

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULES OF APPELLATE PROCEDURE

Case No.:

TWO YEAR CYCLE REPORT OF THE APPELLATE COURT RULES COMMITTEE

Winifred J. Sharp, Chair, Appellate Rules Committee, and John F. Harkness, Jr. Executive Director, The Florida Bar, submit this two-year cycle report of the Appellate Court Rules Committee under *Fla. R. Jud. Admin.* 2.130(c). As required by *Fla. R. Jud. Admin.* 2.130(c)(3), these proposals were reviewed by the Board of Governors of The Florida Bar, except as indicated. The voting records of the committee and Board of Governors are shown on the attached table of contents. The proposed amendments also are attached to this report.

The substantive reasons for the proposed amendments are as follows:

Rule 9.020(h). It was brought to the attention of the committee that the existing rule incorrectly refers to Florida Family Law Rule of Procedure 12.492 instead of 12.491, as was intended. This has caused serious problems in appellate enforcement proceedings. *See* Appendix "A": Letter from William Branch, Office of the Attorney General, dated December 20, 2001. At the January 2002 meeting, the committee determined the reference was clearly error, and authorized the chair to make the correction as an editorial matter.

Rule 9.040(b)(2)(A). For grammatical reasons, the pronoun "which" was replaced with "that."

Rule 9.120(f). This rule change was approved by the committee in the prior cycle, at its June 23, 2000 meeting, but was inadvertently omitted in the rule changes submitted to the Supreme Court. Its inclusion here will remedy that oversight. The revision is intended to correct an apparent ambiguity in rules 9.120 and 9.220, concerning whether or not Supreme Court briefs on the merits must include an appendix containing a conformed copy of the decision of the district court of appeal. This does not represent a substantive change, since the Supreme Court has interpreted the rule as requiring such an appendix for merit briefs.

Rule 9.140(b)(5). The substance of this subdivision has been altered and moved to (d). This required a renumbering of the subsequent subdivision from (6) to (5).

Rule 9.140(d). This new subdivision replaces (b)(5), and was moved to (d) because it now applies to both defense appeals and state appeals. It deals with the conditions and requirements before defense counsel of record will be allowed to withdraw in a criminal proceeding. The substance of (b)(5) is retained in (d), but it adds new requirements in the event the state takes an appeal. This revision was in response to a decision by the Second District Court of Appeal, *State v. White*, 742 So. 2d 374 (Fla. 2d DCA 1999). *See* Appendix "B". In cases in which the state takes an appeal, and the defendant was represented by counsel, there was no clear provision in this rule for continued appellate representation. As *White* points out, problems resulting from this deficiency in the rule are particularly common when the court has appointed private counsel for an indigent defendant for the trial proceedings. In many cases, defendants have not been afforded representation for the state appeal proceedings.

The draft of this rule, which was approved by the committee at the September 2000 meeting, with housekeeping changes made at the June 2001 meeting, is attached. *See* Appendix "C". It was presented to the Board of Governors at their meeting in November 2001, and was approved, except for (d)(5) and (7). The reasons given for not approving those subdivisions were that they imposed unwarranted duties on retained counsel, and might force an attorney to represent a defendant on appeal, contrary to his or her contract or retainer, or wishes.

At the January 2002 meeting of the committee, this problem was addressed, and subdivisions (5) and (7) were combined and redrafted. The subdivisions were also renumbered and paragraphed. Subdivision (E) was adopted by the committee to replace (5) and (7) of the original rule. (E) makes clear that, in publicly-funded cases, public defenders and private counsel appointed to handle indigent cases at the trial level retain specified responsibilities to insure representation of defendants for their appeal or the state's appeal. It also specifies that retained trial defense counsel may withdraw from representation of a defendant seeking to appeal, or in the event of a state appeal, but requires that the attorney file a motion to withdraw in the appellate court with service on the defendant, stating what the defendant's plans for representation are for the appeal, or may be, if any. This is a new requirement in the rule, but parallels the procedure set forth in the *White* case. The committee

felt it would not impose too great a burden on retained defense counsel. *See* Appendix "D".

The committee deleted the former language about the right to self-representation because this court decided *Davis v. State*, 79 So. 2d 978, 981 (Fla. 2001) (“[I]n Florida there is no state constitutional right to proceed pro se in direct appeals in capital cases. . . . The decision to allow a convicted defendant the ability to proceed pro se in appellate proceedings is vested in the sound discretion of the appellate court”).

The balance of the lettered subdivisions in the rule following new (d) have been dropped down one letter; *i.e.*, (d) becomes (e) and (e) becomes (f), through to (i). Cross-references within former (e) have been similarly corrected.

Rule 9.180(c)(3). This rule was amended by adding the phrase "any necessary" before "approval of the settlement." This was in response to legislative changes that took effect October 1, 2001, which eliminated the requirement that a Judge of Compensation Claims approve the entirety of a settlement, if the employee/claimant is represented by counsel. As of that date, Judges of Compensation Claims will approve the entirety of a settlement only in those cases where the employee/claimant is not represented by counsel. Otherwise in all other cases where the claimant is represented by counsel, the new law limits the Judges of Compensation Claims jurisdiction to approval of the attorney's fee paid by the claimant under the settlement and consideration of child support arrearages, if any.

Rule 9.190(e)(1). This rule was editorially changed to replace "where" with "when"; and (e)(3) was also edited to remove the superfluous phrase "such jurisdiction or to grant, modify or deny."

Rule 9.330. This rule was amended to address concerns about per curiam affirmed opinions, and to respond to the Report issued by the Supreme Court's Committee. Originally the rules committee proposed and passed a change that would allow a litigant to move (as part of a motion to rehear) that the court issue an opinion in a case in which the court issued a PCA, and the litigant believes a written opinion will provide a basis for Supreme Court review. That rule was broadened at a subsequent meeting by the rules committee, to include all decisions issued without a opinion, thereby including denials of petitions or writs.

An editorial change to insert commas in (a) was also made.

In (d) of this rule, at the request of the Supreme Court, the committee clarified the language to expressly provide that the Supreme Court will not entertain motions for rehearings after dismissals of a petitions for extraordinary writs when used to seek review of a district court decision without an opinion. *See Grate v. State*, 750 So. 2d 625 (Fla. 1999). *See* Appendix "E".

The committee added a 2002 Committee Note to this rule to explain that the addition to (a) is not a limitation on the right of a litigant to seek a rehearing on other grounds.

Rule 9.370. This rule was expanded and subdivided, to provide more specific guidelines for the content of amicus briefs, set shorter and more definite time limits for briefs, add requirements for the content of motions to file, reduce page limits, and deny the possibility of filing a reply brief. The revised rule was intended to address concerns that some parties had abused the amicus brief-writing privilege, and there were no rules that governed those problems.

Rule 9.440(a) and (b). The rule was revised to make this rule regarding the appearance of foreign attorneys in Florida courts, and withdrawal of attorneys, parallel and consistent with the recently revised Rules of Judicial Administration 2.060(i) and 2.061. The prior rules were different, and they were causing confusion among the bar as to which rules should be followed.

A 2002 Committee Note was added to explain the reasons for the revised rules.

Rule 9.800(i). This rule was edited to make the citation to Bar Admission Rules correct, since "articles" have been dropped, pursuant to the 1997 Supreme Court's rule change.

Subdivision (n) was amended to allow practitioners to use the ALWD Citation Manual as a default reference, in addition to the Blue Book. This has become a scholarly and well respected authority. In addition, editorial changes were made to correct the references to state name abbreviations.

The committee respectfully requests that the court amend the Rules of Appellate Procedure as proposed in this report.

Respectfully submitted February 7, 2002.

/s/ Winifred J. Sharp

WINIFRED J. SHARP

Chair

Appellate Court Rules Committee

300 South Beach Street

Daytona Beach, FL 32114

(386) 947-1517

FLORIDA BAR NO.: 72903

/s/ John F. Harkness, Jr.

JOHN F. HARKNESS, JR.

Executive Director

The Florida Bar

650 Apalachee Parkway

Tallahassee, FL 32399-2300

(850) 561-5600

FLORIDA BAR NO.: 123390