the other hand, the setting aside of an existing settlement agreement occurs where everyone agrees there was a settlement agreement and the case was over. It poses more serious issues that would need to be immediately addressed. This is a much narrower approach to the problem.

- Angela Flowers agreed with Ms. Wheeler that there was no conceptual difference as to the need for an immediate appeal when an order denies enforcement as opposed to an order that grants a motion to set aside and found the proposed amendment to be unfair.

- Ms. Flowers also noted that she could not envision how a motion to set aside a settlement agreement could be brought up unless it fell under 1.540 or unless you have an independent action. So she was not sure how you would have a non-final appeal in that scenario in any event.

  - Mr. Kuntz stated that this proposed rule seemed to expand the jurisdiction of trial judges to consider motions to enforce settlement agreements. The Florida Supreme Court has ruled on this.

- Mr. Ward replied to Ms. Flowers that trial judges were willing to apply equity considerations and hear claims of fraud outside of the year under a known or should have known type-of-standard. The decisions the sub-subcommittee reviewed were not always clear as to how or why jurisdictionally certain cases came before the court. So this proposal attempts to ensure generally that orders granting these motions, whether the motions are made within the year or not, would be immediately appealable. If a judge entered an order to set aside, regardless of how or why, this proposal gives the party the opportunity to go up to the appellate court.

- Ms. Flowers noted that if a trial court acts beyond its jurisdiction under 1.540, it should be addressed by a petition for certiorari.

- Mr. Curry noted his concern that these issues are already covered under Rule 9.130(a)(4) because they are non-final orders entered after final orders on an authorized motion.

- Mr. Leen noted that he likes the concept of making these issues subject to immediate appeal, but would make the amendment broader and apply it to orders denying motions to enforce settlement. If the concern is that these appeals will be filed a lot, the rule could be narrowed to apply only to written or executed settlement agreements.

- Mr. Leen's concern was that he could see this coming up in a circumstance where a party has signed a release and a party does not enforce it and this results in the release being set aside, and then you can take an immediate interlocutory appeal in another case. He thinks that maybe anytime a settlement agreement is not enforced, a party should perhaps be able to take an immediate appeal. He thinks the plan is very well presented and that something should be done. He suggested that this proposal be sent back to the subcommittee.

  - Mr. Ward responded that he was amenable to further discussion, but noted that the hesitancy to broaden the proposal was that district court judges do not want to add another category of non-final orders subject to immediate appeal.

- The Chair recognized Mr. Kuntz and his concern regarding expanding the trial court's jurisdiction. Mr. Kuntz noted that the only way to have jurisdiction in the trial court is to have the settlement agreement incorporated into the final judgment. If the proposal gives the right to an immediate appeal on an order on a motion to enforce, we might be implying that such motions would be appropriate, and he is not sure that they are.

- Mr. Ward noted that there certainly are scenarios where parties would not bring a settlement to the trial court to approve and would instead simply voluntarily dismiss the case. A new lawsuit could be filed if the agreement needed to be enforced or it might be termed something else; lawyers are going to be creative and there are lots of different ways they might try to get a settlement agreement enforced. But the appellate court will still consider it despite how attorneys term it. So he is wary of agreeing that the only way to attack something like this is through a timely 1.540 motion.

- Mr. Kuntz remarked that there is a Florida Supreme Court opinion that expressly limits the trial court's jurisdiction to the portion of an agreement that is incorporated in the judgment and that the trial court's ability to enforce the agreement is circumscribed by the terms of the agreement. Mr. Kuntz therefore noted that these motions would have to be brought as new lawsuits for breach of contract if they were not part of what was incorporated.

- Mr. Ward stated that these jurisdictional concerns would not be at issue in this proposal because they only address the setting aside of a settlement agreement, not a motion to enforce.

- Mr. Kuntz understands that and thinks those motions are no different than setting aside a judgment under 1.540.

- Mr. Ward stated that this proposal is intended to cover instances where the parties are not asking a court to set aside judgment, but instead to set aside a settlement agreement that might have been entered into without the court's approval.

- Mr. Leen noted that it would be very rare that a party who does not think a settlement agreement exists would file a motion to set it aside and admit that it does exist. Instead, it would be the other party moving to enforce it. That is, unless some sort of judgment has been entered, and then these other rules come into play. Mr. Leen moved to send the proposal back to the subcommittee.

  - Ms. Gunn noted that the subcommittee would be happy to take it back, but that the committee should weigh in, particularly if anyone had any additional thoughts regarding the difference between a motion to enforce and a motion to set aside, so that the subcommittee can address the concerns properly.

  - Judge Wetherell noted that there is an underlying policy question that needs to be decided as to whether the proposal should be limited to orders granting motions to set aside versus those denying enforcement.

- Judge Wetherell also expressed concern with Ms. Wheeler's proposed language that would create an avenue for appeal of orders "setting aside a settlement agreement" rather than orders that "grant a motion to set aside a settlement agreement." That language change might create an interpretive issue about whether the scope of the rule was intended or not intended to include motions to enforce settlement agreements. So again, the policy decision needs to be made and the language made clear. He suggested a straw poll to give the subcommittee a sense as to whether the proposal should be broad, narrow, or neither.

- Mr. Nutt remarked that the concerns expressed are all about timing and that there is not any language that teases out that temporal concern. He favors a broad proposal if there is one that can avoid potential mischief.

- Ms. DiFiore noted her perspective is from cases involving liability insurance. She sees a difference in these categories because to set aside a settlement agreement, you have to have had one. And that presents an entirely different issue than whether or not a settlement has been formed. The question of whether you have one is a contract analysis – was there offer, acceptance, and consideration. When setting aside, the evaluation is whether there is excusable neglect, fraud, etc. Like Ms. Wheeler and Ms. Flowers, she would like to see an order denying a motion to enforce also subject to immediate appeal. She recognized this is a policy decision. She did not see there to be a temporal difference because setting aside a settlement may happen in a variety of different circumstances.

- Ms. Gunn advised that the subcommittee would take the issue back but wants a straw poll as to whether 9.130 should be amended to allow immediate appeal of orders finding that no settlement exists and the case should proceed (either because the order grants a motion to set aside or denies a motion to enforce).

- Mr. Curry noted his concern that this is an area ripe for abuse. Both plaintiffs and defendants have tried to get settlements approved on shaky grounds and giving them the opportunity to take it up on appeal is concerning.

    - Ms. Wozniak stated that she agreed with Mr. Curry's concerns at the outset. Her concerns were in the foreclosure arena because permitting immediate appeals will actually discourage settlement when defendants want to slow things down and stop foreclosures. Banks will not want to settle because they will not want to give borrowers this opportunity to delay. But if the proposal is limited to motions to set aside a settlement, there is a higher burden in these instances because

everyone has to agree there is a contract already, as opposed to enforcing a settlement.

- Mr. Hall said he had the same concerns and wanted to keep the option narrow. He pondered whether there was a way to phrase the amendment so an immediate appeal is only available for motions to enforce on settlement entered pre-litigation.

- The Chair recognized that there were lots of comments and called for two straw polls. First, the committee was asked to vote on whether the subcommittee should continue working on some sort of addition to Rule 9.130 regarding settlement agreements. The vote favored the subcommittee to keep working on an amendment, 32-9.

- Next, the Chair asked the committee to vote as to whether, moving forward, the Rule 9.130 addition should be broad, including enforcement, or narrow? Judge Wetherell remarked that the amendment should be broad without mischief. The committee voted for a narrow scope: 15 voting for a broad without mischief scope, 27 for a narrow scope, and 1 abstaining.

- **Approved Action**: **This referral is remanded back to the Original Proceedings Subcommittee for further consideration on amending to provide a narrow scope for adding a new Rule 9.130 category to address orders on settlement agreements.**

(b) **Rule 9.210(a)(1)** – Referral number 14-AC-09 from Jodi Jennings seeks to change the rule on briefs to state that when parties file briefs in electronic format, they do not need to also file a paper version.

- Mr. Curry noted that in the Eleventh Circuit, both electronic and paper copies of briefs are required, so the concern here is to make clear that Florida courts do not want paper copies.

- The Chair opened the issue for discussion and, hearing none, called for a vote. The proposal was unanimously approved 42-0.

- **Action Item: Rule 9.210 will be submitted for amendment, as follows:**

RULE 9.210. BRIEFS

(a) [No change]

(1) When not filed in electronic format, briefs shall be printed, typewritten, or duplicated on opaque, white, unglossed paper. The dimensions of each page of a brief, regardless of

format, shall be 8½-by-11 inches. When filed in electronic format, parties shall file only the electronic version.

(2)-(5) [No change]

(b)-(f) [No change]

(c) **Rule 9.020** – During its review of rules, the subcommittee noted that there was no definition of the term "conformed copy" in the rules' text.

- Mr. Curry noted that Rule 2.515 requires a signature and certificates of attorneys and parties. So, originally, the subcommittee was thinking that it should just use the term signed copy instead. But, Mr. Curry noted, the term is almost always used in the appellate rules to refer to a judge's order, but the signature rule only applies to attorneys and parties. Mr. Curry explained that the term "conformed copy" was only defined in a comment to the rule on appendices and means "a true and accurate copy."
    - Mr. Curry noted that the numbering of this at subsection (l) was because another amendment to 9.020, adding (k), is pending. The appropriate numbering is an issue Ms. Telfer will deal with.
- Mr. Hall remarked that the proposal is needed because this issue came up a lot when he was clerk. The reason the term exists is to distinguish between it and a certified copy, which means that the party has the original document. Since it comes up a lot, such a definition should be in the rule.
- Judge Wetherell asked whether the definition should be placed in the rule in alphabetical order. Mr. Curry noted that doing that would shuffle the numbering for the rule on rendition, and Judge Wetherell withdrew his suggestion.
- The Chair called for a vote to adopt the proposal, which passed unanimously, 42-0.
- **Action Item: Rule 9.020 will be submitted for amendment, as follows:**

RULE 9.020. DEFINITIONS

(a)-(k) [No change]

***(l)* Conformed Copy.** A true and accurate copy.

JANUARY 23, 2015, MEETING MINUTES
APPELLATE COURT RULES COMMITTEE
|8:00 AM TO 12:00 PM

In attendance:
Wendy S. Loquasto, Chair
Thomas D. Hall, Vice Chair
Craig Edward Leen, Vice Chair
Hon. T. Kent Wetherell, II, Vice Chair
Courtney Rebecca Brewer, Secretary
Ceci Culpepper Berman
Robin I. Bresky
Mihaela Cabulea
Christopher Vincent Carlyle
Wendie Michelle Cooper
Hon. Marva Louise Crenshaw
Landis Vernon Curry, III
Michael T. Davis
Diane G. DeWolf
Rosemarie Elizabeth Farrell
Angela Carol Flowers
Ivy R. Ginsberg
Christine Davis Graves
Michael C. Greenberg
Tracy Raffles Gunn
Robin Felicity Hazel
Nikole Hiciano
Elliot Burt Kula
Jeffrey Thomas Kuntz
John Wesley Little, III
David Lanier Luck
Hon. John D. Campbell Newton, II
Kristin Ann Norse
James Edward Nutt
Erin Jane O'Leary
Sara-Jean Palmer
Hon. Kathryn Senecal Pecko
Hon. Stephanie Williams Ray
Gigi Rollini
Sarah J. Rumph
Stephanie L. Serafin
Stephanie Rebecca Silver
Dwight Oneal Slater
Andrew McBride Stanton
Brandon Stuart Vesely
Thomas Steven Ward
Elizabeth Cangelose Wheeler
Carrie Ann Wozniak
Stephanie Christina Zimmerman

Appeared by telephone:
Andrew L. Adler
Duane Allan Daiker
Dorothy Venable DiFiore
Marjorie Gadarian Graham
Jack Roy Reiter
Steven Lauren Seliger

Absent:
Margaret Diane Mathews, Board Liaison
Marie Attaway Borland (excused)
Hon. Joseph Lewis, Jr. (excused)

Guests:
Gregory W. Coleman, President of The Florida Bar
William J. Schifino, Jr., President-Elect Designate of The Florida Bar
Meredith Charbula, Liaison from Criminal Procedure Rules Committee
Hon. John Tomasino, Clerk of the Florida Supreme Court
Anthony Russo
David Brunell
Laura Triplett
James Norcross Floyd, Liaison from Code & Rules of Evidence Committee
Paul Regensdorf, Vice Chair of Rules of Judicial Administration Committee

(a) Rule 9.030 – Referral number 12-AC-26. An amendment to Rule 9.030 was approved at the previous June meeting of the ACRC. Afterward, former Secretary David Caldevilla noted that the proposed amendment did not convey what had been intended to be changed. The language approved stated that three judges shall constitute a panel of a circuit court, but did not tell the courts that, when they sit in their appellate capacities,

they should be in these three-judge panels. The new proposal incorporates language from the constitution to make the requirement clear.

- Ms. Serafin noted that Mr. Hall had raised the issue as to whether we have authority to require this of circuit courts and whether it can be addressed via rule.

Note: Marjorie Gadarian joined the meeting via phone.

  - Mr. Hall noted that he thinks that circuit courts should indeed sit in three judge panels when acting in their appellate capacity. But this same issue went to the Florida Supreme Court a number of years ago and was referred to the RJAC. The chief judges of the circuit courts vehemently opposed the change and submitted evidence that it was not possible in a lot of circuits to have three-judge panels on every appellate case, due to financial constraints and the number of judges in some circuits. He was not sure we had done enough homework to present this to the Florida Supreme Court and successfully overcome that type of opposition. He expected that the chief judges would again take issue with such a proposal and file lots of comments.

  - Ms. Serafin responded that the sub-subcommittee had done research on the feasibility of this proposal. Craig Leen noted that he was on the sub-subcommittee and that Mr. Hall's concern had been addressed. It has been a number of years since the Supreme Court considered the issue and the sub-subcommittee felt there would not be as big an objection today, now that judges can sit by designation and have various technology tools at their disposal. The same concerns did not seem to be as big a hindrance, and the proposal's concept had already been approved by the full committee. Moreover, the point of the proposal is very important: permitting one judge to reverse another judge is so troubling that the sub-subcommittee felt that the amendment should proceed even if there are remaining administration issues.

  - Judge Marva Crenshaw noted that she was on the sub-subcommittee. One of the biggest concerns previously expressed was the lack of resources in some circuits. But considering the rapid advance of technology, those concerns are not as daunting anymore.

- Michael Davis asked whether there is any entitlement to have more than one judge on appeal. Ms. Serafin responded that there is not. But she noted that litigants on appeals to circuit court should have the same procedural protections as other litigants.

- Lance Curry raised a technical issue as to whether the proposal should say "Matters within the circuit court's appellate jurisdiction …"? Ms. Serafin responded that she hoped that would be apparent since the rule is within the appellate jurisdiction section. Mr. Curry noted that Rule 9.030(c)(1) regards "Appeal Jurisdiction", and this change will be in (c)(4). Jim Nutt asked whether we should add "appellate" to the heading of (c) (i.e., Appellate Jurisdiction of Circuit Courts) or even to 9.030 (i.e., Appellate Jurisdiction of Courts).

- Judge John Newton asked whether anyone recently spoke to circuit court judges about this issue. Ms. Serafin replied that they had not. Judge Newton responded that reaching out to the circuit judges would be both polite and informative.

- Mr. Kuntz asked whether it would be possible to give the chief justice the authority to excuse circuits from doing this if they were strapped for resources. Even if there are one or two circuits where it is not possible to get a three-judge panel together, there are many where it is, and permitting those few that cannot to be excused would fix the problem.

- John Little noted that he was the advocate who argued the Supreme Court case fifteen years ago and he felt we need to be fully armed this time if we were to propose this amendment. There are differentiations in the smaller circuits, but still something should be done, and it should be done by working in conjunction with other judges and circuits.

- Mr. Leen responded to Mr. Curry's previous concern regarding the use of the term appellate. He suggested, as a friendly amendment, that (c)(4) state: "Matters with the circuit court's appellate or certiorari jurisdiction … ." The proposal should not apply to circuit courts' original jurisdiction, but should apply to certiorari jurisdiction.

    - Tracy Gunn responded that she was not sure what the distinction would be between certiorari and original jurisdiction, since original jurisdiction proceedings are still review proceedings, essentially. Mr. Leen noted that in mandamus, habeas corpus, and other original proceedings, there might be circumstances governed by the rules of civil procedure and where evidence is taken, so it makes sense to have just one judge in those instances.

    - Andy Stanton noted that the practice in Miami-Dade County is that in the DCA, habeas is reviewed by a panel of three, but in the circuit court, it is just one judge.

- Mr. Curry recommended that the proposal should be returned to the subcommittee so that more research could be done to address these concerns.

    - Ms. Serafin noted that she did not think the subcommittee had considered distinguishing between the types of jurisdiction and agreed to take the proposal back.

(b) **Rule 9.330**– Referral numbers 13-AC-10, 12-AC-15, and 14-AC-11. These referrals were a joint effort of the General Practice Subcommittee and the ad hoc PCA Subcommittee. The proposal combines a number of changes that Ms. Serafin and Mr. Leen would discuss.

1. First, Ms. Serafin discussed the proposal's limitation to only review of final appellate orders. She noted that a straw poll taken almost two years ago had indicated the committee's preference to limit the rule in this manner.

- Ms. Serafin noted that the proposal sought to divide up the rule and add structure to it such that subsection (a) would be divided into sub-subdivisions that addressed specific issues: (a)(1) time for filing; (a)(2) contents and further division within the contents section to address each type of motion that may be filed; and (a)(3) response.

- The proposal also incorporates, in light of the straw poll, throughout the rule that the only items covered by this rule are "final appellate order[s] or decision[s]." What this means is explained in new addition subsection (e). Additionally, in the proposed committee note, the second paragraph explains the intent behind this change.

- The Chair noted that there was a spacing issue in (b) that Ms. Telfer would resolve later.

- Mr. Stanton asked whether an order disposing of an original proceeding is an appellate order. Judge Wetherell responded that such an order would fall within the term "decision." Ms. Serafin noted that the intent was to cover such an order.

- Ms. Norse commented that the drafted proposal might be ambiguous as to whether "appellate" applies to both orders or decisions. She also thinks that the rule should stay flexible as to whether it applies to final or non-final orders or decisions, as she thinks the proposal could create problems and does not see the necessity for this change.

- Mr. Davis asked if he received an appellate order sua sponte relinquishing jurisdiction, could he file for rehearing under this proposal? Ms. Serafin responded that this rule then would not apply. But she noted that in such a circumstance, a litigant could still seek a motion for reconsideration, just not a motion for rehearing, which is consistent with the civil rules.

    - Mr. Davis noted that such a motion could then be subject to a motion to strike if not contemplated by the rules. Ms. Serafin countered that the proposed committee note indicated that the appellate court always has the ability to correct non-final orders.

    - The Chair noted one of her concerns was that this amendment would put appellate courts in the same boat as circuit courts regarding whether such motions for reconsideration are timely.

- Ceci Berman commented that she agreed with Ms. Norse and that we should not change (a)(1) in this manner. She noted that the term "final appellate order or decision" does not appear anywhere else in the rules. She is unaware of any troubles the courts have faced in applying the current rule.

    - Mr. Kuntz noted that the Florida Supreme Court and U.S. Supreme Court have held courts always have the authority to reconsider a non-final order.

    - Mr. Leen presented a counter-concern to these. If you do not amend the rule in this manner, there is an argument to be made that any motion for reconsideration as to any order must be brought under this rule. Then, there would be a time limitation as to non-final orders, which would be a mistake unsupported by the law. The proposal seeks to make that clear to everyone.

- Judge Wetherell noted that there were two issues that appeared to be of concern to the group.

    - First, as a matter of policy, should Rule 9.330 apply just to final orders? He referenced a case he was involved in in which the First District reviewed an order regarding a stay of a tobacco appeal. Because the court wrote a long opinion and certified the issue, the petitioners were able to seek review by the Florida Supreme Court. But had they not and simply denied the motion for review of the stay order, under this provision, there would be no opportunity to seek Supreme Court review.

- Judge Wetherell noted that the second concern regarded motions for reconsideration; the implication is that this rule prohibits parties from seeking en banc consideration or certification of non-final orders.

- Mr. Stanton asked what the goal of the proposal is: is it to favor reconsideration of non-final orders or is it to limit or constrain reconsideration of non-final orders?

  - Ms. Serafin noted that this proposal was drafted in light of a straw poll in June 2013 from this committee, which is reflected at page 222 of the materials. The discussion reported therein indicates why the vote went the way it did, but that the issue might be ripe for another vote, given that the ACRC has different members now. The Chair pondered whether we should vote anew on the concept.

  - Mr. Leen noted that the problem or concern is that the rule right now is ambiguous as to whether or not it applies to non-final orders. Most people view this as applying only to final orders. If it does apply to final orders, then it should say that. Otherwise, a court could find that you waived the ability to reconsider a non-final order by not filing within the relevant time limitations.

- Betty Wheeler expressed a concern at page 8 regarding the language being off from the current version. Ms. Telfer noted that the language reflects the most updated version of the rule and that Ms. Wheeler may not be looking at the most updated version.

- Mr. Luck indicated that he was concerned about the scope of the proposal. He suggested that taking the language from the comment and putting it in the text of the rule might alleviate some of the concerns expressed. This is analogous to Florida Rule of Civil Procedure 1.540 regarding relief from judgment, which contains limiting language in the text of the rule.

  - Judge Wetherell noted the underlying debate on policy and there should be an up or down vote on the proposal. He proposed that any amendments to the language should be made before the up or down vote occurs.

  - Mr. Luck proposed a friendly amendment to the language regarding moving the scope from the comment and placing it in text of rule. Ms. Serafin indicated that she was willing to accept moving the second sentence of the second paragraph in the comment ("The rule is not meant to limit the court's inherent authority to reconsider non-final appellate orders and decisions.") to the end of (e) and deleting the first sentence of the second paragraph ("New subsection (e) is intended to limit the scope of this rule to final appellate orders and decisions.").

- Mr. Davis asked whether we should consider a language change to add a time limit for non-final orders? Mr. Kuntz indicated his concern that non-final orders may be reconsidered at any time, in part because there may be changing circumstances that necessitate reconsideration.

    - Stephanie Zimmerman indicated her concern that this situation arises in juvenile dependency proceedings. Parents often seek to reopen cases post-deadline; though she is not sure if this is because the rule is not clear or if courts just want to give the benefit of the doubt to parents, she has seen situations where cases are being reopened 90 days later.

    - Mr. Curry noted that the whole intent of this amendment was to make clear that there are no time limits for non-final orders. He wondered how bad of a problem this issue really is and noted that we should not be addressing it if it is not really a problem.

    - Ms. Berman asked why we need the language in (a)(1) if (e) makes the application so clear. Ms. Serafin noted that the concern was to make this rule abundantly clear and to ensure no one read a distinction in these circumstances into the use of the words order or decision. She rejected the proposed amendment. Ms. Berman noted that she still thinks the proposal should not include the term "final appellate."

    - Mr. Curry noted that this proposal sought to make it clear that it was referring not to orders of the lower tribunal, which is how the rules define the word "order" alone.

    - Mr. Stanton inquired what the risk really was of motions for rehearing being filed regarding lower court orders. He renewed his concern as to the need for using the term "appellate" because of the ambiguity it creates. Ms. Serafin noted that this gets back to the problem Mr. Curry pointed out—the term "order" would mean lower tribunal orders as well. She suggested "order or decision of an appellate tribunal." Mr. Stanton said that would address his concern, but that he is not certain on the language.

    - Judge Wetherell suggested that the language should use the term "court" since it is defined to mean appellate tribunals, and proposed the relevant (a)(1) language be modified to say: "within 15 days of an order or decision <u>of the court</u> or within such other time." Ms. Serafin accepted this amendment.

- Judge Wetherell then wondered whether the application section of the amendment should say "this rule <u>only</u> applies to," which would clarify that

it does not apply to non-final orders. Ms. Serafin accepted that suggestion. The Chair clarified all of these suggestions.

- Mr. Leen made clear that there should be a similar change to subsection (e). Ms. Berman noted that "only" should be inserted after applies in that subsection: "This rule applies only to orders or decisions of the court." Ms. Serafin accepted all of these friendly amendments, and Mr. Leen seconded that acceptance.

- Mr. Kula explained that the "appellate order" language came from Rule 9.020(j). Mr. Kuntz added that "appellate order" is meant to differentiate what the proposal is referring to from "order," which would encompass trial court orders.

- Angela Flowers expressed concern that we were adding commentary to the language of the rule itself, in violation of longstanding committee policy. Ms. Serafin explained that the portion of the committee note that is being moved in accordance with Mr. Luck's suggestion is not commentary.

- Mr. Davis expressed his desire to see the rule succeed, but wants it sent back to the subcommittee for further consideration in light of this discussion. Ms. Serafin noted she would take it back to the subcommittee, but that she wanted a concept vote so that the subcommittee would know how to proceed. She also would like a vote on the structural changes to the rule.

  - Mr. Leen noted that he wanted to call the question for a vote, rather than sending it back to the subcommittee. Mr. Hall noted that we could vote on whether the question should be called or sent back to the subcommittee. Judge Wetherell and Mr. Stanton seconded.

  - As a point of order, Mr. Hall noted that first you had to vote on whether to call the question and that it would require a 2/3 vote to call the question to a vote rather than sending it back to the subcommittee. Duane Daiker confirmed.

  - The Chair noted that there was lots of confusion as to what the vote would be on and what the amended proposal looked like at this point. She exercised her authority as chair to simply send the issue back to the subcommittee.

- Mr. Curry requested that the committee first take a straw vote so that the subcommittee provided direction as to what it wanted. The Chair explained that the straw vote was whether the committee wanted the

proposal limited to final orders. The committee voted to so limit the proposal, 31-18.

- **<u>Approved Action</u>: This referral is remanded back to the General Practice Subcommittee and the ad hoc PCA Subcommittee for further consideration on amending the proposal to apply only to final orders of appellate courts and revisions in light of the discussion.**

2. Next, Ms. Serafin noted the changes to Rule 9.330(b) adding "or written opinion" to the list of available post-opinion motions and making clear that those moving could only file one single document containing all requests for post-opinion relief.

- The Chair asked whether the pull-down options on e-filing would permit one to file a motion asking for various forms of relief. Mr. Hall noted that all the courts simply docket a document as one thing. That is all the computer filing systems will allow.
    - Mr. Davis noted that even though you can only docket something as one item, you could always select "other" when filing and type in the name of the document.
    - Ms. Serafin asked if anyone had insight as to how the court processes such documents. Mr. Kuntz expressed his assurance that the DCA judges are not simply looking at the docket to determine what the motion is seeking.
- Ms. Serafin next noted that the proposal amended the language to say "a particular <u>order or</u> decision <u>of the court</u>." Jim Nutt pondered what the word "particular" adds and whether we should eliminate it.
    - Mr. Leen noted that the reason the word "particular" is present is the concern that the court might grant a motion for rehearing, the new order has a problem, and an additional motion for rehearing would be required. Taking out "particular" might imply that a party could not then file an additional rehearing motion on the new opinion/order.
    - Mr. Curry also noted that the word "particular" was already in the rule, this was not a new addition.
    - Ms. Serafin rejected the amendment.
- The Chair called for a vote on the proposed amendment, which passed unanimously, 47-0.

- **Action Item: Rule 9.330(b) will be submitted for amendment, as follows:**

RULE 9.330. REHEARING; CLARIFICATION; CERTIFICATION

(a) [NO CHANGE]

(b) Limitation. A party shall not file more than 1 motion for rehearing, ~~or for~~ clarification, ~~of decision and 1 motion for~~ certification, or written opinion with respect to a particular final appellate order or decision. All motions filed under this rule with respect to a particular order or decision must be combined in a single document.

(c)-(e) [NO CHANGE]

3. Mr. Leen, as chair of the ad hoc PCA Subcommittee, explained the rest of the proposed amendments to Rule 9.330.

- Mr. Leen started by explaining the history of the rule regarding motions for written opinions. In May 2000, at the concern of The Florida Bar, the Committee on Per Curiam Affirmed Decisions of the Judicial Management Council looked at the problem of PCAs. The written opinion amendment came out of that committee.
    - But, Mr. Leen explained, the rule has done virtually nothing to ensure more written opinions. He noted that about 2/3 of decisions are PCAs. Yet only one to two motions for written opinion are granted in each district per year.
    - He noted that there may well be lots of good reasons not to issue a written opinion, including the presumption of validity, prior precedent, or no basis for Supreme Court review. But there were also instances where parties had a debatable, contentious, unsettled issue come up and still received a PCA.
    - Mr. Leen continued that the only basis currently in the rules for asking for a written opinion is if there is a legitimate basis for Supreme Court review. That is hard to do on a PCA because a party does not know why the court came to the decision it did and has to certify a good faith basis exists for Supreme Court review. These motions seem to be disfavored by the courts.
- Next, Mr. Leen explained the subcommittee's analysis about the harms and benefits of PCAs.

- The harms are obvious: litigants are left with a decision with no explanation and no mechanism to challenge it. It might limit the jurisdiction of the Supreme Court too much. In very difficult cases with a good legal argument, you still have to advise clients that they may receive a PCA and never receive an explanation on their legal issue. Additionally, certain cases (e.g., workers' compensation cases) are only heard by the First DCA, so conflict of decisions could never develop and there would never be a "legitimate basis for supreme court review."

- The pros of PCAs include that they help manage judicial resources, allowing courts to focus on those cases that truly need, sometimes lengthy, written opinions. Some cases really have no appealable issue. Other cases have preservation problems and lawyers might not want their failures to preserve being highlighted in a written opinion.

- Given these concerns as well as issues regarding the authority of the committee to do so, the subcommittee elected not to restrict PCAs. Instead, it concluded that the potential remedy is already in the rules, in the written opinion rule.

- The proposal therefore expands the written opinion rule to give more options for seeking them and to make clear that they are not disfavored. Mr. Leen explained that the proposed amendment would be to Rule 9.330(a)(2)(D), and would expand the grounds for which an attorney could seek a written opinion. The proposed amendment requires a party to state that the party believes a written opinion would provide: (i) a legitimate basis for supreme court review, which is the one ground already contemplated; (ii) an explanation for deviation from prior precedent, which was an obvious category to add; and (iii) guidance to the parties or the lower tribunal, which were unique additions.

  - The proposal was unanimously passed by the subcommittee after much discussion.

  - The grounds in (iii) came directly from the 2000 supreme court PCA report. Mr. Leen explained that writing a motion under (iii) is an attorney's indication that the loss is accepted, but that guidance is needed for future cases.

  - Mr. Leen further noted that at Mr. Hall's suggestion, (iii)(k) was added permitting a party to seek a written opinion when a dissent might have presented an arguable basis for supreme court jurisdiction.

  - Additionally, (iii)(*l*) addresses the cases over which the First District has exclusive jurisdiction and no conflict could develop.

- Mr. Leen explained that the proposal removes the certification requirement on a motion for written opinion, so that the motion will not be viewed as disfavored. The committee note also makes clear that the motion is not disfavored.

- The proposal also defines what a motion for certification is in (a)(2)(C).

- Judge Wetherell supports the proposal and remarked that from simply a scrivener's point of view, this proposal is important because the previous rule was a mess and now has an easy-to-follow structure that breaks up the various sections.

- Judge Wetherell continued that as for motions for written opinion, the current rule is not being used for the purpose for which it was intended; they are often used by lawyers as whining sessions instead of to actually explain a basis for Supreme Court review. Very few motions are granted, in Judge Wetherell's opinion, because they are not true motions for written opinion. This proposal broadens a party's ability to ask for written opinions and also provides direction to attorneys who were misusing the motion.

    - The Chair noted that very few of these motions are ever even made, which might suggest the rule is too limited.

- Mr. Curry remarked that this proposal takes the rule from a very narrow basis for seeking a written opinion to kicking the door open as wide as it can get. He noted that any attorney could come up with an argument for a written opinion under (iii). He asked whether the subcommittee considered a middle ground of just adding (ii)? He thought that would be more palatable to a wider swath of attorneys and wondered whether that should at least be offered as an alternative.

    - Mr. Leen responded that (iii) was intended to provide a means of seeking a written opinion when there was no precedent on an issue and there would be no means of seeking Supreme Court review, yet the issue was set to recur often. There was a lot of support from the subcommittee on adding this ground. These were the type of circumstances where a party would be correct in seeking guidance from the court. And he thought the Supreme Court would be open to considering the grounds in (iii) since most of them came from its own report.

    - He did not disagree that limiting (iii) might be a good option, but he would not remove it.

- Ms. Gunn asked whether this rule would simply permit a party to reargue points already made (or that should have been made) in briefing. Judge Wetherell noted that the proposal was intended to prevent exactly that; the bases for seeking a written opinion prevents parties from addressing the merits again; it asks them to accept the loss, but articulate why the opinion is necessary. Because when parties brief and argue the merits, they probably are not focused on getting a written decision, but instead on winning the case. The Chair remarked that the rule against reargument is found only in the committee notes to the rule.

    - Judge Wetherell commented that his colleagues already put these factors into their calculus of whether to write an opinion in the first place, but he noted that a judge may not be aware in making the initial calculus, for instance, that 13 other cases are percolating through the system.

    - Ms. Gunn asked if you could raise that aspect of the case for the first time after a PCA, and Judge Wetherell responded yes.

- Judge Newton noted that it would be extremely difficult and time-consuming in some instances to track down exactly what the "decision" is, and did not like that each option starts with "the decision." He likes the idea of expanding the bases for a written opinion.

- Mr. Hall remarked that if you just file a motion for written opinion, you are not technically asking for rehearing. He noted that he wants it to be clear that a motion for written opinion tolls the time for seeking further review even absent a motion for rehearing.

- Mr. Hall also thought the proposal was going to cover when the trial court declares a statute unconstitutional and the district court affirms without a written opinion. The Chair noted that in those circumstances, Supreme Court review is mandatory. If a trial court decision holds a statute valid, discretionary review is available.

- Sara Jean Palmer commented that she loves this proposal, but that she wants caution taken in the approach to (D)(iii). There should be some limitation in that section because we need to be careful we are not giving authority for someone to seek a written opinion when rehearing is the appropriate motion; she is concerned (D)(iii)(d) and (D)(iii)(e) particularly sound like rehearing motions.

- Mr. Curry noted that this proposal would create grounds for thousands of motions not currently authorized, which will be a tremendous burden on courts who have already determined that nothing will be gained from a written opinion.

- Chris Carlyle agreed with Mr. Curry's concerns. He was torn, because as a litigant, it is nice to have every available tool in the arsenal. But this proposal is a very significant change that will permit litigants to ask for a written opinion in just about every case.

- Mr. Kuntz observed that some cases really do not deserve written opinions. Perhaps in those instances, courts could include language indicating that "No motion for written opinion will be entertained."

- Robin Hazel noted that she was in favor of the rule, but perhaps the number of permitted pages for such motions could be limited.

- Mr. Little stated that when you look at the breadth of the expansion of the rule and combine it with a comment that these motions should not be disfavored, this proposal will open attorneys up to criticism if they do not file these motions.

continued): At this time, the meeting returned to the discussion on the proposal to amend the written opinion rule.

- Mr. Leen noted that a friendly amendment had been proposed on the proposal as to Rule 9.330(a)(2)(D)(iii)(k): a dissent has been written~~and the dissent address an issue that presents an arguable basis for supreme court jurisdiction;~~. Mr. Leen accepted the amendment and Judge Wetherell seconded.

- Mr. Leen then reiterated that the grounds in (iii) had already been blessed by the Supreme Court. There had been much discussion and compromise in the subcommittee already on many of these very issues, and the proposal serves a good purpose. While this will lead to more motions, that was a good compromise to allow PCAs to be used, but challenged.

- Dwight Slater remarked that he had a lot of concerns about this proposal, primarily as to the floodgates it will open. He pondered whether we should add the certification requirement back in.

- Ms. Wheeler remarked on (D)(iii)(b) and (c) as to how a PCA could ever establish a new rule of law or modify an existing rule of law. Mr. Leen responded that the motion would reflect the party's belief that the decision had established or changed the rule. Mr. Leen noted that another proposal had suggested that (iii) simply say "guidance to the parties or lower tribunal when the issue is a recurring one," but this would miss all the grounds the supreme court has already sanctioned.

- Chrissy Graves noted that the way the proposal is drafted, the real issue for the motion is whether the written opinion would establish a new rule or modify an existing rule. Mr. Leen said that is the implicit meaning of the proposal.

- The Chair noted that the point of a motion under this proposal would be to show that an opinion is needed, not to rehash the merits.

- Ms. Berman noted that the proposal needed the word "or" after (iii)(k). Mr. Leen accepted that amendment and Judge Wetherell seconded.

- Ms. Berman stated that she would feel better about voting for this proposal if the comment was removed. Mr. Leen would not accept that amendment, but would agree to bifurcate the vote.

- Mr. Leen also remarked that he was not willing to keep the certification requirement in, because that requirement makes the motion for written opinion different from every other post-opinion motion, indicating that it is disfavored.

  - The Chair referenced an article by Justice England noting that the certification requirement was superfluous because lawyers should always be making those assurances any time they sign a motion.

- Mr. Curry indicated that he would not vote in support of this proposal, but was in favor of a more conservative approach. He noted that he thinks doing away with PCAs would be better than this proposal.

- Ms. Flowers suggested a friendly amendment to (D)(iii): "guidance to the parties or lower tribunal when <u>a written opinion would</u>: … ". Otherwise, because the proposed amendment is lengthy, you lose track of the basis for the motion by the time you get through the guidance options. But Judge Wetherell stated that amendment ultimately would not make sense given the remaining guidance options (h), (i), etc.

- Ms. Zimmerman noted that she too favors a more conservative approach. There are items in (D)(iii) that should be a basis for written opinions, such as the workers' comp issue. But from the perspective of a dependency attorney, there are delay concerns with the approach the proposal takes.

- Mr. Leen asked whether we could take a straw poll on a broader versus narrower approach to the rule.

- Mr. Davis had one more comment and asked that if the subcommittee was going to be redrafting, would it consider looking at adding in PCAs affirming life sentences.

- The Chair called for a straw poll as to whether the committee preferred a narrow or broad approach. Mr. Leen explained that the broad approach is the rule as written with all accepted friendly amendments. 17 voted in favor of the broad approach and 23 in favor of a narrower approach.

- Ms. Flowers remarked that the sticking point was (iii). Mr. Leen responded that (iii) was the main point of the proposal, but that the subcommittee would take some of the categories out, reword others, combine some, etc.

- Mr. Davis asked whether if these categories are all in the Supreme Court report and are supposed to be considered by the courts, this proposal just tailors our rule to what the courts are already supposed to consider? Mr. Leen noted that if it is not in the rule, there is no guarantee courts are looking at those factors.

- Another straw poll was taken as to whether the subcommittee should continue to work on the rule. The vote was overwhelmingly in favor of the concept, 37 to 3.

- **<u>Approved Action</u>: This referral is remanded back to the General Practice and ad hoc PCA subcommittees for further consideration on amending to provide a narrower scope for the proposed changes to Rule 9.330(a)(2)(D).**
-

(a) Rule 9.146 – Referral number 14-AC-26 addresses several changes to the rule regarding appellate proceedings in juvenile dependency and termination of parental rights cases.

- The first proposed change is the addition of subsection (c)(3) of the rule regarding stay orders; the current rule does not address how a party seeks review of such orders. Rule 9.310 addresses stays pending review and provides for review of such lower tribunal orders, but only those entered pursuant to the rule, which does not encompass stay orders in the proceedings addressed by rule 9.146.

- The second proposed change is an amendment to subsection (g)(3)(B) of the rule regarding the time for service of briefs when multiple parties are involved in a case. This same change was made to Rule 9.210 at the meeting last June, but in dependency cases, that portion of 9.210 is specifically excluded from Rule 9.146 proceedings. So this updates the rule that does apply to these cases and accounts for issues particular to dependency cases.

- The third proposed change is an amendment to subsection (g)(4)(B) regarding motions to withdraw as counsel. This occurs when the attorney concludes there are no meritorious issues; parents have the opportunity to file a brief within 20 days when such withdrawal occurs. The proposal seeks to address problems in ensuring that the parent has access to the record after an attorney withdraws. The language contemplates that counsel will file some notice with the court that counsel did transmit the record or that they did not do so because they are not able to locate the record or the parents.

- The Chair noted that there are no extensions available in these cases, and that it could take a parent 10 days to receive a record, and the third proposed change gives the withdrawing attorney 5 days after the order granting the motion to withdraw to send the record, meaning that much of the parent's briefing time may have passed before he or she even receives the record. The Chair asked whether the subcommittee would be willing to accept a friendly amendment to the language that requires the withdrawing counsel to send the record "immediately after issuance of an order" granting the motion to withdraw.

    - Ms. Zimmerman noted that the subcommittee was concerned on that front as well. But the subcommittee wanted to ensure the rule specified an end date. She also pointed out that using the word immediately could still be interpreted to mean 5 days.

    - Wendie Cooper noted that an attorney might receive the order granting withdrawal the same day that they file a motion. Ms. Zimmerman confirmed that that is what courts are currently doing.

    - Ms. Norse noted that attorneys are still getting orders from the Second DCA via mail, so it might take 5 days to even get the order.

    - Ms. Zimmerman noted that extensions are available for good reasons, and that probably not receiving the record from a withdrawn attorney until 1 day before the brief is due would qualify as a good reason.

- The Chair called for a vote as to whether the proposal should be adopted and Rule 9.146 amended, which passed unanimously, 43-0.

- **<u>Action Item</u>: Rule 9.146 will be submitted for amendment, as follows:**

RULE 9.146. APPEAL PROCEEDINGS IN JUVENILE DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS CASES AND CASES INVOLVING FAMILIES AND CHILDREN IN NEED OF SERVICES

(a)–(b) [No Change]

(c) Stay of Proceedings.

(1) [No change]

(2) [No change]

(3) **Review.** Review of orders entered by lower tribunals under this rule shall be by the court on motion.

(d)–(f) [No Change]

(g) Special Procedures and Time Limitations Applicable to Appeals of Final Orders in Dependency or Termination of Parental Rights Proceedings.

(1)–(2) [No Change]

(3) Briefs.

(A) [No Change]

(B) **Times for Service.** The initial brief shall be served within 20 days of service of the record on appeal or the index to the record on appeal. The answer brief shall be served within 20 days of service of the initial brief. The reply brief, if any, shall be served within 10 days of the service of the answer brief. If more than 1 initial or answer brief is served, the responsive brief shall be served within 20 days after the last initial brief or within 10 days after the last answer brief was served or could have been timely served, whichever is later.

(4) Motions.

(A) [No Change]

(B) **Motions to Withdraw as Counsel.** If appellate counsel seeks leave to withdraw from representation of an indigent parent, the motion to withdraw shall be served on the parent and shall contain a certification that, after a conscientious review of the record, the attorney has determined in good faith that there are no meritorious grounds on which to base an appeal. The parent shall be permitted to file a brief pro se, or through subsequently retained counsel, within 20 days of the issuance of an order granting the motion to withdraw.

Within 5 days of the issuance of an order granting the motion to withdraw, appellate counsel shall file a notice with the court certifying that counsel has forwarded a copy of the record and the transcripts of the proceedings to the parent or that counsel is unable to forward a copy of the record and the transcripts of the proceedings because counsel cannot locate the parent after making diligent efforts.

(C) [No Change]

(5)–(7) [No Change]

(h) [No Change]

Original Proceedings: The subcommittee's written report and meeting minutes are located at page 301 of the agenda packet. The Chair recognized the subcommittee chair, Tracy Gunn, who presented two proposed amendments:

(a) Rule 9.130 – Referral number 13-AC-16 makes two additions to the list of non-final orders subject to immediate appeal. The first is to add language regarding settlement agreements. Ms. Gunn noted that this issue came to the subcommittee because of problems that developed in obtaining certiorari review of orders regarding settlement agreements which should be decided before litigation proceeds. As hesitant as we are to add categories to the non-final orders subject to immediate appeal, since settlement is encouraged, these amendments are important.

- Ms. Gunn noted that the proposal was approved in concept at the October meeting. This issue came to the subcommittee because of problems that developed in consistently obtaining certiorari review of orders regarding settlement agreements, which should be decided before litigation proceeds.

- The Chair called for discussion and, hearing none, called for a vote. The proposal passed unanimously, 42-0.

- **Action Item: Rule 9.130 will be submitted for amendment, as follows:**

RULE 9.130. PROCEEDINGS TO REVIEW NON-FINAL ORDERS AND SPECIFIED FINAL ORDERS

(a) [No change]

…

(3) [No change]

…

(C) [No change]

…

(xii) that, as a matter of law, a settlement agreement is unenforceable, is set aside, or never existed.

(b) The second proposal seeks to add an additional category to the list of immediately appealable non-final orders regarding disqualification of counsel. Ms. Gunn explained that Rosemarie Farrell, Christine Graves, and Judge Newton had worked on this proposal.

- Ms. Gunn explained that although orders granting or denying motions to disqualify counsel are presently subject to certiorari review, the standard required for certiorari review does not really fit given the standards that have developed in the case law on review of these orders.
    - There is no need to prove irreparable harm because the harm is presumed and, in any event, courts do not want to force attorneys to disclose confidential information.
    - Additionally, the standard of review applied to these orders is de novo.
    - So the proposal does not expand the review available or add a category to the list of non-final orders that is not being reviewed, this proposal just makes the type of review available fit better with the type of review that is already being applied.
- The Chair called for discussion. Ms. Norse indicated that she was not in favor of the rule because she could see instances where review would be sought to delay the process. While she understood that the way these orders are reviewed may not be a great fit for certiorari review, requiring them to be brought as cert proceedings provided some protection against abuse by attorneys using these motions to delay the process. The lack of an automatic stay in those proceedings provides added protection that does not exist in a non-final appeal.
    - Ms. Gunn noted that the subcommittee considered that issue, but noted that there is no automatic stay in appeals of non-final orders, so making these orders subject to immediate appeal will not materially alter the time frame.
    - Mr. Davis asked whether the rule makes it easier to have an order disqualifying or not disqualifying an attorney reviewed. Ms. Gunn responded that it makes such orders reviewable by appeal rather than by cert and makes it clear to people who are not aware of the case law that review is available.

- Mr. Davis then asked whether the rule makes the standard of review easier. Ms. Gunn said that the courts are already applying an easier standard of review for these orders, which is why this proposal was made. Mr. Davis indicated that he agreed with Ms. Norse that he preferred the higher standard.

- Ms. Berman responded that the whole point is that there will not be a different standard. The case law already says the standard of review over these orders is de novo, there is no heightened standard being applied currently.

- Mr. Nutt asked why we are including both orders granting and denying motions to disqualify. He thinks that if the motion is granted, then the policy reasons for immediate review kick in, but not if the motion is denied. Mr. Kuntz responded that the issue is important to both sides. If a lawyer is not disqualified and should be, timely review is required.

- Mr. Leen commented that the standard of certiorari review is not a heightened standard because irreparable harm is presumed. He stated that he was fine with having the proposal apply for both orders granting and denying said motions. If not for both, then the rule should definitely be amended for orders granting such motions.

- Ms. Farrell remarked that with the establishment of certain facts, prejudice is presumed in these cases. Even though review is via certiorari, parties never have to show irreparable harm. The proposal does not change anything; appellate courts are already treating these cases as the amendment proposes they do.

    - Mr. Kuntz noted that except for determining briefing schedule, this changes nothing.

- The Chair called for a vote; the proposal passed 40-7.

- **<u>Action Item</u>: Rule 9.130 will be submitted for amendment as follows:**

RULE 9.130. PROCEEDINGS TO REVIEW NON-FINAL ORDERS AND SPECIFIED FINAL ORDERS

(a) [No change]

…

(3) [No change]

…

<u>(E) grant or deny a motion to disqualify counsel.</u>

JUNE 26, 2015, MEETING
APPELLATE COURT RULES COMMITTEE
9:00 AM TO 12:00 PM

In attendance:
Wendy S. Loquasto, Chair
Thomas D. Hall, Vice Chair
Craig Edward Leen, Vice Chair
Hon. T. Kent Wetherell, II, Vice Chair
Duane Allan Daiker, Parliamentarian
Courtney Rebecca Brewer, Secretary
Andrew L. Adler
Ceci Culpepper Berman
Marie Attaway Borland
Robin I. Bresky
Mihaela Cabulea
Christopher Vincent Carlyle
Wendie Michelle Cooper
Landis Vernon Curry, III
Michael T. Davis
Diane G. DeWolf
Dorothy Venable DiFiore
Ivy R. Ginsberg
Marjorie Gadarian Graham
Christine Davis Graves
Michael C. Greenberg
Robin Felicity Hazel
Nikole Hiciano
Elliot Burt Kula
Jeffrey Thomas Kuntz
Hon. Joseph Lewis, Jr.
John Wesley Little, III
David Lanier Luck
Hon. John D. Campbell Newton, II
Kristin Ann Norse
James Edward Nutt
Erin Jane O'Leary
Sara-Jean Palmer
Hon. Kathryn Senecal Pecko
Hon. Stephanie Williams Ray
Jack Roy Reiter
Gigi Rollini
Sarah J. Rumph
Steven Lauren Seliger
Stephanie L. Serafin
Stephanie Rebecca Silver
Dwight Oneal Slater
Andrew McBride Stanton
Brandon Stuart Vesely
Thomas Steven Ward
Elizabeth Cangelose Wheeler
Stephanie Christina Zimmerman

Appeared by telephone:
Rosemarie Elizabeth Farrell
Angela Carol Flowers

Absent:
Hon. Marva Louise Crenshaw (excused)
Tracy Raffles Gunn (excused)
Carrie Ann Wozniak (excused)

Guests:
Caryn Bellus, incoming member
Amy Borman, current Vice Chair and incoming Chair of Rules of Judicial Administration Committee
James Norcross Floyd, Liaison from Code & Rules of Evidence Committee
Henry Gyden, incoming member via phone
Josh Heller, incoming member via phone
Keri Joseph, incoming member
Steve Kolbert
Hon. Robert Luck, incoming member
Margaret Diane Mathews, Board of Governors Liaison
David Monaco, incoming member via phone
Jennifer Olmedo-Rodriguez, incoming member
Kristina Samuels, Florida Supreme Court Liaison
Brian C. Tackenberg
Hon. John Tomasino, Clerk of the Florida Supreme Court (by telephone)
Jessica Zagier-Wallace, incoming member
Nicole M. Ziegler, incoming member

(a) **9.110**– Referral number 13-AC-18 comes from Judge Altenbernd. Mr. Kuntz recognized Betty Wheeler to discuss the proposal, located at pages 5-6 of the agenda.

- Ms. Wheeler noted that Judge Altenbernd's concern was the rule on partial final judgments; he noted that the scope of review in (h), which states that a court may review any ruling or matter occurring before filing the notice of appeal, does not apply in the case of partial final judgments. Thus, a sentence was added to (k) that tracks the case law regarding the scope of review for partial final judgment appeals.

    - Judge Altenbernd also indicated that there may be a discrepancy with the scope of review in a cross-appeal under (g). The proposal seeks to make clear that an appellee wanting affirmative relief must cross-appeal. This language was chosen in light of case law regarding appeals of orders granting new trial; an appellee in such instances must raise any other issues or risk missing the chance to appeal the trial court's ministerial entry of a final judgment if the court reverses the new trial order.

    - These exceptions were noted in the proposal as to (h).

    - The proposal also added an extensive committee note, explaining the reasons for the amendments.

- Stephanie Zimmerman suggested that a comma be added following the proposed amendment in subsection (h). Ms. Wheeler accepted.

- Craig Leen worried that the phrase "affirmative relief" in (g) might make someone think they must file a cross-appeal whenever they are seeking an affirmance. Ms. Wheeler explained that hopefully a cross-appellant would have that clarified by the committee note. Mr. Leen wanted another word used because "affirmative" is confusing and ambiguous.

    - Mr. Curry questioned whether the proposal needed to be clarified and cited as an example motions for attorney's fees; in that instance, a person is seeking affirmative relief from the appellate court, but a cross-appeal is not the right path for doing so. Ms. Wheeler noted that this issue was clear in the committee note, which stated that a cross-appeal is necessary "if affirmative relief from a lower court's order is sought." Mr. Luck proposed that the amendment be as to "affirmative merits relief" to address Mr. Curry's concern.

    - Mr. Hall was concerned that this amendment risks making cross-appeals jurisdictional.

- Mr. Reiter was concerned that the committee note to the proposal was too confusing.

- The Chair decided to send the proposal back to the subcommittee. She noted that she does not like the second sentence in the committee note. Also, the citation to *Allstate* in the note should be to note 3, rather than note 13.

- **Approved Action: This referral is remanded back to the Civil Practice Subcommittee for further consideration.**

  (b) 9.350 – Referral number 15-AC-08 comes from Ms. Wheeler, who again presented on behalf of the subcommittee.

- Ms. Wheeler explained that this proposal was meant to address a conflict in the time period permitted under the rules for filing cross-appeals (9.110(b)) versus the mandatory waiting period for dismissal of appeals (9.350(b)). Because Rule 9.350(b) currently speaks in terms of 10 days from filing rather than service of the notice of appeal, while Rule 9.110(b) speaks in terms of 10 days from service of the notice (meaning the cross-appellant has 15 days to file a cross-appeal, essentially), there is a conflict that would allow an appellant to dismiss an appeal before a notice of cross-appeal was actually due. This proposal fixes that discrepancy.

- Ms. Norse moved that the proposal be adopted, Dottie DiFiore seconded.

- The Chair called for a vote, and the proposal passed 44-0.

- **Action Item: Rule 9.350 will be submitted for amendment, as follows:**

RULE 9.350. DISMISSAL OF CAUSES

(a) Dismissal of Causes When Settled. [No change.]

(b) Voluntary Dismissal. 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~~service of the notice of appeal or until 10 days after the time prescribed by rule 9.110(b), whichever is later.

(c)–(d) [No change.]

(a) **Rule 9.330** – Referral numbers 13-AC-10, 12-AC-15, and 14-AC-11. The Chair recognized Craig Leen, Chair of the Ad Hoc Subcommittee on Per Curiam Affirmances, which worked in conjunction with General Practice on this proposal. The ad hoc subcommittee's written report and meeting minutes are found at page 357 of the agenda packet. Mr. Leen explained that the joint group originally was charged with exploring PCAs and how the rules could be used to limit their use. The joint proposal evolved into a rule providing additional grounds for which a written opinion may be sought.

- The proposal made at the previous ACRC meeting was returned to the subcommittees, with two straw polls indicating that the general consensus was in favor of the proposal, but that a narrower rule was preferred.

- The subcommittees unanimously agreed on the amendment now proposed. Mr. Leen explained that the recommendations were taken from a Judicial Management Council report. The idea is that the party seeking a written opinion accepts the loss but might want clarification or guidance as to why a decision was affirmed and to know how the law should go forward. The proposal provides parties with three grounds for seeking a written opinion:

    - If a written opinion will provide a basis for Florida Supreme Court review.

    - If the PCA appears to deviate from prior precedent.

    - If a written opinion will provide guidance to the parties or lower tribunal in certain instances.

- Additionally, the subcommittee proposed a comment to, in part, indicate that such motions are not disfavored.

- Stephanie Serafin, chair of the General Practice Subcommittee, noted that several of the changes from her subcommittee were reflected in the proposal, including: limiting the rule to final orders; the addition of (e) explaining the application of the rule and that it does not limit an appellate court's authority to reconsider interlocutory orders; and the changes to (b) permitting only one document to be filed.

- Ms. Norse commented that while she was critical of the previous incarnation, this proposal was perfect and very well-worded. She only suggested that we delete the hyphen in "non-final," which Ms. Telfer indicated would be done.

- Mr. Curry stated that while he was one of the more vocal opponents of the amendment at the previous meeting, he thinks the subcommittees did a nice job. But he still wanted to see the second sentence of the proposed committee note eliminated: "These motions should be more liberally granted in situations where one of the listed factors applies." He thinks that this sentence is inappropriately directed at telling judges how they should decide an issue and will not have the impact desired. Chris Carlyle agreed and noted that these motions should **only** be granted when one of the listed factors applies. Mr. Leen agreed to strike the second sentence of the note as a friendly amendment.

- Mr. Davis noted that he would like to see added to the list circumstances where a criminal defendant has received a life sentence and a PCA of that life sentence. He was encouraged to make that a separate referral.

- Mr. Ward sought clarification as to whether the proposal requires a party to concede that it has lost. Mr. Leen clarified that there was no requirement that a party say that. Judge

Wetherell explained that this is consistent with the general principle that motions for rehearing ask the court to change its mind, while a motion for written opinion does not.

- Ms. DiFiore moved that we call the question; Robin Hazel seconded.

- The Chair called the question for a vote, and the proposal, with the friendly amendment, passed 47-0, with one abstention.

- **Action Item: Rule 9.330 will be submitted for amendment, as follows:**

RULE 9.330. REHEARING; CLARIFICATION; CERTIFICATION; WRITTEN OPINION

(a) Time for Filing; Contents; Response.

(1) Time for Filing. A motion for rehearing, clarification, certification, or issuance of a written opinion may be filed within 15 days of an order or decision of the court or within such other time set by the court.

(2) Contents.

(A) Motion for Rehearing. A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision~~, and~~. The motion shall not present issues not previously raised in the proceeding.

(B) Motion for Clarification. A motion for clarification shall state with particularity the points of law or fact in the court's order or decision that, in the opinion of the movant, are in need of clarification.

(C) Motion for Certification. A motion for certification shall set forth the case(s) that expressly and directly conflicts with the ~~appellate~~ order or decision or set forth the issue or question to be certified as one of great public importance.

(D) Motion for Written Opinion. A motion for written opinion shall set forth the reasons that the party believes that a written opinion would provide:

(i) a legitimate basis for supreme court review;

(ii) an explanation for an apparent deviation from prior precedent; or

(iii) guidance to the parties or lower tribunal when:

a. the issue decided is also present in other cases pending before the court or another district court;

b. the issue decided is expected to recur in future cases;

c. there are conflicting decisions on the issue from lower tribunals;

d. the issue decided is one of first impression; or

e. the issue arises in a case in which the court has exclusive subject matter jurisdiction.

(3) Response. A response may be served within 10 days of service of the motion. ~~When a decision is entered without opinion, and a party believes that a written opinion would provide a legitimate basis for supreme court review, the party may request that the court issue a written opinion. If such a request is made by an attorney, it shall include the following statement:~~

~~I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for supreme court review because (state with specificity the reasons why the supreme court would be likely to grant review if an opinion were written).~~

~~s/~~
~~Attorney for~~ _____
~~(Name of Party)~~
_____
_____
_____
_____
~~(address, e-mail address, and phone number)~~
_____
~~(Florida Bar number)~~

(b) Limitation. A party shall not file more than 1 motion for rehearing, ~~or for~~ clarification, ~~of decision and 1 motion for~~ certification, or written opinion with respect to a particular order or decision of the court. All motions filed under this rule with respect to a particular order or decision must be combined in a single document.

(c) Exception; Bond Validation Proceedings. A motion for rehearing or for clarification of an order or decision in proceedings for the validation of bonds or certificates of indebtedness as provided by rule 9.030(a)(1)(B)(ii) may be filed within 10 days of an order or decision or within such other time set by the court. A reply may be served within 5 days of service of the motion. The mandate shall issue forthwith if a timely motion has not been filed. A

timely motion shall receive immediate consideration by the court and, if denied, the mandate shall issue forthwith.

(d) Exception; Review of District Court of Appeal Decisions. No motion for rehearing or clarification may be filed in the supreme court addressing:

(1) [No change]

(2) [No change]

(3) the dismissal of a petition for an extraordinary writ described in rule 9.030(a)(3) when such writ is used to seek review of a district court of appeal decision without opinion.

(e) Application. This rule applies only to appellate orders or decisions that adjudicate, resolve, or otherwise dispose of an appeal, original proceeding, or motion for appellate attorneys' fees. The rule is not meant to limit the court's inherent authority to reconsider nonfinal appellate orders and decisions.

Committee Notes

20__ Amendment. This rule has been amended to broaden the grounds upon which a party may permissibly seek a written opinion following the issuance of a per curiam affirmance. Subdivision (a)(2)(D)(iii)(e) is intended to address situations in which a specific district court has exclusive subject matter jurisdiction over a type of case by operation of law, such as the First District Court of Appeal regarding workers' compensation matters.

(b) **Rule 9.800** – Referral number 14-AC-30. Lance Curry explained that this proposal recommended a number of technical changes to the citation rule to clean up some issues and otherwise promote consistency to Florida's uniform citation system. The referral came from Ellie Nieberger with Bryant, Miller & Olive, along with the assistance of two FSU law students.

- Mr. Curry explained that there were a number of minor changes. The only contentious part of the proposal was as to subdivision (*o*), which would reverse the order of the FSU Style Manual and the Bluebook so that the Style Manual would be the preferred citation manual. The subcommittee rejected that proposal, but Ms. Nieberger's reasoning to the contrary was compelling. Her letter on this is contained at page 352 of the agenda packet. Ms. Serafin confirmed that she too wanted to change her vote to support the change and thought that the manual is better suited for our preferences.

- Wendie Cooper asked why the proposal strikes subsection (p) and if the changes were meant to indicate that all cases should be italicized. Mr. Curry responded that the Bluebook and Style Manual permit underlining or italicizing, so this subsection was redundant. Ms. Cooper noted that striking this provision makes it appear that we should not underline, which all the courts do and she thought the courts actually preferred.

- Mr. Leen noted that he favors the FSU Style Manual because of the major differences between the Bluebook and Rule 9.800.

- Mr. Hall suggested that the order of citation should be changed when a southern reporter citation is not available to prefer the electronic databases to the Florida Law Weekly citation.

- Judge Kathryn Pecko wondered why the subcommittee removed a citation to the Florida Administrative Code. Judge Wetherell pointed out that it had been moved.

- The Chair also noted that subdivision (c)(3) did not have a LEXIS citation and that one does not exist; so a different example needed to be used.

- Given time issues, the Chair sent this proposal back to the subcommittee. She took a straw poll, which was generally favorable to listing the Style Manual over the Bluebook.

- **Approved Action: This referral is remanded back to the General Practice Subcommittee for further clean up and consideration.**

5. Workers' Compensation Subcommittee: The Chair recognized Marjorie Gadarian Graham, chair of the subcommittee. The subcommittee's report and minutes are located at page 492 of the agenda packet.

(a) Rule 9.331 - Referral number 14-AC-35 from Judge Wallace noting a conflict between subsections (a) and (d) of the rule. Subsection (d) noted that en banc rehearing may be sought when a case or issue is of exceptional importance; subsection (a) referred only to a case being of exceptional importance. The subcommittee proposed adding in "or issue" to subsection (a).

- Ms. Graham moved that the question be called; Ivy Ginsberg seconded.

- The Chair called the question for a vote, and the proposal passed 48-0.

- **Action Item: Rule 9.331 will be submitted for amendment, as follows:**

RULE 9.331. DETERMINATION OF CAUSES IN A DISTRICT COURT OF APPEAL EN BANC

(a) En Banc Proceedings: Generally. A majority of the judges of a district court of appeal participating may order that a proceeding pending before the court be determined en banc. A district court of appeal en banc shall consist of the judges in regular active service on the court. An en banc hearing or rehearing shall not be ordered unless the case or issue is of exceptional importance or unless necessary to maintain uniformity in the court's decisions. The en banc decision shall be by a majority of the active judges actually participating and voting on the case. In the event of a tie vote, the panel decision of the district court of appeal shall stand as

the decision of the court. If there is no panel decision, a tie vote will affirm the trial court decision.

(b)-(d) [No change]

SEPTEMBER 18, 2015, MEETING
APPELLATE COURT RULES COMMITTEE
8:00 AM TO 12:00 PM

In attendance:
Hon. T. Kent Wetherell, Chair
Landis Vernon Curry, Vice Chair
Thomas D. Hall, Vice Chair
Kristin Ann Norse, Vice Chair
Andrew L. Adler
Caryn Lynn Bellus
Diane G. DeWolf
Angela Carol Flowers
Ivy R. Ginsberg
Christine Davis Graves
Tracy Raffles Gunn
Henry Gerome Gyden
Robin Felicity Hazel
Hon. Joshua Ryan Heller
Jeffrey Thomas Kuntz
Hon. Joseph Lewis, Jr.
David Lanier Luck
Hon. Robert Luck
David Alfred Monaco
Hon. John D. Campbell Newton II
James Edward Nutt
Jennifer Olmedo-Rodriguez
Hon. Stephanie Williams Ray
Gigi Rollini
Sarah J. Rumph
Kristina Samuels
Stephanie L. Serafin
Stephanie Rebecca Silver
Andrew McBride Stanton
Brandon Stuart Vesely
Elizabeth Cangelose Wheeler
Carrie Ann Wozniak
Jessica Zagier Wallace
Nicole Marie Ziegler
Stephanie Christina Zimmerman

Appeared by telephone:
Courtney Rebecca Brewer
Mihaela Cabulea
Wendie Michelle Cooper
Duane Allan Daiker
Michael T. Davis
Nikole Hiciano
Keri Teresa Joseph
John Wesley Little III
Patricia Murphy Propheter
Dwight Oneal Slater

Absent:
Hon. Kathryn Senecal Pecko
Marie Attaway Borland
Steven Lauren Seliger
Thomas Steven Ward

Guests:
James Norcross Floyd, Liaison from Code & Rules of Evidence Committee
Paul G. Regensdorf

(b) **9.420—**Ms. Graves outlined referral number 13-AC-24 and noted that the rule as presently written requires that the initial document be served by email and mail. The subcommittee recommended deleting language in subdivision (c) requiring the initial document to be served by mail, and instead requiring only service by email. The amendment would require service of every document filed in a case to be made in accordance with RJA 2.516 except petitions invoking original jurisdiction of court, which shall be served by email and mail.

- Judge John Newton suggested that there be an RJA rule concerning pro se litigants. Ms. Graves responded that there is an RJA rule on point, and this is why the subcommittee

added "shall be served in accordance with RJA rule" including through the e-portal and email.

- Mr. Hall was concerned that he has to serve initial documents in initial proceedings by mail when he already has been serving by email and opposing counsel is part of the e-portal's service list. Ms. Graves responded that a litigant would only need to do so in the context of an original proceeding. Mr. Hall responded that litigants should only have to serve by mail if litigants do not have opposing counsel's email address. Ms. Graves accepted this as a friendly amendment as long as the litigant knows the party is represented by counsel and has the email address.

- Henry Gyden noted that the litigant may not have an email designation filed at the time the original proceeding is initiated. Andrew Adler noted that this amendment came from RJA and appellate rules that were adopted when e-filing started. In original proceedings, the litigant may know who opposing counsel is, but the litigant is hauling a person into court for the first time, so service requirements should be the same as the start of any proceeding.

- Lance Curry stated that it may be superfluous when a litigant serves a petition for writ of certiorari on a discovery issue because everyone knows who counsel of record is, but it is important to be safe so everyone has notice. Mr. Hall noted that the party should be served and not the lawyer to ensure that the document is received.

- The Chair suggested that there is not opposition to the idea embodied in the present language. The Chair suggested either voting on the proposed amendment as is or refining it in the subcommittee.

- Judge Josh Heller asked if a litigant effectuates service through the e-portal, what is the purpose of sending a separate email? Ms. Graves responded that it is important for the rule to cover all possibilities. Mr. Curry noted that some DCAs are on service by e-portal and some are not. Ms. Graves responded that the amendment specifically refers to the RJAs to take into account that if service by e-portal occurred, there is no need to serve by email.

- The Chair called for a vote, and the proposal passed 39-3.

- **Action Item: The following changes to Rule 9.420 will be submitted for amendment, as follows:**

RULE 9.420. FILING; SERVICES OF COPIES; COMPUTATION OF TIME

(c) Method of Service. Service of every document filed in a proceeding governed by these rules (including any briefs, motions, notices, responses, petitions, and appendices) shall be made in conformity with the requirements of Florida Rule of Judicial Administration 2.516, except that petitions invoking the original jurisdiction of the court under rule 9.030(a)(3), (b)(3), or (c)(3) ~~the initial document filed in a proceeding governed by these rules (including any notice to invoke jurisdiction, notice of appeal, or petition for an original writ)~~ shall be served both by email pursuant to rule 2.516(b)(1) and in paper form pursuant to rule 2.516(b)(2).

(b) 9.225—Ms. Serafin explained that John Hamilton submitted this referral 12-AC-15 (H-9) in 2012 concerning notices of supplemental authority. Mr. Hamilton's issue was that the rule currently only allowed notices of supplemental authority to be filed after all briefs are filed with the Court, when Appellees should be able to file notices of supplemental authority after the answer brief is filed because this is the Appellee's last brief. The subcommittee also wordsmithed the rule for readability.

- Judge Heller stated that the Appellee should seek to amend the Answer Brief and make additional argument, not just file a notice of supplemental authority. Ms. Serafin responded that the court may not allow amendment to the brief, and parties file supplemental authorities from years before the case. Mr. Kuntz outlined an issue he experienced in the Eleventh Circuit concerning filing a letter including supplemental authority. Mr. Kuntz stated it is uncertain whether a party can file a new brief in federal court. Judge Heller noted it is discretionary but probably will be granted. If an appellee is going to file supplemental authority based on an overlooked case, it is usually close to oral argument so the appellee can speak about it at oral argument. He is not sure of the ultimate utility of the amendment.

- Ms. Serafin noted that what the amendment allows is probably already happening.

- Mr. Gyden asked whether "a notice" means a party can only file one notice. Ms. Serafin responded that this was not the amendment's intent and would accept it as a friendly amendment that a party may file notices of supplemental authority.

- Ms. Wheeler asked what if a case comes out after the initial brief is filed but before the answer brief?

- Mr. Curry noted that the federal standard changed, and a party can argue supplemental authority as long as it is limited to the stated word count. Mr. Curry suggested taking the whole rule back and reevaluating it in light of this. Ms. Serafin stated that this would be a new referral. David Luck stated that Federal Rule 28(j) allows the opposing party to respond in a letter that is limited to 350 words. He agrees with Mr. Curry that this should be a new referral. The Chair created a new referral.

- Ms. Serafin stated that the subcommittee wanted a vote on the proposed amendment, and the amendment passed 36-5.

- **<u>Action Item</u>: Rule 9.225 will be submitted for amendment, as follows:**

RULE 9.225. NOTICE OF SUPPLEMENTAL AUTHORITY

A party may file n~~N~~otices 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 service of the party's~~the~~ last brief ~~served~~ in the cause. The notice shall not contain argument, but may identify briefly the issues argued on appeal to which the supplemental authorities are pertinent if the notice is substantially in the form prescribed by rule 9.900(j). Copies of the supplemental authorities shall be attached to the notice.

(c) 9.800—Ms. Serafin next outlined proposed changes from referral 14-AC-30 concerning changes to the Uniform Citation System.

- Ms. Samuels outlined her conversation with the Court's librarian concerning additional citations being incorrect, and Mr. Curry suggested sending the amendment back to the subcommittee to address all the issues in the rule. He believes it is almost complete but wanted the subcommittee to review again to make sure everything is addressed.

- Mr. Hall noted that citations to orders of the circuit courts and county courts requires citation to Florida Law Weekly Supplement, and this requires a subscription.

- Judge Heller noted that it would be advantageous to include a parenthetical for slip opinions (i.e., Slip Op.). Also, a citation to the Federal Appendix for federal appellate opinions should be included and preferred.

- Ms. Norse questioned whether the subcommittee wants to remove all of subdivision (p) concerning underlining. Mr. Curry recommended reinserting subdivision (p).

- Andy Stanton recommended directing comments to the subcommittee chair because there are so many comments. Jim Nutt suggested circulating the proposed changes to personnel in the courts who are familiar with citation issues for comments.

Approved Action: This referral is remanded back to the General Practice Subcommittee for further consideration. Ms. Telfer will email the committee with an updated proposed amendment before the next meeting.

(d) 12-AC-15—Stephanie Zimmerman described this referral from John Hamilton and explained that the proposed amendments are contained in pages 175-212 of the meeting agenda, and they concern the use of "non-final" versus "nonfinal" and "post-conviction" versus "postconviction" throughout the rules. She has not received any comments on the changes, and does not believe going through all the changes is the best use of time.

- Judge Heller moved to approve the amendment. Ms. Wells noted a typo of two "s" in "appellant," which will be fixed prior to submission. The Chair called for a vote. and the proposal passed 41-0.

(a) 9.170—Referral number 15-AC-13 comes from Robert Hauser, who asked ACRC to review rule 9.170, after he received a show cause order for failure to transmit the record in his appeal. The amendment will clarify that if the appellant directs that no record be prepared, subdivision (c) will require a copy of the directions to be served on the appellate court when it is served on the clerk of the lower tribunal. The Chair called the vote, and the amendment passed 41-0.

- **<u>Action Item</u>: Rule 9.170 will be submitted for amendment, as follows:**

RULE 9.170. APPEAL PROCEEDINGS IN PROBATE AND GUARDIANSHIP CASES

(a)–(b) [No change]

(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<u>; a copy of such direction shall be served on the court when it is served on the clerk of the lower tribunal</u>. However, any other party may direct the clerk to prepare a record in accordance with rule 9.200<u>; a copy of such direction shall be served on the court when it is served on the clerk of the lower tribunal</u>. If no record is prepared under this rule, the appeal shall proceed using appendices pursuant to rule 9.220.

(d)–(e) [No change]

(a) 9.360 and 9.900—Referral number 14-AC-33 came out of the civil practice subcommittee's report in January 2015 relating to joinder. Dorothy DiFiore had commented that the rule may need to be revised to address what happens to the case caption in a joinder situation, and noted that the circuit court sitting in appellate capacity may need such direction. The sub-subcommittee decided beefing up the rule and form to provide specific direction to the clerk concerning the case caption was the best option. The proposal was vetted with clerks of the circuit courts and DCA law clerks, and the response was overwhelmingly positive. They just wanted to be clear they didn't have to adopt an erroneous case caption if the notice of joinder had error. Subdivision (a)'s amendments state that the body of the notice shall set forth the proposed new caption, and upon filing and paying the fee, the clerk shall change the caption to reflect the realignment of the parties. The corresponding form in rule 9.900 adds "insert proposed new caption here" to reflect this change.

- Mr. Curry asked if the amendment should delete "appellate court" and just state "court" in 2017 amendment comment.

- Mr. Kuntz asked if the header in the form should be moved over to the left for space for clerks, and proposed such a friendly amendment. Ms. Rollini accepted the friendly amendment.

- Judge Heller asked if the court needed to approve the caption, and Ms. Rollini responded that the amendment gives the clerk an opportunity to correct the caption proposed if needed. The party is providing a proposed case caption, and the clerk can change if appropriate.

- Mr. Hall asked whether a party can file a notice of joinder in a notice to invoke discretionary jurisdiction of the Supreme Court, because the rules are written primarily for DCAs, which causes confusion in the Florida Supreme Court. The Chair noted that it appeared Mr. Hall was suggesting an ad hoc committee for rule conformity to Supreme Court practice, and that Mr. Hall should chair it. He will work with Ms. Telfer to establish this ad hoc committee.

- Ms. Zimmerman stated that there should be a referral for all forms to have their case headers moved to the left, and Mr. Kuntz stated that he will submit such a referral. Mr. Kuntz withdrew his friendly amendment as to the joinder form for later referral for all forms.

- The Chair called a vote, and the proposal passed 40-0.

- **Action Item: Rules 9.360 and 9.900 will be submitted for amendment, as follows:**

RULE 9.360. PARTIES

(a) Joinder for Realignment as Appellant or Petitioner. An ~~party to the cause in the lower tribunal~~ appellee or respondent who desires to ~~join in a proceeding~~realign as an ~~petitioner or~~ appellant or petitioner shall serve a notice ~~to that effect~~of joinder no later than the latest of the following: (i) within 10 days of service of a timely filed ~~petition or~~ notice of appeal or petition; (ii) within the time prescribed for filing a notice of appeal; or (iii) within the time prescribed in rule 9.100(c). The notice of joinder, accompanied by any filing fees prescribed by law, shall be filed either before service or immediately thereafter ~~in the same manner as the petition or notice of appeal~~. The body of the notice shall set forth the proposed new caption. Upon filing of the notice and payment of the fee, the clerk shall change the caption to reflect the realignment of the parties in the notice.

(b)-(c) [No change]

2017 Amendment. The title of subdivision (a) was amended to clarify that the joinder

permitted by this rule is only for the purpose of realigning existing parties to the appeal. The required notice pursuant to subdivision (a) retains the original terminology and continues to be referred to as a "notice of joinder" consistent with the existing statutory scheme to collect a fee for filing such a notice. Subdivision (a) was also amended to remove the prior directions for filing the notice "in the same manner as the petition or notice of appeal," so that a notice of realignment is now properly filed in the appellate court.

RULE 9.900. FORMS

(a)-(j) [No change]

(l) **Notice of Joinder.**

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
_____ DISTRICT

Case No. _____

_____,)	
Appellant/Petitioner,)	
_____)	
v. _____)	NOTICE OF JOINDER
_____)	
_____,)	
Appellee/Respondent.)	
_____)	
_____)	

NOTICE IS GIVEN that _____, [Appellee/Respondent] elects to realign as a(n) [Appellant/Petitioner] in this action, in accordance with rule 9.360(a). The proposed new caption is:

[insert proposed new caption here]

_____
Attorney for . . . . .(name of party) . . . . . .
. . . . .(address, e-mail address, and phone number). . . . .
Florida Bar No.: ……...

(a) 9.110—Referral number 13-AC-18 was submitted by Judge Altenbernd, who asked whether rule 9.110 could be clarified concerning the scope of subdivision (h) in the context of appeals proceeding under rule 9.110(k). Specifically, 9.110(h) is in conflict with subdivision (k) because the court cannot review anything occurring prior to the entry of partial final judgment. The amendment is intended to clarify the scope of review of a partial final judgment as any

matter prior to the notice of appeal so long as it is directly related to the partial final judgment under review, using language directly from case law on point. A committee note is also added to explain that subdivision (k) is amended so subdivision (h) does not expand the scope of review of a partial final judgment.

- The Chair called for a vote, and the amendment passed 42-0.
- **Action Item: Rule 9.110 will be submitted for amendment, as follows:**

RULE 9.110. APPEAL PROCEEDINGS TO REVIEW FINAL ORDERS OF LOWER TRIBUNALS AND ORDERS GRANTING NEW TRIAL IN JURY AND NON-JURY CASES

(a)–(g) [No change]

(h) Scope of Review. Except as provided in subdivision (k), ~~T~~the court may review any ruling or matter occurring before filing of the notice. Multiple final orders may be reviewed by a single notice, if the notice is timely filed as to each such order.

(i)–(j) [No change]

(k) Review of Partial Final Judgments. Except as otherwise provided herein, partial final judgments are reviewable either on appeal from the partial final judgment or on appeal from the final judgment in the entire case. A partial final judgment, other than one that disposes of an entire case as to any party, is one that disposes of a separate and distinct cause of action that is not interdependent with other pleaded claims. If a partial final judgment totally disposes of an entire case as to any party, it must be appealed within 30 days of rendition. The scope of review of a partial final judgment may include any ruling or matter occurring before filing of the notice of appeal so long as such ruling or matter is directly related to and an aspect of the partial final judgment under review.

(*l*)–(m) [No change]

Committee Notes

20__ Amendment. Subdivision (k) was amended to clarify that subdivision (h) does not expand the scope of review of partial final judgments to include rulings that are not directly related to and an aspect of the final order under review. *E.g.*, *Cygler v. Presjack*, 667 So. 2d 458, 461 (Fla. 4th DCA 1996).

- Ms. Rollini then explained that the sub-subcommittee has struggled with putting together acceptable language to address the referral regarding the same issue of the interplay with subdivision (h) on scope of review with subdivision (g) regarding cross-appeals. Subdivision (h) states that a court may review any ruling/matter before the notice of appeal. But if an appellee wants to seek affirmative relief, the appellee needs to file a notice of appeal or cross-appeal even if subdivision (h) states any matter before the notice of appeal may be reviewed. There have been many cases where the notice of cross-appeal is not filed and the appellees' arguments are barred.

- Ms. Rollini explained that the problem is even more complicated in an appeal from an order granting a new trial. Although not technically a final order, because reversal of such an order requires a trial court to simply enter judgment in accordance with the jury's verdict, an appellee has been deemed to waive any issues not raised by cross-appeal of a new trial order. This is enough of a trap that even savvy practitioners are getting trapped, and it is unlike the partial final judgment rule where the standard is clearly stated in many cases.

- Ms. Gunn stated that she had this issue arise in a case where John Hamilton was opposing counsel. The issue needs to be addressed. Ms. Zimmerman stated that she echoes what Ms. Gunn stated, as practitioners may not know to delve into the case law.

- Ms. Wheeler stated that the subcommittee tried to explain the issue in the committee note. Former Chair Loquasto believed the committee note was unwieldy, but something needed to be done. Mr. Hall agreed that it is a trap but he is not sure the committee can fix it; it seems to be more of a substantive change that cannot be changed by rule.

- The Chair stated that the proposed amendment "An appellee seeking affirmative relief must cross-appeal" does not appear to address the problem. He would not know to file a cross-appeal based on this sentence, and perhaps the rule needs a separate paragraph on orders granting new trial. Ms. Rollini responded that the initial proposal contained such a separate paragraph, but the civil subcommittee did not approve it.

- Ms. Zimmerman stated that she did not believe this issue is limited to orders granting motions for new trial; there are other types of orders that require a cross-appeal if a party wants relief. Ms. Rollini agreed to continue working on the amendment with the subcommittee based on the comments received.

(b) 9.370—Referral number 15-AC-01 was submitted by Jeff Kuntz. The only part of the referral remaining (the rest was withdrawn) is adding a provision that an amicus may file an amicus brief in support of a motion for rehearing or rehearing en banc.

- Judge Heller asked whether the amendment would allow an amicus to serve a brief as "brief" is defined by the rules. Mr. Kuntz responded yes. Judge Heller asked whether the amendment would include amici who were not involved in the case and decided after the opinion is issued to become amici. Mr. Kuntz responded that yes, a party may decide that an opinion may have unforeseen consequences, so the party would seek to file an amicus brief at that point.

- Jessica Ziegler asked why the amendment appears in subdivision (c). Mr. Kuntz responded that it makes clear that an amicus brief may be filed in support of a motion for rehearing.

- Mr. Curry stated that if a party wants to be amicus, it must file a motion within 10 days. Clarification may be needed to state that new parties can become amici after an opinion is issued. He suggested inserting "including amici who have not appeared previously." Judge Newton agreed and stated that the rule appears to allow existing amici to file a post-opinion brief, but not new amici. Ms. Zimmerman suggested including the clarification in subdivision (a).

- Judge Heller stated that he has seen cases not allowing amici to appear at the rehearing stage.

- The Chair asked for a straw vote on whether the committee believes amici should be allowed to appear post-opinion. The straw vote confirmed there will be support for the amendment and the subcommittee should keep working.

General Practice: The subcommittee's written report and meeting minutes are found at page 69 of the agenda packet. The Chair recognized Stephanie Serafin, chair of the subcommittee, who noted that the subcommittee has four proposals:

(a) 9.200 and 9.300—Referral number 14-AC-06 comes from William Baldwin, who requested that the ACRC review the rules regarding the statement of evidence to improve the timelines. Ms. Serafin recognized Ms. Wheeler to discuss the proposal.

- Ms. Wheeler explained that Mr. Baldwin's referral stemmed from difficulty in finalizing a statement of evidence/proceedings when no court reporter is present. The amendment attempted to deal with situations when an opposing party does not respond, making it impossible to finalize the statement. The subcommittee added definite response times so that if an objection to an appellant's statement is not raised within 10 days, waiver results. The amendment also leaves it to a trial judge's discretion as to whether to find waiver to have occurred.
- Mr. Curry noted that the issue is putting teeth behind the rule so the opposing party responds and does not delay the process, versus mischief happening when someone tries to submit inaccurate statement of facts and the other side fails to respond.

- Ms. Norse raised a concern that this rule will be used to create inaccurate records, and trial courts prefer simplified procedures like default in favor of finding waiver. The solution to Mr. Baldwin's problem was getting a court reporter. An appellant must show that the error was preserved, and a transcript should not be created where there is not one. Imposing strict time periods and then threatening waiver puts too much burden on the opposing party.

- Mr. Kuntz noted that an order finding waiver may not be reviewable.

- Ivy Ginsberg noted that in foreclosure appeals, a pro se appellant writes the initial brief without the record. The appellate lawyer may not have been at the hearing and needs more time to reconstruct the record. She opined that the timeframes are too short.

- Judge Newton opined that having "may" instead of "shall" takes certainty out of the rule. He agrees the timeframes are too short given the significance of the issue. Ms. Wheeler noted that the timeframes are tied to the same time periods for designating a transcript, but agreed they are short.

- Ms. Serafin stated that the subcommittee considered timeframes during several subcommittee meetings, and noted other subdivisions that allow for leave of court to correct the record. In short, the waiver provision is the hang-up. She asked Ms. Wheeler if the rule would lose something if the sentence on waiver is eliminated. Ms. Wheeler responded that it could cause problems because there are no consequences for failing to respond to a proposed statement of facts.

- Mr. Curry stated that the current version of the rule has a waiver concept in it because the statement shall be served on all other parties, who may serve objections within 10 days. This addresses Mr. Baldwin's concerns that someone needs to react in a timely fashion to the suggested record. He wonders if the fix is already in the rule and no amendment is needed.

- Ms. Norse noted that it is ultimately up to the trial judge to accept what is in the record. If the judge does not agree that a proposed statement is accurate, the judge can state that. Ms. Wheeler responded that Mr. Baldwin's issue was that by the time he got in front of judge with a conflict in the statement of the record, the judge did not remember and it was unhelpful. Ms. Norse responded that the solution is having a court reporter.

- The Chair noted that there are two issues to consider—the timeframe and waiver provision. Ms. Serafin stated that she believes there is a benefit to encouraging people to start the record building process early. She does not want to take the waiver sentence out because it was an important reason behind the proposed amendment.

- The Chair invited Ms. Norse to move to strike the waiver language. Ms. Norse moved to strike the language in subdivision (b) concerning waiver. Mr. Kuntz seconded. This motion passed 32-10.

- Ms. Serafin stated that the subcommittee wanted a vote on the rest of rule. The Chair called a vote on the rest of the rule. The amendment passed 21-20. Because the vote was close, Ms. Norse will prepare the minority report. Ms. Telfer will send Ms. Norse the appropriate paperwork. Ms. Norse requested the minority's reasoning for voting against the

amendment, and most were opposed to the amendment because they did not want the amendment at all as opposed to certain aspects of it.

Action Item: Rules 9.200 and 9.300 will be submitted for amendment, as follows:

RULE 9.200. THE RECORD

(a) [No change]

(b) Transcript(s) of Proceedings.

(1) Designation to Court Reporter. Within 10 days of filing the notice of appeal, the appellant shall designate those portions of the proceedings not on file deemed necessary for transcription and inclusion in the record. Within 20 days of filing the notice of appeal, an appellee may designate additional portions of the proceedings. Copies of designations shall be served on the approved court reporter, civil court reporter, or approved transcriptionist. Costs of the transcript(s) so designated shall be borne initially by the designating party, subject to appropriate taxation of costs as prescribed by rule 9.400. At the time of the designation, unless other satisfactory arrangements have been made, the designating party must make a deposit of 1/2 of the estimated transcript costs, and must pay the full balance of the fee on delivery of the completed transcript(s).

(2) Court Reporter's Acknowledgment. On service of a designation, the approved court reporter, civil court reporter, or approved transcriptionist shall acknowledge at the foot of the designation the fact that it has been received and the date on which the approved court reporter, civil court reporter, or approved transcriptionist expects to have the transcript(s) completed and shall serve the so-endorsed designation on the parties and file it with the clerk of the court within 5 days of service. If the transcript(s) cannot be completed within 30 days of service of the designation, the approved court reporter, civil court reporter, or approved transcriptionist shall request such additional time as is reasonably necessary and shall state the reasons therefor. If the approved court reporter, civil court reporter, or approved transcriptionist requests an extension of time, the court shall allow the parties 5 days in which to object or agree. The court shall approve the request or take other appropriate action and shall notify the reporter and the parties of the due date of the transcript(s).

(~~2~~**3**) **Time for Service of Transcript.** Within 30 days of service of a designation, or within the additional time provided for under subdivision (b)(~~3~~2) of this rule, the approved court reporter, civil court reporter, or approved transcriptionist shall transcribe and file with the clerk of the lower tribunal the designated proceedings and shall serve copies as requested in the designation. If a designating party directs the approved court reporter, civil court reporter, or approved transcriptionist to furnish the transcript(s) to fewer than all parties, that designating party shall serve a copy of the designated transcript(s) on the parties within ~~5~~10 days of receipt from the approved court reporter, civil court reporter, or approved transcriptionist.

~~(3) On service of a designation, the approved court reporter, civil court reporter, or approved transcriptionist shall acknowledge at the foot of the designation the fact that it has been received and the date on which the approved court reporter, civil court reporter, or approved transcriptionist expects to have the transcript(s) completed and shall serve the so-endorsed designation on the parties and file it with the clerk of the court within 5 days of service. If the transcript(s) cannot be completed within 30 days of service of the designation, the approved court reporter, civil court reporter, or approved transcriptionist shall request such additional time as is reasonably necessary and shall state the reasons therefor. If the approved court reporter, civil court reporter, or approved transcriptionist requests an extension of time, the court shall allow the parties 5 days in which to object or agree. The court shall approve the request or take other appropriate action and shall notify the reporter and the parties of the due date of the transcript(s).~~

(4) Organization of Transcript. The transcript of the trial shall be filed with the clerk separately from the transcripts(s) of any other designated proceedings. The transcript of the trial shall be prefaced by an index containing the names of the witnesses, a list of all exhibits offered and introduced in evidence, and the pages where each may be found. The pages, including the index pages, shall be consecutively numbered, beginning with page 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. 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. ~~The statement shall be served on all other parties,~~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.

(c)–(g) [No change]

Committee Notes

20__ Amendment. The rule was reorganized to clarify the procedure for designating, serving, and organizing a transcript of proceedings. Subdivisions (b)(4)(A)–(b)(4)(D) were added to set specific time frames for preparing and finalizing a statement of the evidence or proceedings when a transcript is not available and are not intended to preclude or prohibit supplementation or correction of the record with such a statement at any time. After the record has been transmitted, the court by order may permit the lower tribunal to proceed as set forth in subdivisions (b)(4)(A)–(b)(4)(D) or upon other terms and conditions.

RULE 9.300. MOTIONS

(a) [No change]

(b) Effect on Proceedings. Except as prescribed by subdivision (d) of this rule, service of a motion shall toll the time schedule of any proceeding in the court until disposition of the motion. An order granting an extension of time for any act shall automatically extend the time for all other acts that bear a time relation to it. An order granting an extension of time for preparation of the record, or the index to the record, or for filing of the transcript of proceedings, or for finalizing the statement of the evidence or proceedings, shall extend automatically, for a like period, the time for service of the next brief due in the proceedings. A conformed copy of an order extending time shall be transmitted forthwith to the clerk of the lower tribunal until the record has been transmitted to the court.

(c)–(d) [No change]

JANUARY 22, 2016, MEETING MINUTES
APPELLATE COURT RULES COMMITTEE
8:00 AM TO 12:00 PM

In attendance:
Hon. T. Kent Wetherell, II, Chair
Landis Vernon Curry, III, Vice Chair
Thomas D. Hall, Vice Chair
Kristin Ann Norse, Vice Chair
Caryn Lynn Bellus
Courtney Rebecca Brewer
Mihaela Cabulea
Wendie Michelle Cooper
Michael T. Davis
Diane G. DeWolf
Christine Davis Graves
Tracy Raffles Gunn
Hon. Joshua Ryan Heller
Nikole Hiciano
Keri Teresa Joseph
Jeffrey Thomas Kuntz
Hon. Joseph Lewis, Jr.
David Lanier Luck
Hon. Robert Joshua Luck

David Alfred Monaco
Hon. John D. Campbell Newton II
James Edward Nutt
Jennifer Olmedo-Rodriguez
Hon. Stephanie Williams Ray
Sarah J. Rumph
Kristina Samuels, Florida Supreme Court Representative
Steven Lauren Seliger
Stephanie L. Serafin
Stephanie Rebecca Silver
Dwight Oneal Slater
Andrew McBride Stanton
Carrie Ann Wozniak
Jessica Zagier Wallace
Thomas Steven Ward
Nicole Marie Ziegler
Stephanie Christina Zimmerman

Appeared by telephone:

Marie Attaway Borland
Duane Allan Daiker
Ivy R. Ginsberg
Henry Gerome Gyden
Robin Felicity Hazel
John Wesley Little, III
Patricia Murphy Propheter
Brandon Stuart Vesely
Elizabeth Cangelose Wheeler

Absent:

Andrew L. Adler
Rosemarie Elizabeth Farrell (resigned)
Angela Carol Flowers (resigned)
Hon. Kathryn Senecal Pecko (resigned)
Gigi Rollini

Guests:

James Norcross Floyd, Liaison from Code & Rules of Evidence Committee
Steven Kolbert (on phone)
Paul G. Regensdorf

General Practice Subcommittee: The subcommittee's written report and meeting minutes are found at page 172 of the agenda packet. The subcommittee chair Stephanie Serafin noted that the subcommittee had three proposals ready for a vote.

(a) **Rule 9.800** – Referral numbers 14-AC-30 and 14-AC-14. Ms. Serafin recognized Lance Curry to explain the proposal.

- Mr. Curry noted that this latest proposal regarding the citation rule addressed concerns previously raised. He mentioned as examples that the proposal would permit a variety of options when a So. 3d citation is not available for a case and also specifically permitted case names to be italicized or underlined.

- Andy Stanton queried why the subcommittee had eliminated a phrase encouraging pincites in case citations. Mr. Curry explained that the subcommittee was attempting to trim down the rule, and that this provision is already set forth in the Bluebook. In any event, it was not a requirement, just a suggested practice. Mr. Stanton noted that courts prefer the pincitations and that it would send a bad message to take that preference out.

- David Luck remarked that the rule should provide means to indicate when a federal decision is not yet published in the Federal Reporter but is going to be and therefore is precedential. Also, he noted that the correct abbreviation for the Federal Appendix is F. App'x.
    - Mr. Curry accepted the latter suggestion as a friendly amendment.

- Mr. Curry also noted that while many courts require particular citations when a case is unpublished or not-yet-published, he did not think we should add this provision into our rule. It's an issue of practice.

- Hon. Josh Heller stated that federal court decisions designate time of issuance and whether or not they are published.

- Mr. Curry noted that these issues could be explained in a parenthetical.

- Jeff Kuntz noted that at page 180, under United States Supreme Court citations, a Florida 9th Judicial Circuit decision was cited as an example for the LEXIS cite. Mr. Curry agreed that needed to be fixed.

- Betty Wheeler remarked that she was looking at her Bluebook and that the Federal Appendix citation should be "F. App'x". The Chair noted that Mr. Curry had accepted that friendly amendment, and that Mr. Curry and Ms. Telfer had the authority to make sure the final submission was accurate.

- Mr. Stanton then moved that the sentence from (o) regarding pinpoint citations be added back in.

  - Mr. Kuntz remarked that the rule currently stated that pinpoint citations were preferred as to Florida court opinions, but should be for all opinions.

  - Ms. Serafin responded that she could not remember what the reason was for taking the sentence regarding pinpoint citations out, but she would accept the friendly amendment to include it if there was not a good reason. She agreed the amendment should not be limited to Southern Reporter citations.

  - Mr. Curry was opposed to the motion, because he does not think it belongs in this subsection. The Chair reminded the ACRC that this was the third time this item has been on the agenda and that if it is not finished today, it will not get amended until 2020.

  - Ms. Norse noted that if the Bluebook addresses this issue, our inclusion of it was academic.

  - Jim Nutt proposed that the amendment be added to the end of (o) and that it state: "Pinpoint citations are preferred." Mr. Luck seconded that proposal. Judge Heller proposed creating a new subsection (q) that stated "When referring to specific material, pinpoint citation to the page where that material occurs is preferred." Mr. Curry then stated that the material could be added into (p).

- Ms. Serafin accepted the following as a friendly amendment: (p) would be modified and entitled "Case Names and Pinpoint Citations." Then the following sentence will be added to the end of (p): "Pinpoint citations are preferred."

- The Chair repeated the proposal. Mr. Stanton moved that we vote on the proposal, Mr. Nutt seconded. The proposed amendment passed unanimously, 41-0.

- **Action Item: Rule 9.146 will be submitted for amendment, as follows:**

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 any of the following:

(A) the slip opinion: *Medina v. State*, No. SC00-280 (Fla. Mar. 14, 2002);

(B) Florida Law Weekly: *Traylor v. State*, No. 70051, 17 FLW S42 (Fla. Jan. 16, 1992);

(C) Westlaw: *Singh v. State*, No. SC10-1544, 2014 WL 7463592 (Fla. Dec. 30, 2014); or

(D) LEXIS: *Johnston v. State*, No. SC09-839, 2010 Fla. LEXIS 62 (Fla. Jan. 21, 2010).

~~Florida Law Weekly: *Traylor v. State*, 17 Fla. L. Weekly S42 (Fla. Jan. 16, 1992). If not therein, 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 any of the following:

(A) the slip opinion: *Fleming v. State*, No. 1D01-2734 (Fla. 1st DCA Mar. 6, 2002);

(B) Florida Law Weekly: *Myers v. State*, No. 90-1092, 16 FLW D1507 (Fla. 4th DCA June 5, 1991);

(C) Westlaw: *Williams v. State*, No. 2D14-2438, 2014 WL 3418358 (Fla. 2d DCA June 12, 2014); or

(D) LEXIS: *Minakan v. Husted*, No. 4D09-4439, 2010 Fla. App. LEXIS 288 (Fla. 4th DCA Jan. 20, 2010).

~~Florida Law Weekly: *Myers v. State*, 16 Fla. L. Weekly D1507 (Fla. 4th DCA June 5, 1991). If not therein, 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) ~~*Whidden v. Francis*, 27 Fla. Supp. 80 (Fla. 11th Cir. Ct. 1966)~~Circuit Court: *State v. Campeau*, No. 1990-CF-4363, 16 FLW C65 (Fla. 9th Cir. Ct. Nov. 7, 1990).

(2) ~~*State v. Alvarez*, 42 Fla. Supp. 83 (Fla. Dade Cty. Ct. 1975)~~County Court: *Gables Ins. Recovery v. Progressive Am. Ins. Co.*, No. 2012- 24280-SP-05, 22 FLW Supp. 637 (Miami-Dade Cnty. Oct. 8, 2014).

(3) For opinions not published in Florida Law Weekly or Florida Law Weekly Supplement, cite to any of the following:

(A) the slip opinion: *Jones v. City of Ocoee*, No. CVAI-93-18 (Fla. 9th Cir. Ct. Dec. 9, 1996);

(B) Florida Supplement: *Whidden v. Francis*, No. 1965-L- 2107, 27 Fla. Supp. 80 (Fla. 11th Cir. Ct. July 12, 1966);

(C) Westlaw: *Berne v. State*, No. 2006-CA-9772-O, 2009 WL 8626616 (Fla. 9th Cir. Ct. Oct. 26, 2009); or

(D) LEXIS: *Alberti v. Gangell*, No. 51-2008-CA-0198-WS/H, 2014 Fla. Cir. LEXIS 55 (Fla. 6th Cir. Ct. April 16, 2014).

~~Florida Law Weekly Supplement: *State v. Ruoff*, 17 Fla. L. Weekly Supp. 619 (Fla. 17th Cir. Ct. Feb. 13, 2010). If not therein, cite to Florida Law Weekly: *State v. Cahill*, 16 Fla. L. Weekly C41 (Fla. 19th Cir. Ct. Mar. 5, 1991). If not therein, cite to the slip opinion: *Jones v. City of Ocoee*, No. CVAI-93-18 (Fla. 9th Cir. Ct. Dec. 9, 1996).~~

(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)~~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 ~~Florida Public Service Commission: *In re Application of Tampa Elec. Co.*, 81 F.P.S.C. 2:120 (1981).~~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) 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).~~

(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 Reports: *Dep't of Health v. Sabates*, 34 F.A.L.R. 2378 (Fla. Bd. of Med. 2011).

(B) The Florida Career Service 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, at 2 (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 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 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 Reports: *Whitney v. Mercy Hosp.*, 9 F.C.R. 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)~~48.031, Fla. Stat. (2014).

(2) § 120.53, Fla. Stat. (Supp. 1974).

(g) Florida Statutes ~~Annotated~~Administrative Code. ~~(To be used only for court-adopted rules, or references to other nonstatutory materials that do not appear in an official publication.)~~

~~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.~~the Florida Statutes or if desired for clarity or adoption reference.)

(1) 1997–present: Ch. 2001-01, § 3, Laws of Fla.

(~~1~~2) ~~After 1956~~1957–1996: Ch. 74-177, § 5, ~~at 473,~~ Laws of Fla.

(~~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 Civil Procedure for Involuntary Commitment of Sexually Violent Predators: Fla. R. Civ. P. – S.V.P. 4.010.

Florida Rules of Judicial Administration: Fla. R. Jud. Admin. 2.110.

Florida Rules of Criminal Procedure: Fla. R. Crim. P. 3.850.

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 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 Qualifications Commission Rules: Fla. Jud. Qual. Comm'n R. 9.

Florida Standard Jury Instructions, Civil: Fla. Std. Jury Instr. (Civ.) 601.4.

Florida Standard Jury Instructions, Contract and Business: Fla. Std. Jury Instr. (Cont. & Bus.) 416.12.

Florida Standard Jury Instructions, Criminal: Fla. Std. Jury Instr. (Crim.) 3.7.

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 there~~in~~; 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 any of the following:

(A) the slip opinion: *Frank v. Walker*, No. 14A352 (U.S. Oct. 9, 2014);

(B) Florida Law Weekly Federal: *California v. Hodari D.*, No. 89-1632, 5 FLW Fed. S249 (U.S. Apr. 23, 1991);

(C) Westlaw: *Otter v. Latta*, No. 14A374, 2014 WL 5025970 (U.S. Oct. 8, 2014); or

(D) LEXIS: *Otter v. Latta*, No. 14A374, 2014 U.S. LEXIS 6732 (Oct. 8, 2014).

~~Florida Law Weekly Federal: *California v. Hodari D.*, 13 Fla. L. Weekly Fed. S249 (U.S. Apr. 23, 1991).~~

(*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 any of the following:

(A) the slip opinion: *Airtran Airways, Inc. v. Elem*, No. 13- 14912 (11th Cir. Sept. 23, 2014);

(B) Federal Appendix: *Evans v. McDonald*, 313 F. App'x 256 (11th Cir. 2009);

(C) Florida Law Weekly Federal: *Cunningham v. Zant*, No. 90-8165, 5 FLW Fed. C591 (11th Cir. March 27, 1991);

(D) Westlaw: *Murphy v. Dulay*, No. 13–14637, 2014 WL 5072710 (11th Cir. Oct. 10, 2014); or

(E) LEXIS: *Murphy v. Dulay*, No. 13–14637, 2014 U.S. App. LEXIS 19311 (11th Cir. Oct. 10, 2014).

~~Florida Law Weekly Federal: *Cunningham v. Zant*, 13 Fla. L. Weekly Fed. C591 (11th Cir. March 27, 1991).~~

(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 any of the following:

(A) the slip opinion: *Slay v. Hess*, No. 5:14-cv-264 (N.D. Fla. Oct. 10, 2014);

(B) Florida Law Weekly Federal: *Wasko v. Dugger*, No. 90- 312-CIV, 5 FLW Fed. D183 (S.D. Fla. Apr. 2, 1991);

(C) Westlaw: *Taylor v. Bradshaw*, No. 11-80911-CIV, 2014 WL 5325291 (S.D. Fla. Oct. 7, 2014); or

(D) LEXIS: *Taylor v. Bradshaw*, No. 11-80911-CIV, 2014 U.S. Dist. LEXIS 148468 (S.D. Fla. Oct. 7, 2014).

~~Florida Law Weekly Federal: *Wasko v. Dugger*, 13 Fla. L. Weekly Fed. D183 (S.D. Fla. Apr. 2, 1991).~~

(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 (available at www.law.fsu.edu/journals/lawreview) 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 and Pinpoint Citations. Case names shall be underscored ~~(~~or italicized~~)~~ in text and in footnotes. Pinpoint citations are preferred.

****

- Mr. Hall noted in conclusion that West may still put its own editorial spin on this rule. Ms. Telfer noted that she would have Krys Godwin call West, and Ms. Samuels recommended that the ACRC also reach out to John Tomasino, who speaks with West regularly about publishing issues.

- Mr. Luck decided not to move for an addition to the proposal regarding not-yet-published federal opinions.

(c) **Rule 9.030** – Referral number 12-AC-26 regarding three-judge panel requirement for county to circuit court appeals.

- Ms. Serafin explained that this referral from Michael Ufferman had been brought before the committee several times and had even been unanimously adopted in June 2014. Most recently, it had been sent back for reconsideration because of some language issues as well as substantive concerns. Most pressing was the concern of whether there was research to support the feasibility of the proposal and whether there would be opposition.

- The subcommittee had considered those concerns and had lots of debate on the proposal. It discovered that the majority of circuits already have some form of 3-judge panels. And those that do not are not necessarily the smaller ones. Even in the 16th Circuit (Monroe County), a party or judge may request a 3-judge panel. The subcommittee ultimately concluded the proposal was a good idea.

- Mr. Hall noted that he was originally opposed to the proposal, but had now concluded it is not that big of an imposition. He stated it was important to document those findings to the court.

- Ms. Zimmerman noted that the proposal does not require that the three judges meet in person; with technology, this should not be burdensome.

- Ms. Gunn stated that the subcommittee and Ms. Serafin did a lot of background work and she thinks this proposal will not face the obstacles raised to a similar proposal 15 years ago.

- Mr. Curry is conceptually in favor of this proposal, but was concerned that the committee is proposing something that is going to fail. He was happy that Judge Luck had put some of his concerns at bay. When this is presented to the supreme court, the committee needs to be sure it has sufficient research and support from sitting circuit court judges. He noted that in Monroe County, where three-judge panels are already optional, the circuit only has four judges.

- Judge Luck stated that he is in favor of this rule and thinks it is tremendously important. In circuit courts, a one-judge appeal proceeding is troubling because one judge may be reticent to review the decision of his or her colleague in the county court. Also, more judges make an appeal more likely to be correct. The collective wisdom is that a three-judge panel is the preferred appellate option. In Miami-Dade County, three judges are empaneled for appeals, but not writs.

- Judge Heller echoed Judge Luck's comments. Having input from other judges is helpful; more sound appellate decisions come from larger appellate panels.

- The Chair called for a vote and the proposal passed unanimously, 41-0.[1]

- **<u>Action Item</u>: The following proposal will be submitted to the supreme court:**

RULE 9.030. JURISDICTION OF COURTS

(a)–(b) [No change]

[1] Patricia Propheter was no longer on the phone.

(c) Jurisdiction of Circuit Courts

(1)–(3) [No change]

(4) Panels. Matters within the circuit court's jurisdiction under this rule shall be considered by a panel of three judges, and the concurrence of two judges shall be necessary to a decision.

(a) **Rules 9.140 and 9.360** – Referral number 15-AC-38.

- Judge Newton noted that the appellate rules have opted out of the Rules of Judicial Administration ("RJA") limited representations scheme. But the appellate rules still reference "attorney of record," a term that it is not defined elsewhere. This proposal eliminates that term.

- Ms. Zimmerman noted that there is going to be a follow up referral to ensure that the terms our rules use comply with the matrix. Mr. Hall explained that the matrix is a term adopted by the Technology Commission and the supreme court; it establishes which attorneys can view the electronic record.

- The Chair called for a vote and the proposals passed unanimously, 41-0.

- **Action Item: Rules 9.140 and 9.360 will be submitted for amendment, as follows:**

RULE 9.140. APPEAL PROCEEDINGS IN CRIMINAL CASES

(a)–(b) [No change]

(c) Appeals by the State.

(1)–(2) [No change]

(3) Commencement. The state shall file the notice prescribed by rule 9.110(d) with the clerk of the lower tribunal within 15 days of rendition of the order to be reviewed; provided that in an appeal by the state under rule 9.140(c)(1)(k), the state's notice of cross-appeal shall be filed within 10 days of service of defendant's notice or service of an order on a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2). Copies shall be served on the defendant and the defendant's attorney ~~of record~~. An appeal by the state shall stay further proceedings in the lower tribunal only by order of the lower tribunal.

(d) Withdrawal of Defense Counsel after Judgment and Sentence or after Appeal by State.

(1) The ~~attorney of record for a~~ defendant's attorney~~, in a criminal proceeding,~~ shall not be relieved of any professional duties, or be permitted to withdraw as 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)–(E) [No change]

(2) [No change]

(e)–(i) [No change]

RULE 9.360. PARTIES

(a)–(b) [No change]

(c) Substitution of Parties.

(1)–(3) [No change]

(4) If a person entitled to file a notice dies before filing and that person's rights survive, the notice may be filed by the personal representative, the person's attorney ~~of record~~, or, if none, by any interested person. Following filing, the proper party shall be substituted.

(a) **Rule 9.370** – Referral number 15-AC-01.

- Mr. Kuntz noted that the proposal sought to amend the rule on amicus briefs to make it clear that there is an opportunity to file an amicus brief at the rehearing stage. The subcommittee had considered a different timing requirement for such briefs, but had rejected that idea. It also sought to make some of the language already in the rule consistent.

- Mr. Nutt noted that this proposal was repetitive to the statement in subsection (a) of the rule that "An amicus curiae may file a brief only by leave of the court."

  - Mr. Kuntz responded that this proposal sought to ensure that all interested persons would understand that an amicus brief may be filed at the rehearing stage; it is therefore not redundant because that sentiment is not clear from the sentence in (a).

- Judge Heller remarked that the last time this came up, he had noted there were a series of cases on this subject. But he had followed up and those cases were all unpublished orders in the First DCA.

- The Chair called for a vote, and the proposal passed 38-1, with 1 abstention.

- **Action Item: Rule 9.370 will be submitted for amendment, as follows:**

RULE 9.370. AMICUS CURIAE

(a) When Permitted. An amicus curiae may file a brief only by leave of court. A motion for leave to file must state the movant's interest, the particular issue to be addressed, how the movant can assist the court in the disposition of the case, and whether all parties consent to the filing of the amicus brief.

(b) Contents and Form. An amicus brief must comply with ~~R~~rule 9.210(b) but shall omit a statement of the case and facts and may not exceed 20 pages. The cover must identify the party or parties supported. An amicus brief must include a concise statement of the identity of the amicus curiae and its interest in the case.

(c) Time for Service. An amicus curiae must serve its brief no later than 10 days after the first brief, petition, or response of the party being supported is filed. An amicus curiae that does not support either party must serve its brief no later than 10 days after the initial brief or petition is filed. A court may grant leave for later service, specifying the time within which an opposing party may respond. The service of an amicus ~~curiae~~ brief does not alter or extend the briefing deadlines for the parties. An amicus curiae may not file a reply brief. Leave of court is required to serve an amicus brief in support of or opposition to a motion for rehearing, rehearing en banc, or for certification to the Supreme Court of Florida.

(d) Notice of Intent to File Amicus Brief in Supreme Court. When a party has invoked the discretionary jurisdiction of the supreme court, an amicus curiae may file a notice with the court indicating its intent to seek leave to file an amicus brief on the merits should the court accept jurisdiction. The notice shall state briefly why the case is of interest to the amicus curiae, but shall not contain argument. The body of the notice shall not exceed one page.

(a) Rule 9.350 – Referral number 15-AC-30.

- This proposal clarifies the application of the voluntary dismissal rule and its timing in the context of discretionary cases at the supreme court.

- There being no discussion, the Chair called for a vote and the proposal passed unanimously, 41-0.

- **Action Item: Rule 9.350 will be submitted for amendment as follows:**

RULE 9.350. DISMISSAL OF CAUSES

(a) [No change]

(b) Voluntary Dismissal. 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 serving of the notice of appeal or until 10 days after the time prescribed by rule 9.110(b), whichever is later. In a proceeding commenced under rule 9.120, dismissal shall not be effective until 10 days after the serving of the notice to invoke

discretionary jurisdiction or until 10 days after the time prescribed by rule 9.120(b), whichever is later.

(c)–(d) [No change]

****

(b) **Rule 9.400**– Referral number 15-AC-30.

- This proposal explains how a party may seek attorney's fees in discretionary proceedings before the supreme court. Subsection (3) states that fees must be sought when the response on jurisdiction is filed. Subsection (4) is meant to address when a question of great public importance is certified, such that jurisdictional briefs are not filed, in which case fees must be sought within 5 days of the filing of the notice.

- Ms. Samuels noted that if jurisdiction is denied in the case of a certified question of great public importance, the time for seeking your fees is limited; but if jurisdiction is granted in either case, you have a great deal of time.

- Mr. Curry pointed out that the language in the proposal contained in the agenda packet should have stated "jurisdictional briefs."

- Ms. Zimmerman clarified that this proposal would mean that if jurisdiction is granted, an incautious party who had not asked for fees at the time of the jurisdictional briefing would get a second bite at the apple. Mr. Curry noted that this proposal simply informs parties of the last day they may seek such fees.

- Ms. Samuels noted that if jurisdiction is denied, fees are minimal. Mr. Hall stated that the supreme court ought to remand such fee determinations to the trial court.

- Ms. Wheeler pondered the organization of the proposal and whether subsections (3) and (4) should be switched or if subsection (3) should clarify that it is speaking to (i)-(iv), but Ms. Samuels and Mr. Hall explained that the proposal was careful to carve out distinctions between certified question and all other jurisdictional bases.

- The Chair called for a vote and the provision was unanimously approved, 42-0.

- **Action Item: Rule 9.400 will be submitted for amendment as follows:**

RULE 9.400. COSTS AND ATTORNEYS' FEES

(a) [No change]

(b) Attorneys' Fees. With the exception of motions filed pursuant to rule 9.410(b), a motion for attorneys' fees shall state the grounds on which recovery is sought and shall be served not later than:

(1) in appeals, the time for service of the reply brief;~~ or~~

(2) in original proceedings, the time for service of the petitioner's reply to the response to the petition~~.~~;

(3) in discretionary review proceedings commenced under rule 9.030(a)(2)(A) in which jurisdictional briefs are permitted, the time for serving the respondent's brief on jurisdiction, or if jurisdiction is accepted, the time for serving the reply brief; or

(4) in discretionary review proceedings in which jurisdiction is invoked under rule 9.030(a)(2)(A)(v), not later than 5 days after the filing of the notice, or if jurisdiction is accepted, the time for serving the reply brief.

The assessment of attorneys' fees may be remanded to the lower tribunal. If attorneys' fees are assessed by the court, the lower tribunal may enforce payment.

(c) [No change]

20-- Amendment. Subdivision (b) is amended to specify the time limit for serving a motion for attorneys' fees in a discretionary review proceedings in the Florida Supreme Court. Absent a statement to the contrary in the motion, any timely motion for attorney fees, whether served before or after the acceptance of jurisdiction, will function to request attorneys' fees incurred in both the jurisdiction and merits phases of the proceeding. As a result, generally only one motion per party per proceeding is contemplated.

****

(c) Rule 9.120 – Referral number 15-AC-30.

- This proposal will eliminate the requirement to attach a conformed copy of the district court's opinion to a merits brief at the supreme court. The subcommittee checked with the liaison judge who thought this would be fine.

- The Chair called it for a vote and the proposal passed unanimously, 42-0.

- **Action Item: Rule 9.120 will be submitted for amendment as follows:**

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

(a)–(e) [No change]

(f) Briefs on Merits. Within 20 days of rendition of the order accepting or postponing decision on jurisdiction, the petitioner shall serve the initial brief on the merits~~,~~

~~accompanied by an appendix that must include a conformed copy of the decision of the district court of appeal~~. Additional briefs shall be served as prescribed by rule 9.210.

(a) **Rules 9.140, 9.146, 9.180, 9.200, 9.900** – Referral number 15-AC-31 from Amy Borman deals with attorneys' failure to serve designations on court reporters.

- The proposals make clear that attorneys must serve designations on the court reporter or transcriptionist. This issue affected a number of rules. The proposal also seeks to eliminate the passive voice in the various rules.

- Mr. Stanton proposed a friendly amendment that would correct an additional 2 spots where the passive voice is used – 9.140(f)(6)(B) ("A copy of the designation shall be filed …") and 9.146(g)(2)(B) ("The designation shall be served …"). Ms. Telfer noted that the phrase "a copy of" should be removed. Ms. Cabulea accepted the two friendly amendments to remove the passive voice in those instances.

  - The Chair noted that the active voice is used in the previous sentences in these two instances, and wondered whether that eliminated the confusion. Mr. Stanton explained that he was not confused, but that if we are going to eliminate the passive voice, these were other instances he had seen. The language should instead be "Appellate counsel/Appellant shall serve/file …"

- Ms. Zimmerman noted that this proposal makes the change to the ineffective assistance of counsel in TPR proceedings just discussed. She noted that another select committee put together by the supreme court had discussed this same issue and proposed that the clerk be required to provide a copy of the designation to the court reporter.

- The Chair called for a vote, and the proposals passed unanimously, 41-0

- **<u>Action Item</u>: The following rules will be submitted for amendment as follows:**

RULE 9.140. APPEAL PROCEEDINGS IN CRIMINAL CASES

(a)–(c) [No change]

(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 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)–(C) [No change]

(D) designations to the approved court reporter or approved transcriptionist have been filed and served by counsel for appellant 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

(E) [No change]

(2) [No change].

(e) Sentencing Errors. [No change]

(f) Record.

(1) Service. [No change]

(2) Transcripts.

(A)–(B) [No change]

(C) Except as permitted in subdivision (f)(2)(D) of this rule, the parties shall ~~designate~~serve the designation on 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 email as set forth in the Florida Rules of Judicial Administration.

(D) Non-indigent defendants represented by counsel may ~~designate~~serve the designation on 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 ~~designate~~serve a designation on 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) [No change]

(3)–(5) [No change]

(6) Supplemental Record for Motion to Correct Sentencing Error Pursuant to Florida Rule of Criminal Procedure 3.800(b)(2).

(A) [No change]

(B) If any appellate counsel determines that a transcript of a proceeding relating to such a motion is required to review the sentencing issue, appellate counsel shall, within 5 days from the transmittal of the supplement described in subdivision (A), designate those portions of the proceedings not on file deemed necessary for transcription and inclusion in the record. ~~A copy of~~ Appellate counsel shall file the designation ~~shall be filed~~ with the court and serve it on the approved court reporter or approved transcriptionist. The procedure for this supplementation shall be in accordance with this subdivision, except that counsel is not required to file a revised statement of judicial acts to be reviewed, the approved court reporter or approved transcriptionist shall deliver the transcript within 15 days, and the clerk shall supplement the record with the transcript within 5 days of its receipt.

(g)–(i) [No change]

RULE 9.146. APPEAL PROCEEDINGS IN JUVENILE DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS CASES AND CASES INVOLVING FAMILIES AND CHILDREN IN NEED OF SERVICES

(a)–(f) [No change]

(g) Special Procedures and Time Limitations Applicable to Appeals of Final Orders in Dependency or Termination of Parental Rights Proceedings.

(1) [No change]

(2) The Record.

(A) [No change]

(B) **Transcripts of Proceedings.** The appellant shall file a designation to the approved court reporter or approved transcriptionist, including the name(s) of the individual court reporter(s) or transcriptionist(s), if applicable, with the notice of appeal. ~~The designation shall be served~~Appellant shall serve the designation on the approved court reporter or approved transcriptionist 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 approved court reporter or approved transcriptionist 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 approved court reporter or approved transcriptionist 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 or transcriptionist

from preparing the transcript(s) within the 20 days, the reporter or transcriptionist shall request an extension of time, 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.

(C) Directions to the Clerk, Duties of the Clerk, Preparation and Transmittal of the Record. The appellant shall file directions to the clerk with the notice of appeal. The clerk shall electronically transmit the record to the court within 5 days of the date the approved court reporter or approved transcriptionist files the transcript(s) or, if a designation to the approved court reporter or approved transcriptionist has not been filed, within 5 days of the filing of the notice of appeal. When the record is electronically transmitted to the court, the clerk shall simultaneously electronically transmit the record to the Department of Children and Families, the guardian ad litem, counsel appointed to represent any indigent parties, and shall simultaneously serve copies of the index to all non-indigent parties, and, upon their request, copies of the record or portions thereof. The clerk shall provide the record in paper form to all parties exempt from service by e-mail as set forth in the Florida Rules of Judicial Administration.

(3)-(7) [No change]

(h) [No change]

RULE 9.180. APPEAL PROCEEDINGS TO REVIEW WORKERS' COMPENSATION CASES

(a)-(e) [No change]

(f) Record Contents: Final Orders.

(1)-(5) [No change]

(6) Transcript(s) of Proceedings.

(A) Selection of Approved Court Reporter by Lower Tribunal. The deputy chief judge of compensation claims shall select ~~the~~an approved court reporter or ~~transcriber~~an approved transcriptionist to transcribe any hearing(s). The deputy chief judge who makes the selection shall give the parties notice of the selection.

(B) Objection to Court Reporter ~~or Transcriber~~ Selected. Any party may object to the court reporter or ~~transcriber~~transcriptionist selected by filing written objections with the judge who made the selection within 15 days after service of notice of the selection. Within 5 days after filing the objection, the judge shall hold a hearing on the issue. In such a case, the time limits mandated by these rules shall be appropriately extended.

(C) Certification of Transcript by Court Reporter or Transcriber. The court reporter or ~~transcriber~~transcriptionist ~~designated~~selected by the deputy

chief judge of compensation claims shall certify and deliver an electronic version of the transcript(s) to the clerk of the office of the judges of compensation claims. The transcript(s) shall be delivered in sufficient time for the clerk of the office of the judges of compensation claims to incorporate transcript(s) in the record. The court reporter or ~~transcriber~~transcriptionist shall promptly notify all parties in writing when the transcript(s) is delivered to the clerk of the office of the judges of compensation claims.

(7)-(9) [No Change]

(g)-(i) [No change]

RULE 9.200. THE RECORD

(a) [No change]

(b) Transcript(s) of Proceedings.

(1) Within 10 days of filing the notice, the appellant shall designate those portions of the proceedings not on file deemed necessary for transcription and inclusion in the record and shall serve the designation on the approved court reporter, civil court reporter, or approved transcriptionist. Within 20 days of filing the notice, an appellee may designate additional portions of the proceedings and shall serve the designation on the approved court reporter, civil court reporter, or approved transcriptionist. ~~Copies of designations shall be served on the approved court reporter, civil court reporter, or approved transcriptionist.~~ Costs of the transcript(s) so designated shall be borne initially by the designating party, subject to appropriate taxation of costs as prescribed by rule 9.400. At the time of the designation, unless other satisfactory arrangements have been made, the designating party must make a deposit of 1/2 of the estimated transcript costs, and must pay the full balance of the fee on delivery of the completed transcript(s).

(2)-(4) [No change]

(c)-(f) [No change]

RULE 9.900. FORMS

(a)-(g) [No change]

(h) Designation to Approved Court Reporter, Civil Court Reporter, or Approved Transcriptionist.

IN THE .....(NAME OF THE LOWER TRIBUNAL WHOSE ORDER IS TO BE REVIEWED).....

Case No. _____

_____,	)	DESIGNATION TO APPROVED
Plaintiff/Appellant,	)	COURT REPORTER, CIVIL COURT
	)	REPORTER, OR APPROVED

v.	)	TRANSCRIPTIONIST, AND
	)	REPORTER'S OR APPROVED
_____	,)	TRANSCRIPTIONIST'S
Defendant/Appellee.	)	ACKNOWLEDGEMENT
	)	
_____)		

I. DESIGNATION

Plaintiff/Appellant, _____, files this Designation to Approved Court Reporter, Civil Court Reporter, or Approved Transcriptionist and directs .....(name of approved court reporter, civil court reporter, or approved transcriptionist)..... to transcribe the following portions of the trial proceedings to be used in this appeal [for cases where a party is exempt from service by electronic mail as set forth in the Florida Rules of Judicial Administration, state the following, and provide paper copies of the transcript(s)]:

1. The entire trial proceedings recorded by the reporter on .....(date)....., before the Honorable .....(judge)....., except _____.

2. [Indicate all other portions of reported proceedings.]

3. The approved court reporter, civil court reporter, or approved transcriptionist is directed to file the original with the clerk of the lower tribunal and to serve one copy on each of the following:

1.

2.

3.

I, counsel for ~~A~~appellant, certify that I have made satisfactory financial arrangements ~~have been made~~ with the approved court reporter, civil court reporter, or approved transcriptionist for preparation of the transcript, and I have served a designation on the approved court reporter, civil court reporter, or approved transcriptionist.

_____
Attorney for .....(name of party).....
.....(address, e-mail address, and phone number).....
Florida Bar No. .....

II. [No change]

(i)-(j) [No change]

Original Proceedings: The subcommittee's written report and meeting minutes are located at page 366 of the agenda referrals. Subcommittee chair David Luck described two pending referrals.

(a) **Rule 9.020** – Referral number 15-AC-17.

- Mr. Luck explained that the proposal provides a more concrete definition of electronic posting for the rendition determination, consistent with Judge Luck's suggestion. It omitted redundant language regarding conflicts between the date the judge signs the order versus the date an order is docketed. The proposal also separates motions to correct the sentence and probation from motions to challenge a verdict because a motion to challenge the verdict is not under 3.800.

    - Mr. Luck also noted that the case law uses the terms toll and delay interchangeably, and that there were some good arguments that the term "delay" is more appropriate in this instance.

    - Mr. Luck noted that the RJA Committee ("RJAC") is also considering putting together a rule defining judicial signatures. Currently there is a rule regarding attorney signatures; this rule will likely be very similar. Ms. Zimmerman noted that proposal will be considered by the RJAC today.

- Ms. Ginsberg noted that she has concerns about this proposal. Broward County judges enter their orders but then the clerk does not post them until seven days later. The Chair responded that in that case a party would actually gain time. Mr. Luck and Judge Luck agreed that the date to be applied in that instance is the date on the electronic docket. Ms. Ginsberg responded that the proposal does not state that clearly enough.

    - Ms. Cabulea stated that while an order may be entered in the system one day, it will not appear on the online docket until a day later. Judge Luck replied that a party in that circumstance is still better off under the proposal, because at least the delay is now only between electronic date stamping and docketing, not signing and docketing.

    - Judge Newton asked for clarification; wouldn't counsel on a case receive the notice right away, regardless of the clerk's office delay in docketing something. Judge Luck agreed that in Dade County counsel gets the document right away, but the clerk's office still has to upload the document to the docket. Ms. Cabulea responded that in Broward County, parties get orders from the clerk's office. Mr. Hall remarked that it works differently around the state, depending on whether a judge uses the eportal, judicial viewer, or other means to enter an order. This rule sought to make rendition standard.

    - Mr. Davis asked whether any new motions tolling rendition had been added; Mr. Luck responded that they had not.

    - Paul Regensdorf chimed in that the issue with rendition is that people must know a precise date. This rule is drafted to say that the starting point for rendition is date stamp, but the electronic docket may have a different date.

Attorneys may not have access to the electronic version of an order to know what the date stamp is. Everyone needs to know what the date is, delay is not the issue.

- Judge Luck replied that not all circuits work the same way as far as electronic docketing is concerned. But all courts use the electronic date stamp in the same manner, and that uniformity is what the proposal was embracing. Mr. Hall agreed that the docketing does not occur in the same way; at the supreme court, something may be entered on the docket days later than the docket entry reflects.

- Judge Heller inquired whether the proposal is identical to the system already in place, and whether we are just translating the present rule to be consistent with electronic filing. Mr. Hall noted that the date used to be tied to signing, which was not indicated by docketing. Now, there is an electronic date stamp, so the question is whether that is the same as the date an order is entered.

- Mr. Luck also explained that there was some debate as to the use of the term "tolling" in the current rule and proposed amendment. Decisions from the DCAs inconsistently switch between the terms "tolling" and "delaying." He has no opinion, but notes that while "delaying" is the technically correct term for what occurs, "tolling" is the term already associated with rendition.

  - The Chair asked whether this was an academic question. Ms. Gunn responded that it is more technically correct to call what we are talking about delay when a time period does not start till event occurs. But historically, the term is "tolling rendition." Mr. Curry noted that about 2/3 of opinions use "delay" to refer to the concept at issue. The use of the term "tolling" might confuse parties to thinking the time period starts, then stops, then simply starts again from where it left off.

  - Judge Heller remarked that there is an extensive body of federal case law involving federal time periods and the technical meaning of "tolling." There might have been a supreme court decision on this subject involving the closing of the courts and addressing what "tolling" meant in that circumstance. He believed it would be wise to use "delay" in the context of rendition to avoid importing a body of case law about the language.

  - Ms. Zimmerman noted that the ineffective assistance of counsel rule previously approved used the term "tolling," and asked that if the term "toll" is altered to "delay," it be done in that instance as well.

  - Mr. Hall thought the supreme court might have decided this. Judge Heller thinks that case was ultimately decided due to an admission by one of the parties that they were not making this argument.

- The Chair noted that this was the last meeting of the current cycle and asked Mr. Luck if the subcommittee wanted to go forward on the proposal. Mr. Luck responded that he did want to ensure the issue of when an order is rendered does not continue to cause confusion.

- Mr. Davis noted that the definition of rendition is extremely important. He was concerned that removing the subsection number cross-references and altering the numbering would be problematic and asked that the proposal be returned to subcommittee to add them back in. Mr. Luck responded that subsection numbering is going to change regardless of whether this proposal passes.

- Ms. Gunn noted that any confusion as to the term "tolling" is remedied by the subsection of the rule entitled "effect of tolling."

- The Chair asked whether there was a motion to alter the term "tolling" to "delaying." Hearing none, the Chair called for a vote on the proposal. It passed unanimously, 42-0. The Chair recommended that Mr. Curry consider a referral to address the tolling language.

- **<u>Action Item</u>: Rule 9.020 will be submitted for amendment, as follows:**
-

RULE 9.020. DEFINITIONS

(a)–(h) [No change]

(i) Rendition (of an Order). An order is rendered when a signed, written order is filed with the clerk of the lower tribunal. If the clerk maintains an electronic docketing system, then an order is rendered on the date that a signed, written order is electronically posted to the docket by the clerk in the lower tribunal. <u>The date of electronic posting is determined by the electronic docketing system's file stamp. Alternatively, if the clerk does not maintain an electronic docketing system, then rendition occurs on the date when the signed, written order is filed with the clerk in the lower tribunal.</u> ~~However, unless another applicable rule of procedure specifically provides to the contrary, if a final order has been entered and there has been filed in the lower tribunal an authorized and timely motion for new trial, for rehearing, for certification, to alter or amend, for judgment in accordance with prior motion for directed verdict, for arrest of judgment, to challenge the verdict, to correct a sentence or order of probation pursuant to Florida Rule of Criminal Procedure 3.800(b)(1), to withdraw a plea after sentencing pursuant to Florida Rule of Criminal Procedure 3.170(l), or to vacate an order based upon the recommendations of a hearing officer in accordance with Florida Family Law Rule of Procedure 12.491, the following exceptions apply:~~

<u>**(1) Motions Tolling Rendition.** The following motions, if authorized and timely filed, toll rendition:</u>

<u>(A) motion for new trial;</u>

<u>(B) motion for rehearing;</u>

(C) motion for certification;

(D) motion to alter or amend;

(E) motion for judgment in accordance with prior motion for directed verdict, or for arrest of judgment;

(F) motion to challenge the verdict;

(G) motion to correct a sentence or order of probation pursuant to Florida Rule of Criminal Procedure 3.800(b)(1);

(H) motion to withdraw a plea after sentencing pursuant to Florida Rule of Criminal Procedure 3.170(l); or

(I) motion to vacate an order based upon the recommendations of a hearing officer in accordance with Florida Family Law Rule of Procedure 12.491.

(2) Effect of Motions Tolling Rendition. If an authorized and timely motion listed in subdivision (i)(1) of this rule has been filed in the lower tribunal directed to a final order, the following apply:

~~(1)~~(A) ~~If such a motion or motions have been filed, t~~The final order shall not be deemed rendered as to any existing party until the electronic docketing by, or paper filing ~~with, the clerk~~ of a signed, written order disposing of the last of such motions.

~~(2)~~(B) ~~If such a motion or motions have been filed, a~~A signed, written order granting a new trial shall be deemed rendered when electronically docketed by, or paper filed with, the clerk, notwithstanding that other such motions may remain pending at the time.

~~(3)~~(C) If ~~such a motion or motions have been filed and~~ a notice of appeal is filed before the electronic docketing by, or paper filing with, the clerk of a signed, written order disposing of all such motions, the appeal shall be held in abeyance until the electronic docketing by, or paper filing with, the clerk of a signed, written order disposing of the last such motion.

(j) Rendition of an Appellate Order. If any timely and authorized motion under rule 9.330 or 9.331 is filed, the order shall not be deemed rendered as to any party until all of the motions are either withdrawn or resolved by the electronic docketing or paper filing by the clerk of a written order. If the clerk maintains an electronic docketing system, then an order is rendered on the date that a written order is electronically posted to the docket by the clerk. The date of electronic posting is determined by the electronic docketing system's file stamp. Alternatively, if the clerk does not maintain an electronic docketing system, then rendition occurs on the date when the written order is filed with the clerk.

(k) Signed. A signed document is one containing a signature as provided by Florida Rule of Judicial Administration 2.515(c).

Committee Notes

20-- Amendment. These amendments to existing rule 9.020(i) and (j) are intended to clarify the definition of rendition in light of Florida's progression toward a complete system of electronic filing and docketing. For those courts that have not yet adopted electronic filing and docketing, the amended language is intended to maintain the prior definition of rendition.

OCTOBER 21, 2016 MEETING
APPELLATE COURT RULES COMMITTEE
8:00 A.M. – 12:00 P.M. (E.S.T.)

In attendance:

Kristin Ann Norse, Chair
Landis Vernon Curry, III, Vice Chair
Christine Davis Graves, Vice Chair
Thomas D Hall, Vice Chair
Thomas Steven Ward, Secretary
Margaret Diane Mathews, Board Liaison
Kristina Samuels, Representative
Caryn Lynn Bellus
Marie Attaway Borland
Courtney Rebecca Brewer
Duane Allan Daiker
Diane G DeWolf
Donna Louise Eng
Tracy Raffles Gunn
Henry Gerome Gyden
Keri Teresa Joseph
Jeffrey Thomas Kuntz
Hon. Joseph Lewis, Jr.
John Wesley Little, III
David Lanier Luck
Hon. Robert Joshua Luck
Elba Caridad Martin-Schomaker
Hon. John D Campbell Newton, II
Rachel Erin Nordby
Sarah J. Rumph
Steven Lauren Seliger
Stephanie L Serafin
Stephanie Rebecca Silver
Dwight Oneal Slater
Andrew McBride Stanton
Laura Anne Triplett
Brandon Stuart Vesely
Elizabeth Cangelose Wheeler
Carrie Ann Wozniak
Jessica Zagier Wallace
Nicole Marie Ziegler
Stephanie Christina Zimmerman
Appeared by telephone:
Wendie Michelle Cooper
Nikole Hiciano
David Alfred Monaco
Jennifer Olmedo-Rodriguez

Absent:
Andrew L Adler
Michael T. Davis
Ivy R Ginsberg
Robin Felicity Hazel
Hon. Joshua Ryan Heller
Patricia Murphy Propheter
Gigi Rollini

Guests:
John Tomasino, Florida Supreme Court
Hon. T. Kent. Wetherell, II, Criminal Procedure Rules Committee Liaison

C. COMMENTS TO THE PROPOSED THREE-YEAR-CYCLE AMENDMENTS

Maher Comment

Stephen Maher suggested that the Committee change its font requirements. While the Committee is working on such a proposal, the request is outside the scope of the cycle amendments published July 1, 2016.

Triplett Comment

Laura Triplett submitted a comment that Rule 9.170(c) references the wrong subdivision of Rule 9.200. The correct reference is Rule 9.200(c)(2), not (c)(3). The Committee voted 38-0 to approve that amendment for the upcoming Cycle Report.

Altenbernd Comment

Judge Chris Altenbernd submitted a comment raising several concerns with the proposed amendments to Rule 9.200 and 9.300 regarding the statement of proceedings. Tracy Gunn, General Practice Subcommittee Chair, asked the General Practice Subcommittee members to review the comments. The Subcommittee members agreed that Judge Alternbernd's concerns had merit. In response, they recommended revoking the proposed amendments on statement of claim for the purposes of the upcoming cycle report and having the Subcommittee review the matter further. The Committee voted 38-0 to revoke the amendments to Rule 9.200 and 9.300 regarding statement of claim.

Regensdorf Comment

Proposed Revision to the definition of "rendition" in Rule 9.020 from the Supplemental Agenda circulated on October 21, 2016.

- Mr. Luck reports that he took part in meetings with trial court judges and clerks about the proposed new definition of "rendition." Their concern was that the deadline is contingent on the date of the file stamp, but the portal does not always provide a stamp.

- Mr. Hall further noted that if a trial court judge issues an order using a portal, then the portal will make a file stamp. But the clerk's office will not make a second file stamp indicating the date and time that the clerk received it.

- Mr. Luck then explained that Mr. Hall proposed a new revision after these issues were raised by the judges and clerks. Mr. Luck then further revised to removed the "process" language. Page 6 of the supplemental materials address these issues. The new central theme is the term "docketed," which the Subcommittee defines in subdivision (*l*). The Subcommittee then learned that there are a number of clerks who "backdate." In other words, regardless of when they put an order on the docket, they list the date of the order as being the date that the judge signed it, even if the judge signed it a week before the clerk put it on the docket. This was concerning to the Subcommittee so it added the anti-backdating language. The Subcommittee is trying to focus on notice to the parties, rather than when the judge signs an order behind closed doors. The *Strax Rejuvination & Aesthetics Inct., Inc. v. Shield*, 49 So. 3d 741, 744 n.2 (Fla. 2010) decision talks about

a rebuttable presumption of a clerk's timestamp. So the Subcommittee built on that concept here and simultaneously addresses the aforementioned practical issues.

- Mr. Hall said that what they learned from speaking with the clerks is that each court would actually be implementing the first proposed amendment differently. These discrepancies between the court were even more prevalent than initially thought. For example, an order signed after 5 p.m. Friday in Pinellas County is assigned a docketing date of Friday, but in Seminole County is assigned a docketing date of Monday morning at 9 a.m. The proposed new rule addresses those differences. Mr. Hall had a series of long-range planning meetings with those court clerks and was told they to implement a uniform clerk date stamp for all counties at the time of docketing that would be placed on the order would require coordination with the software clerks and an update to the existing software.

- Mr. Luck said that part of the goal is to enlist the aid of the Florida Supreme Court to provide uniformity and direction to the clerks notwithstanding the clerks and individual court's personal preferences.

- Mr. Hall said that the clerks have a uniformity committee, but sometimes it takes a while to implement because of software issues or because the chief judges at those courts are instructing the clerks to do something contrary.

- Ms. Silver asked how she will know when the other party receives the final order.

    - Mr. Hall answered that if a judge issues an order via portal or judicial viewer, then you will get notice when the clerk puts it on the docket. It is at that time the notice goes out. But all computers privately keep track of when that date happens. So even now when there is an issue of when something is served by portal, clerks regularly issue affidavits.

    - Ms. Silver asked if she has to subpoena the clerk.

    - Mr. Luck said that if the Subcommittee's proposed amendment passes, then the date that appears on the online docket should correspond with the date that the clerk received it.

- Ms. Wheeler suggests that it say the "date on which the clerk provides the notice of electronic processing," but then wonders what if you're not in the office when that notice is sent? Shouldn't rendition be tethered to the date that notice is received?

- Mr. Luck announced that Judge Wetherell suggested that the Subcommittee change "received" to "provided."

- Mr. Gyden asks what happens if the clerk does not docket an order for weeks. Does that give the opponent extra time to appeal?

- Mr. Hall responds that the date that the clerk actually gets around to processing it (not the date it simply comes into their processing queue) should be the rendition date. This will require a software update to the portal.

- Mr. Gyden notes that the only date on the order is the date the judge signed it.

- Mr. Hall suggests also attaching to your notice of appeal the email that notifies you that the clerk has processed and docketed it.

- Judge Luck notes that not every court has electronic docket. Miami-Dade's criminal and juvenile courts still have paper. So he feels this proposed amended rule has a huge gaping hold. He also feels this proposal is requiring independent research for something that is simple, including getting subpoenas. The rendition date should simply be the date the order is stamped, which is on the face of the order. The proposal from the Subcommittee is going to create litigation. There are also access to court issues since *pro se* and criminal litigants will not be able to issue subpoenas. He agrees that Miami-Dade civil clerks do backdate. The Subcommittee rule is telling the clerk what to do with their system so he thinks ACRC should tell them to do something simple like putting the actual electronic date that controls on the face of the order. A litigant should not have to look to external documents to determine rendition.

- Mr. Little notes that the current version of the rule has the alternative language in there for non-electronic clerks. He feels this is important for the property rights field because while local governments take actions that can be appealed, they do not have a docketing system, let alone an electronic docketing system. Instead, they have the mayor sign, put their own clerk's stamp on it, and that is it. He thinks the ACRC needs to keep some language in there for the quasi-judicial areas where there is no electronic docketing.

    - Mr. Hall says he thought the Subcommittee left in the language concerning paper orders.

    - Mr, Luck agrees with Mr. Hall and says that the only mention is to say that backdating is not required for paper orders either.

- Judge Luck notes that in practice in Miami-Dade County there is an old yellow sheet that is the docket. That paper is what is looked at to find the rendition date. He thinks the Subcommittee should ensure the rule defines rendition as a date that is on the order itself.

    - Mr. Hall says that the Subcommittee discussed that. Ideally in his mind, the software creates a datestamp that goes on the order so you only have to look at the order. In Pinellas County some judges do it electronically, but some do paper and their assistants do not walk the entered orders to the clerk's office for a week after they were entered. So there are inconsistencies in practice even within the same court.

- Judge Luck says that if the ACRC is going to change the way clerks do things then we need to make it easy for them.

- Chair Norse asks what the status quo is if the ACRC does nothing with the rule.

  - Mr. Hall responds that the ACRC already has something in the three-year cycle amendments with a new date of rendition that he believes is wrong. So maybe the ACRC doesn't have to do something today, but might need to withdraw the proposal later.

  - Chair Norse suggests that the ACRC either acts on the Subcommittee's proposal today or it withdraws the proposal in the three-year cycle.

- Ms. Silver asks how the proposed amendment affects the tolling rule.

  - Mr. Luck answers that it does not affect it at all.

- Chair Norse asks the Subcommittee what it wants to do.

  - Mr. Hall suggests the Subcommittee takes the proposal back to prepare something more permanent in nature. The Subcommittee wants the clerk to put a stamp on the order with the date the clerk processed it and wants that to be the date of rendition.

  - Mr. Luck suggests looking into finding out how to require the clerks' software vendors create such a stamp.

- Ms. Silver suggests that there are inconsistencies between the tolling rule and rendition.

- Ms. Wheeler notes that the RJA has rules that require attorneys to create their pleadings to leave a place for a filestamp and that says where the filestamp is supposed to go. So she suggests maybe this is an RJA issue.

  - Mr. Hall says that would go beyond the definition of "rendition," though he agrees that RJA may try to define the date of filing. He has had an issue in the past with the record being backdated. He does agree that a new physical datestamp may change the formatting of the document.

- Mr. Gyden says that he has never relied on the docket, but only the order to determine the date of rendition. He doesn't want the rule to require a litigant to have to look to the docket and thinks the rendition date should be defined to be something on the order.

- Chair Norse announces that the ACRC should withdraw its proposal in the three-year cycle and restore the old language for now, but use the new subdivision title and include the deletion of committee notes.

    - Mr. Hall requests a vote by concept now and, later after the meeting adjourns, by email.

    - The ACRC voted in favor 37-0

- Ms. Telfer says that she will circulate the Subcommittee's updated version via email later.