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Compilation of Minutes with rules amendments

Appellate Court Rules Committee
June 25, 2010

Civil Practice Subcommittee (Paul Regensdorf, Chair)

Paul Regensdorf, Chair of the Civil Practice Subcommittee, gave the report on that subcommittee's behalf. Mr. Regensdorf reported that the subcommittee had considered two issues since the ACRC's last meeting.

1. The first issue (10-AC-03) that the subcommittee considered concerned a slight conflict between the recently revised language of rule 9.110(b) dealing with the commencement of plenary appeals and comparable language in rule 9.130(b). The subcommittee unanimously approved the following proposed change to rule 9.130(b) to bring its language in line with the language of rule 9.110(b):

~~The~~ J~~j~~urisdiction of the court to seek review of orders described in subdivisions (a)(3)-(a)(6) of this rule shall be invoked by filing an original and 1 copy ~~2 copies~~ of a notice, accompanied by any ~~the~~ filing fees prescribed by law, with the clerk of the lower tribunal within 30 days of the order to be reviewed.

Mr. Regensdorf noted, however, that the language of the proposed amendment needed to be rewritten slightly to address a "glitch." He requested that Chairman Crabtree pass over to the next subcommittee report to enable him, Mr. Regensdorf, to attempt to fix the "glitch" in the language. Chairman Crabtree agreed to do so.

[At this point Michael Ufferman, as Chair of the Criminal Practice Subcommittee, gave the first portion of that subcommittee's report. That portion of Mr. Ufferman's report is described in more detail below.]

Chairman Crabtree then returned to Mr. Regensdorf's report on behalf of the Civil Practice Subcommittee. The proposed amendment to rule 9.130(b)—as slightly rewritten by Mr. Regensdorf to address the "glitch" to which he had previously referred—read as follows:

~~The~~ J~~j~~urisdiction of the court to ~~seek~~ review ~~of~~ orders described in subdivisions (a)(3)-(a)(6) of this rule shall be invoked by filing an original and 1

copy~~2 copies~~ of a notice, accompanied by any~~the~~ filing fees prescribed by law, with the clerk of the lower tribunal within 30 days of the order to be reviewed.

Chairman Crabtree asked a question of Mr. Regensdorf: If someone filed an untimely notice of appeal, that person would not theoretically be invoking the jurisdiction of the court, correct? Mr. Regensdorf responded that the court would have jurisdiction to review its own jurisdiction, but Chairman Crabtree countered that the court would not have jurisdiction to "review order[s]" under those circumstances. Mr. Regensdorf asked the Chairman to explain his "point." In response, the Chairman said the latest proposed language by Mr. Regensdorf is not precise.

Chairman Crabtree asked why there was a problem with the original "seek review" language of the proposed amendment. Mr. Regensdorf responded that the new language was more consistent and parallel with other rules—and with the language of rule 9.110 in particular. Chairman Crabtree suggested that the new language sacrificed accuracy. Mr. Regensdorf then suggested that the Chairman's concern could be addressed if the language of the proposed rule were changed yet again to provide that "J~~j~~urisdiction of the court under subdivisions (a)(3)-(a)(6) of this rule shall be invoked . . . ." Mr. Crabtree said that he was concerned that the current proposed language is "just not accurate" because "it's just not true" that one invokes the jurisdiction of a court when filing an untimely notice of appeal. As rephrased, the Chairman said that the prior proposed language was okay—because it referred to "seeking review"—but the new proposed language would render the rule "a lie."

Mr. Regensdorf repeated that the Chairman's concern could be addressed by using the phrase "jurisdiction of the court under subdivisions (a)(3)-(a)(6) of this rule shall be invoked."

Mr. Hamilton also responded to the Chairman by noting that the problem with the original "seek review" language of the proposed rule was a grammatical one; the language literally suggested, incorrectly, that the court, rather than a party, was seeking review of an order. Mr. Regensdorf is now attempting to fix that grammatical error in the original language.

Siobhan Shea suggested that the Chairman's concern could be addressed by removing "to review orders" from the proposed language. Chairman Crabtree opined that Ms. Shea's suggested approach would not address his concern; it would result in a rule that was not necessarily "true" because the rule would imply

that the court had jurisdiction to review the merits of a case in which its jurisdiction did not actually exist.

To address the Chairman's concern, Mr. Regensdorf once again proposed that the language of the proposed amendment to rule 9.130(b) be altered to read as follows:

~~The J~~jurisdiction of the court under ~~to seek review of orders described in~~ subdivisions (a)(3)-(a)(6) of this rule shall be invoked by filing an original and 1 copy ~~2 copies~~ of a notice, accompanied by any the filing fees prescribed by law, with the clerk of the lower tribunal within 30 days of the order to be reviewed.

Mr. Regensdorf moved for approval of that language. He further confirmed that his subcommittee was agreeable to that change.

After Chairman Crabtree asked if there was any further discussion, Nancy Gregoire noted that someone filing a notice of appeal is not necessarily invoking the jurisdiction of the court. Instead, that person is merely seeking to invoke the court's jurisdiction. So she suggested that the rule should say that "jurisdiction . . . shall be sought," not "jurisdiction of the court shall be invoked." Both Chairman Crabtree and Mr. Regensdorf stated that Ms. Gregoire had an "interesting thought."

Michael Korn said that he was not as troubled by Ms. Gregoire's concern. In his view, the party filing the notice of appeal does indeed "invoke" the court's jurisdiction, but the court ultimately determines whether it actually has jurisdiction. Thus, Mr. Korn suggested that even an untimely notice of appeal "invokes" the court's jurisdiction, disagreeing with the Chairman on that point.

The question was called, and the ACRC passed Mr. Regensdorf's motion by a unanimous vote of 48 to 0. The proposed amendment was thus approved.

Criminal Practice Subcommittee (Michael Ufferman, Chair)

Michael Ufferman, Chair of the Criminal Practice Subcommittee, gave the report for that subcommittee. The subcommittee resolved two issues since the ACRC's last meeting.

1. Mr. Ufferman reported on the subcommittee's first issue during the period that Mr. Regensdorf addressed the "glitch" in the language of the proposed

amendment to rule 9.130(b). Mr. Ufferman reported that the Criminal Practice Subcommittee addressed a conflict between rule 9.140(c)(3) and rule 9.110(b) concerning when the state must file a notice of appeal in a criminal case. Specifically, rule 9.110(b) provides that a notice of appeal of an order granting a new trial in a criminal case must be filed within 30 days. In contrast, rule 9.140(c)(3) provides that a notice of appeal filed by the state directed towards an order granting an new trial in a criminal case must be filed within 15 days.

To resolve the conflict, the subcommittee recommended an amendment to rule 9.110(b) to cross-reference rule 9.140(c)(3). The subcommittee reached that conclusion because rule 9.110 is a more general rule covering orders granting new trials in both civil and criminal cases, but rule 9.140 is the specific rule that governs appeals in criminal cases. The proposed amendment would clarify that notices of appeal by the state in criminal cases must be filed within 15 days, as set forth in rule 9.140(c)(3). As amended, rule 9.110(b) would read, in pertinent part, as follows:

(b) Commencement. Jurisdiction of the court under this rule shall be invoked by filing an original and 1 copy of a notice, accompanied by any filing fees prescribed by law, with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed, except as provided in rule 9.140(c)(3).

Mr. Ufferman moved for adoption of the proposed amendment. No second was needed (because it was a recommendation of a subcommittee). Mr. Ufferman added that an alternative approach could have been to allow the state 30 days to appeal, but Florida law had never contemplated that the state would have 30 days to appeal in criminal cases, and no one on the subcommittee favored that approach. **The motion passed unanimously by a vote of 48-0.**

2. Following the completion of Mr. Regensdorf's report on behalf of the Civil Practice Subcommittee, Mr. Ufferman returned to his report on behalf of the Criminal Practice Subcommittee. He identified the second issue that the subcommittee addressed was whether rule 9.141(b)(2)(C) conflicts with rule 9.210(b)(3). Specifically, rule 9.141(b)(2)(C) states that in a case involving an appeal from the summary denial of postconviction motions, no briefs are required, but if an initial brief is filed, it must be filed within 15 days of the filing of the notice of appeal. Rule 9.141(b)(2)(B) also provides that the clerk is not required to paginate the record or send a copy of the record to the parties. Yet a record on appeal is normally not received by appellate counsel within 15 days of the filing of

the notice of appeal and therefore it is impossible to file a proper brief (with citations to the record) within this 15-day period.

The subcommittee researched this issue. It found that First DCA Administrative Order 02-2 addressed this concern; it requires the clerk to paginate the record and send it to the parties, notwithstanding the rule's provisions. So the subcommittee sent letters to the central staff offices and the clerks of the other DCAs seeking their input on the issues of: (1) whether to increase the 15-day period for filing initial briefs; and (2) whether to require clerks to paginate the records. Responses were received from representatives of four of the DCAs. After receiving and reviewing those responses, the subcommittee considered a proposal to extend the 15-day time period for initial briefs to 30 days. But that proposal failed by a 5-3 vote, and the majority of the subcommittee therefore recommended taking no action on the referral.

Secretary John Hamilton asked Chairman Crabtree whether the full ACRC could consider the referral notwithstanding the subcommittee's recommendation; he opined that increasing the 15-day period for serving an initial brief to 30 days seemed to him to be a "really good idea." Chairman Crabtree consulted Parliamentarian Robin Bresky, who stated that the full ACRC could indeed do so if the issue is raised by motion. Mr. Hamilton then moved to amend rule 9.141(b)(2)(C) to extend, from 15 days to 30 days, the time within which an initial brief would be due in appeals involving the summary denial of a postconviction motion.

Siobhan Shea seconded the motion. She explained that part of the reason she supported the motion was because of the practical delays that inmates experience in these types of cases, which often make it extremely difficult for them to file initial briefs within the current 15-day timeframe. Ms. Shea noted that inmates often do not even receive the necessary copies of the documents necessary to prosecute appeals of this nature.

Chairman Crabtree sought procedural clarification from Mr. Hamilton as to whether further review was warranted and as to whether Mr. Hamilton thought additional time needed to be devoted to drafting language. Mr. Hamilton responded that he thought no additional time was necessary; his amendment was merely changing a number in existing rule 9.141(b)(2)(C)—from 15 days to 30 days. The proposed amendment read as follows:

(C) No briefs or oral argument shall be required, but any appellant's brief shall be filed within ~~15~~ 30 days of the filing of the notice of appeal. The court may request a response from the appellee before ruling.

Discussion ensued. Mr. Ufferman noted that the agenda (on page 78) reflected that Mr. Hamilton's motion was the same motion that had been voted upon by the Criminal Practice Subcommittee. He noted that he had voted in favor of the motion when the subcommittee considered it. But his perception was that those who voted against it did so based on a belief that extending the time for the initial brief is unnecessary. Most appeals of this nature are brought by pro se inmates, who do not need additional time to prepare their briefs. And in the few cases in which attorneys are retained to handle the appeals, the attorneys could seek enlargements of time to serve the initial briefs, and no one was aware of instances in which the courts were denying those requested enlargements of time. Moreover, even pro se inmates could request enlargements of time, and no one could identify a problem arising from the frequent denials of such motions. Mr. Ufferman nevertheless opined that 15 days is a very short period of time—and increasing it to 30 days would allow either a pro se party or an attorney more ample time to prepare a better brief—or to request even more time in appropriate cases.

Roberta Mandel asked if there would be any negative consequences that would come from giving inmates additional time to serve their initial briefs. Additionally, she suggested that increasing the deadline to 30 days would also relieve the appellate courts from the burdens of addressing more motions for enlargements of time.

Carol Dittmar spoke in opposition to Mr. Hamilton's motion. She noted that these requests for postconviction relief are frequently denied because they are filed too late—often by people who are incarcerated for life and who have nothing better to do than file requests for postconviction relief that are either facially insufficient or procedurally barred. Because the record is, by rule, a limited one, the appeal is not a difficult or complicated one; usually, the only question is whether the case should be remanded for an evidentiary hearing. In frivolous cases like those, it is wholly unnecessary to provide for more than 15 days for the initial brief. Initial briefs are not even necessary, and the district courts usually decide these appeals based upon the trial court's order and the limited record. Ms. Dittmar's perception was that these types of appeals are already "bogging down the system," and that increasing the deadline for initial briefs would make that problem worse. Moreover, the courts are not currently seeing very many requests for enlargements

of time to serve initial briefs, so the existing 15-day rule is not especially burdensome for the courts.

Craig Leen asked if the subcommittee had data as to the percentage of these types of appeals that resulted in reversals and remands.

Mr. Ufferman responded to Mr. Leen and said the subcommittee did not have those precise numbers. But he noted that the most common basis for reversal in these types of appeals is because the trial judge failed to attach to the order summarily denying relief the portion of the record affirmatively demonstrating that the inmate was not entitled to relief—or the judge otherwise failed to comply with some technical requirement applicable to summary denials of postconviction relief. Mr. Ufferman's perception is that there are a "handful" of reversals in these types of cases each week, based on what appears in Florida Law Weekly. Mr. Ufferman could not identify the percentage of those cases in which briefs were (or were not) filed, but he noted that the subcommittee had received information from the Second District Court of Appeal stating that briefs are filed in approximately 15 percent of the appeals of this nature in that court.

Tom Hall said that the reversal rate in appeals of this nature is about ten percent, but that includes the cases in which required portions of the record were not attached to the orders in question. In a lot of those latter cases, the case goes back to the trial court, the appropriate portions of the record are attached to the order and the order is affirmed when a second appeal is filed.

Mr. Hamilton noted that he was prompted to make the motion in large part by the letter dated January 21, 2010, jointly from the Clerk of the Second District Court of Appeal and that court's Director of Central Staff, in which the authors advocated enlarging the 15-day period to 30 days. (The letter is on pages 82-83 of the agenda.) That letter constituted the only firm position that any representative of any of the DCAs took on this question—and it was an unambiguous request that the ACRC consider increasing the 15-day period to 30 days. Mr. Hamilton noted that no representative of any DCA had opposed the proposal.

The motion passed by a vote of 30 to 15, with one abstention (by Rob Hauser). The proposed amendment was adopted.

Appellate Court Rules Committee
Minutes of Meeting Held Friday, September 24, 2010
Orlando Marriott, Orlando, Florida

IV. Standing Subcommittee Reports

D. Family Law Practice – Thomas Young, Chair

Tom Young reported that the subcommittee addressed a referral from the Family Law Section of The Florida Bar, and he addressed the lengthy history of communication between the Family Law Section and the subcommittee. The request was for a rule authorizing "immediate interlocutory appeals from orders determining the enforceability of prenuptial agreements and postnuptial agreements."

Mr. Young stated that most states do not have a rule addressing the issue one way or the other. He reported that Sandy Solomon drafted the proposed rule, and that ultimately the subcommittee (after many meetings and discussion) unanimously agreed on the proposed amendment, which is:

Rule 9.130. Proceedings to Review Non-final Orders and Specified Final Orders

(a) Applicability.

(1) – (2) [No change.]

(3) Appeals to the district courts of appeal of non-final orders are limited to those that …

(A) – (B) [No change.]

(C) determine

(i) - (ii) [No change.]

(iii) ~~the right to immediate monetary relief or child custody~~ in family law matters:

~~(a) the right to immediate monetary relief;~~

~~(b) the rights or obligations of a party regarding time sharing under a parenting plan; or~~

(c) the invalidity of a marital agreement as a whole....

(iv) – (viii) [No change.]

(D) [No change.]

(4) – (6) [No change.]

(b) – (h) [No change.]

John Hamilton stated that he is circumspect about modifying Rule 9.130, and wondered why the suggestion was different from others, and why an interlocutory appeal was needed. Chairman Crabtree mentioned that it seemed designed to preserve the benefit of the bargain, and the purpose might be defeated if an appeal was not allowed. Andrew Berman stated that the proposed change was designed to potentially avoid the time and expense of a trial where a trial was not intended. John Hamilton commented that a release does the same thing. Andrew Berman commented that family law is different, that there is a stronger policy at issue to cut down on acrimony, etc. John Crabtree commented that a release is distinct from having rights taken away from having to litigate them. Andrew Berman commented that defenses need to be distinguished from remedies. Kim Ashby commented that, if petitions for writs of certiorari are routinely being granted granting such relief, then she believed a rule change might be appropriate; if not, the rule should be left alone.

Craig Leen commented that child custody is a broad term, and wondered if "time sharing" involved child welfare, i.e., who gets to make the major decisions. Chairman Crabtree asked that the Committee focus on proposed subsection "c" for the moment. Paul Regensdorf commented that he is generally more in favor of broadening 9.130. He stated that subdivision (c) seems like the arbitration agreement provision under 9.130. Michael Korn commented that the subcommittee discussed at length the Kim Ashby comment, and that Paul Regensdorf is right – this is like an arbitration agreement. He stated that going to court when not required to do so can be crippling, and that most states allow for some type of relief in these situations. The relief is very narrow and limited.

Chairman Crabtree stated that initially, he had a strong bias against amending the rule, but that he had come around to embrace it (as had other members). Michael Korn said he agreed, and the more it was studied, the more it made sense. Sandy Solomon said they were concerned about taking interpretations of a document and making them appealable, and that is why it was drafted as it was.

Chris Carlyle made a motion to sever "b" from "c" and to consider them separately. Jere Tolton seconded, and the motion was unanimously approved. James Hauser said he supports "c," and offered a friendly amendment, suggesting the rule would be cleaner if it said "determine that a marital agreement is invalid as a whole." Michael Korn stated that it did not seem this would get into the realm of final judgments. He was not sure it could be accepted without looking at it more. Sandy suggested it could be circulated back to the subcommittee.

Eduardo Sanchez offered a different suggestion, asking if the note to the rule could clarify that it is appealable only if it is found invalid. Sandy Solomon supported this suggestion, though he suggested taking it back to the subcommittee. Paul Regensdorf asked what was meant by "finding it invalid," and wondered if better language would be to "determine that a marital settlement agreement is invalid as a whole." He said it was a drafting question. Craig Leen stated that the idea that litigation itself could cause a harm was reflected elsewhere in the law.

Michael Korn said that he could probably accept the change suggested by Paul. It would read, 3(c) "limited to those that determine that a marital agreement is invalid as a whole." Andrew Berman moved to change "as a whole" to "in its entirety," and Michael Korn seconded. Judge Northcutt stated that the case law seemed to favor the change, and he thought it was a good idea. He stated he would rather deal with such matters as appeals rather than in petitions for writs of certiorari. John Crabtree thought it was a good policy which would help prevent depletion of the estate. Chairman Crabtree called for a reading, and the language was "determine that a marital agreement is invalid in its entirety." **He then called for a vote on "c" as amended, and it unanimously passed with a vote of 45-0.**

Appellate Court rules Committee
Minutes of Meeting Held Friday, January 21, 2011
Sheraton Suites Tampa Airport Westshore

IV. Standing Subcommittee Reports

B. Civil Practice – Paul Regensdorf, Chair

1. Mr. Regensdorf addressed several proposed rule amendments submitted to the committee by John Hamilton. He noted that the materials included Mr. Hamilton's original list of issues, minutes from the five telephone calls where the issues were addressed, and memos regarding the recommendations of the subcommittees that addressed particular issues.

Rule 9.110(k): (Hamilton item 2) John Hamilton raised a concern about appellate review of "partial final judgments." Andy Berman was in charge of addressing this issue and he explained that the rule was implemented to avoid the former "Mendez trap." Mr. Berman explained that the proposed change to the rule was designed to apply only to parties that remained in the case, and it defines which orders may be appealed immediately and which cannot. Mr. Regensdorf explained that this was not a change in the law, but was designed to codify existing law. Kim Ashby asked if a comment could be added reflecting that the change is not a change in the law; Chairman Crabtree agreed.

The proposed changes are 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)-(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 claim that is completely unrelated to the claims that remain pending. If a partial final judgment totally disposes of an entire case as to any party, it must be appealed within 30 days of rendition.

(*l*)-(n) [No change]

VOTE: The proposed changes passed unanimously (47 to 0).

f. Rule 9.130 Concerning Cross-Appeals: (Hamilton item 7) Jack Aiello explained that the rule does not expressly authorize cross-appeals in appeals from nonfinal orders, but at least one Florida appellate court has tacitly held that cross-appeals can be brought in appeals from nonfinal orders. The subcommittee wanted to make it parallel to rule 9.110. The proposal is as follows:

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

(a)-(f) [No change]

(g) Cross-Appeal. An appellee may cross-appeal the order or orders designated by the appellant, to review any ruling described in subdivisions (a)(3)–(a)(5), by serving a notice within 10 days of service of the appellant's timely filed notice of appeal or within the time prescribed for filing a notice of appeal, whichever is later. Two copies of a notice of cross-appeal, accompanied by any filing fees prescribed by law, shall be filed either before service or immediately thereafter in the same manner as the notice of appeal.

(gh) Review on Full Appeal. This rule shall not preclude initial review of a non-final order on appeal from the final order in the cause.

(hi) Scope of Review. Multiple non-final orders that are listed in rule 9.130(a)(3) may be reviewed by a single notice if the notice is timely filed as to each such order.

Michael Korn stated that he supported the idea, but wondered if it should be consistent with Sandy Solomon's changes on the filing mechanism. Sandy suggested that it would be addressed.

VOTE: The suggested changes passed by a vote of 43 in favor, 4 opposed.

j. Rule 9.400(a): (Hamilton item 18) Beth Coleman explained that the rule lists four categories of taxable appellate costs which may need to be amended to expressly include the costs of trial and hearing transcripts included in the record on appeal and used in the appeal. Based on the *Abraham* case, some have argued that the cost of transcripts should not be included. The subcommittee voted 9-1 in favor of the new language. The language is as follows:

RULE 9.400. COSTS AND ATTORNEYS' FEES

(a) Costs. Costs shall be taxed in favor of the prevailing party unless the court orders otherwise. Taxable costs shall include

(1) fees for filing and service of process;

(2) charges for preparation of the record and any hearing or trial transcripts necessary to determine the proceeding;

(3) bond premiums; and

(4) other costs permitted by law.

Costs shall be taxed by the lower tribunal on motion served within 30 days after issuance of the mandate.

(b)-(c) [No change]

Ms. Coleman voted against the proposed change, and suggested that any necessary transcript should be included, but the subcommittee rejected her change. Barbara Eagan asked if there was any other law that would allow for payment of transcripts, and John Hamilton stated that two cases allowed for it. Richard Swank asked if there was any concern about double taxation. Ms. Coleman stated that there was some concern, but the thought was that the appellate court would send it to the trial court for assessment, and it could be handled at that time. Chairman Crabtree called for the vote.

VOTE: The proposal passed, 28 in favor, 16 opposed.

E. General Practice – Jamie Billotte Moses, Chair

Jamie Billotte Moses noted that the subcommittee considered several proposed rule amendments submitted to the committee by John Hamilton:

a. Rule 9.020(h)(3): The manner in which the rule is currently written results in an abandonment of all motions filed prior to the notice of appeal, although some motions are not deemed abandoned. The proposed change, consisting of the addition of one word, is as follows:

RULE 9.020. DEFINITIONS

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

(a)-(g) [No change]

(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) If such a motion or motions have been filed, the final order shall not be deemed rendered with respect to any claim between the movant and any party against whom relief is sought by the motion or motions until the filing of a signed, written order disposing of all such motions between such parties.

(2) If such a motion or motions have been filed, a signed, written order granting a new trial shall be deemed rendered when filed with the clerk, notwithstanding that other such motions may remain pending at the time.

(3) If such a motion or motions have been filed and a notice of appeal is filed before the filing of a signed, written order disposing of all such motions, all <u>such</u> motions filed by the appealing party that are pending at the time shall be deemed abandoned, and the final order shall be deemed rendered by the filing of the notice of appeal as to all claims between parties who then have no such motions pending between them. However, a pending motion to correct a sentence or order of probation or a motion to withdraw the plea after sentencing shall not be affected by the filing of a notice of appeal from a judgment of guilt. In such instance, the notice of appeal shall be treated as prematurely filed and the appeal held in abeyance until the filing of a signed, written order disposing of such motion.

(i) [No change]

There was no discussion.

VOTE: The proposed change passed unanimously (45-0).

b. Rule 9.300(b): Ms. Moses explained that there was a concern regarding extensions of briefs other than initial briefs which are not provided for within the rule. The proposed changes, which consisted of the addition of six words, is as follows:

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, shall extend automatically, for a like period, the time for service of ~~appellant's initial brief~~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]

There was no discussion.

VOTE: The proposal passed unanimously (45-0).

d. Rule 9.330: A question was raised as to whether the rule authorizes a stand-alone motion for written opinion, or whether the rule requires that a request for written opinion be combined with a motion for rehearing, clarification, or certification. Ms. Moses stated that this was to clarify that it applied to entry of written opinions. The proposed changes are as follows:

RULE 9.330. REHEARING; CLARIFICATION; CERTIFICATION

(a) Time for Filing; Contents; Response. A motion for rehearing, clarification, ~~or~~ certification, or entry of a written opinion may be filed within 15 days of an order or within such other time set by the court. 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 decision, and shall not

present issues not previously raised in the proceeding. A motion for clarification shall state with particularity the points of law or fact in the court's decision that, in the opinion of the movant, are in need of clarification. 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 ~~motion~~party may ~~include a~~ 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 and phone number)

_____
(Florida Bar number)

(b)-(d) [No change]

David Caldevilla noted that the title should be adjusted. Michael Korn stated that it should be the "issuance" of a written opinion, not the "entry" of same. Siobhan Shea suggested taking out the words "entry of a." Michael Korn clarified that the suggestion was "or issuance of a written opinion." Chairman Crabtree clarified that the proposed language was modified from "or entry of a written opinion" to "or issuance of a written opinion."

VOTE: The modified proposed change passed, 44 in favor, 2 opposed.

The second change suggested above, changing the language from a "motion" requesting it to a "party" requesting it, was then voted on.

VOTE: The proposal passed, 48 in favor, 1 opposed.

f. Rule 9.331(d)(1): Mr. Hamilton suggested that the rule to be amended to allow for either the case or an issue in the case which is of exceptional importance warrant consideration en banc. The proposed language, which added "or issue," is as follows:

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

(a)-(c) [No change]

(d) Rehearings En Banc.

(1) Generally. A rehearing en banc may be ordered by a district court of appeal on its own motion or on motion of a party. Within the time prescribed by rule 9.330, a party may move for an en banc rehearing solely on the grounds that the case or issue is of exceptional importance or that such consideration is necessary to maintain uniformity in the court's decisions. A motion based on any other ground shall be stricken. A response may be served within 10 days of service of the motion. A vote will not be taken on the motion unless requested by a judge on the panel that heard the proceeding, or by any judge in regular active service on the court. Judges who did not sit on the panel are under no obligation to consider the motion unless a vote is requested.

(2) Required Statement for Rehearing En Banc. A rehearing en banc is an extraordinary proceeding. In every case the duty of counsel is discharged without filing a motion for rehearing en banc unless one of the grounds set forth in (1) is clearly met. If filed by an attorney, the motion shall contain either or both of the following statements:

I express a belief, based on a reasoned and studied professional judgment, that the ~~panel decision~~case or issue is of exceptional importance.

Or

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court (citing specifically the case or cases).

/s/ _____

_____

Attorney for _____
(name of party)

_____
———(address and phone number)
Florida Bar No. _____

(3) [No change]

Mr. Regensdorf asked how there can be a case without important issues? If that is the situation, perhaps we should get rid of "case" altogether? Craig Leen explained that they kept "case" because some opinions say "case" in an apparent attempt to limit the scope of the Rule. The idea was to make it clear that an issue could also be reviewed while not removing the concept that an important case could also be considered. It was also designed to make the rule consistent.

VOTE: The proposed change passed, 48 in favor, 1 against.

g. Rule 9.340: Proposal that the Rule be amended to reflect the fact that some district courts and circuit courts do not issue mandates in their appellate capacities. The subcommittee realized that rule 9.146 also needed to be amended. The proposed language is as follows:

RULE 9.340. MANDATE

(a) [No change]

(b) Extension of Time for Issuance of Mandate. Unless otherwise provided by these rules, if a timely motion for rehearing, clarification, ~~or~~ certification or issuance of a written opinion has been filed, the time for issuance of the mandate or other process shall be extended until 15 days after rendition of the order denying the motion, or, if granted, until 15 days after the cause has been fully determined.

(c) [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)-(5) [No change]

(6) Rehearing; Rehearing En Banc; Clarification; Certification; Issuance of Written Opinion. Motions for rehearing, rehearing en banc, clarification, ~~and~~ certification, and issuance of a written opinion shall be in accordance with rules 9.330 and 9.331, except that no response to these motions is permitted unless ordered by the court.

(7) [No change]

(h) [No change]

There was no discussion.

VOTE: The proposal passed unanimously (48-0).

Appellate Court rules Committee
Minutes of Meeting Held Friday, June 24, 2011
Gaylord Palms Hotel and Convention Center
(48 members present)

Rule 9.130(a)(4) -- opening phrase

Mr. Regensdorf explained that this issue on this topic deals with the opening phrase of Rule 9.130(a)(4), which is both confusing (what are "non-final orders" in this context) and wrong (because orders on these motions are appealable as part of the main appeal). In this proposed amendment, the subcommittee redefines what orders are being addressed in this subdivision and clearly define the manner in which those orders are appealable. By unanimous vote, the subcommittee voted to amend Rule 9.130(a)(4) to read:

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

(a) Applicability.

(1)–(3) [No change]

(4) ~~Non-final o~~Orders ~~entered after final order on~~disposing of motions that suspend rendition are not reviewable separately from a review of the final order; provided that orders granting motions for new trial in jury and non-jury cases are reviewable by the method prescribed in rule 9.110. Other non-final orders entered after final order on authorized motions are reviewable by the method prescribed by this rule.

(5)–(6) [No change]

(b)–(h) [No change]

Mr. Regensdorf made a motion to accept the proposed change.

Vote: the change was accepted by acclamation, with no opposition. (48-0)

Rule 9.130 - class action certification orders

Mr. Regensdorf addressed the second issue referred back from the Committee, which also dealt with Rule 9.130. Specifically, there are two existing provisions relating to orders on motions to certify a class, those being Rule 9.130(a)(3)(C)(vi), and Rule 9.130(a)(6).

The subcommittee previously determined that it wished to delete subdivision (a)(6) in its initial proposal. The specific issue on referral was the precise language to be utilized in subdivision (a)(3)(C)(vi). By an eight to one vote, the subcommittee agreed to the following language:

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

(a) Applicability.

(1)–(2) [No change]

(3) Appeals to the district courts of appeal of non-final orders are limited to those that

(A)–(B) [No change]

(C) determine

(i) the jurisdiction of the person;

(ii) the right to immediate possession of property, including but not limited to orders that grant, modify, dissolve or refuse to grant, modify, or dissolve writs of replevin, garnishment, or attachment;

(iii) the right to immediate monetary relief or child custody in family law matters;

(iv) the entitlement of a party to arbitration, or to an appraisal under an insurance policy;

(v) that, as a matter of law, a party is not entitled to workers' compensation immunity;

(vi) ~~that a class should be certified~~whether to certify a class;

(vii) that, as a matter of law, a party is not entitled to absolute or qualified immunity in a civil rights claim arising under federal law; or

(viii) that a governmental entity has taken action that has inordinately burdened real property within the meaning of section 70.001(6)(a), Florida Statutes;

(D) [No change]

(4)–(5) [No change]

~~(6) Orders that deny motions to certify a class may be reviewed by the method prescribed by this rule.~~

(b)–(h) [No change]

Mr. Regensdorf made a motion to accept the proposed change.

Vote: the change was accepted by acclamation, with no opposition.

Rule 9.310(b)(1), superseding a purely money judgment.

Mr. Regensdorf addressed the third issue referred-back from the full committee which dealt with the proposed amendment to Rule 9.310(b)(1). That change establishes the conditions under which a stay pending appeal for a pure money judgment can be obtained. The subcommittee's alternative proposals have not changed. Instead, the referral was simply to obtain from the Committee a breakdown of how the subcommittee voted on its preferences for the Third and Fourth Districts' position (that a mathematically calculated money supersedeas bond was essential to obtain a stay), versus the Second District's approach (that a trial court does have discretion to go beyond a pure mathematical calculation in setting the conditions of the bond). The issue of whether to amend the rule still has the unanimous support of the subcommittee.

After further discussion, the subcommittee voted 7-4 in favor of a proposed rule drafted consistent with the Third and Fourth Districts' opinions: to obtain a stay from a pure money judgment, the supersedeas bond would have to be mathematically calculated at 100% of the judgment plus two years interest and the trial court would have no discretion to stay the judgment unless those terms were met. The options are as follows:

Draft Rule 9.310 #1, following the 3d and 4th DCAs:

RULE 9.310. STAY PENDING REVIEW

(a) [No change]

(b) Exceptions.

(1) Money Judgments. If the order is a judgment solely for the payment of money, a motion or order is unnecessary. ~~a~~A party ~~may~~will obtain ~~an automatic~~ stay of execution pending review~~, without the necessity of a motion or order~~, only by posting a good and sufficient bond equal to the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest. Multiple parties having common liability may file a single bond satisfying the above criteria.

(2) [No change]

(c)–(f) [No change]

Draft Rule 9.310 #2, following the 2d DCA:

RULE 9.310. STAY PENDING REVIEW

(a) Application. Except as provided by general law and in subdivision (b) of this rule, a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief. A stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both.

(b) Exceptions.

(1) Money Judgments.

(A) If the order is a judgment solely for the payment of money, a party may obtain an automatic stay of execution pending review, without the necessity of a motion or order, by posting a good and sufficient bond equal to the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest.

Multiple parties having common liability may file a single bond satisfying the above criteria.

(B) If the order is a judgment solely for the payment of money and a party does not obtain an automatic stay of execution pending review as provided in subdivision (b)(1)(A) of this rule, a party may file a motion as provided in subdivision (a) of this rule seeking a stay of execution pending review. The lower tribunal may, in its discretion, enter a stay pending review that must be conditioned on the posting of a good and sufficient bond, other conditions, or both.

(2) [No change]

(c)-(f) [No change]

Ceci Berman addressed the work of the subcommittee, and again explained the issue. She noted that the subcommittee had to choose one of the two proposals, and they chose proposal number one, representing the view taken by the Third and Fourth Districts. Chairman Crabtree asked for discussion.

Kim Ashby stated that she thought the Committee should provide comment to the Supreme Court regarding the option that was chosen. Jacqulyn Mack commented on the requirement of a bond potentially restricting access to the courts. Andrew Berman noted that a bond is not a requirement for access to the courts. Paul Regensdorf noted that a bond is not a condition for an appeal.

Jack Reiter commented that there were two issues, the first being that we should be careful when we are choosing between two courts, and second, allowing a trial court to have discretion is an important thing to keep in mind. Craig Leen said he dealt with a lot of stays, and they are the quintessential act of discretion given the large number of factors involved. Kim Ashby addressed the issue of stays in mortgage cases. Andrew Berman noted that the rule dealt with pure money judgments.

John Hamilton noted that this discussion dealt only with subpart "b," and not subpart "a." He stated that he prior to *Platt* being decided in 2004, there was no issue. Since then, *Platt* has not been cited once, and accepting the Platt rule will lead to more motion practice. The purpose of a stay is to protect the creditor.

Paul Regensdorf wondered if the Committee could or should be addressing a pure question of law, and concluded that was indeed the function of the Committee. He wondered if we could send two choices. He added that if

discretion was allowed, a flood of litigation would follow. Chairman Crabtree indicated that the Committee could indeed recommend a certain position if there was a conflict in the rules.

Craig Leen noted that removing discretion could prevent legitimate parties from obtaining a stay. John Crabtree wondered about the effect of an execution occurring, and if a remedy is foreclosed. Paul Regensdorf noted that a wrongful execution could be remedied. James Nutt wondered if an "extraordinary circumstance" exception might be appropriate. Paul Regensdorf noted that is what the second option amounts to, though Chairman Crabtree noted that it did not specifically say that. Ceci Berman noted that the second option was intended to apply to extraordinary situations. Sandy Solomon wondered if many hearings and much delay would follow if it was adopted.

The vote was called for option one:

Vote: 28 for; 15 opposed; 2 abstain.

9.300 Motions for appellate mediation.

Mr. Regensdorf stated that Gwendolyn Braswell raised a concern regarding appellate mediation, and she pointed out a conflict between the new appellate mediation rule concerning motions to seek mediation and Rule 9.300, which provides that motions (unless listed and excepted) toll times for other actions in the appellate court.

Rule 9.700(d) states that a "motion for mediation by a party within 30-days of the Notice of Appeal shall toll all deadlines under these rules until the motion is ruled upon by the court." The idea was that if a party wished to invoke mediation and wanted to stop the time for the preparation of briefs, the motion had to be filed within 30-days. Otherwise, the default provision would be that the appeal would continue unless a separate order of the court directed that the action be stayed.

The conflict comes from the standard motion rule, Rule 9.300(b), which provides that <u>any</u> motion tolls the time for further actions unless specifically excepted in subdivision (d). Accordingly, Ms. Braswell recommended an additional exception to Rule 9.300(d) which would except from automatic tolling a motion for mediation filed beyond the 30-day time limit. The subcommittee unanimously agreed, and approved a new subdivision (9) to Rule 9.300(d), which provides:

RULE 9.300. MOTIONS

(a)–(c) [No change]

(d) Motions Not Tolling Time.

(1) Motions for post-trial release, rule 9.140(g).

(2) Motions for stay pending appeal, rule 9.310.

(3) Motions relating to oral argument, rule 9.320.

(4) Motions relating to joinder and substitution of parties, rule 9.360.

(5) Motions relating to amicus curiae, rule 9.370.

(6) Motions relating to attorneys' fees on appeal, rule 9.400.

(7) Motions relating to service, rule 9.420.

(8) Motions relating to admission or withdrawal of attorneys, rule 9.440.

(9) Motion for mediation filed later than 30-days after the notice of appeal, rule 9.700(d).

(10) Motions relating to expediting the appeal.

(~~10~~11) All motions filed in the supreme court, unless accompanied by a separate request to toll time.

Mr. Regensdorf moved to accept the changes, and Sandy Solomon seconded. Kim Ashby stated that she was against moving numbers around, and suggested putting it at the end. Paul Regensdorf agreed in general, but stated the subcommittee thought it best placed at 9 because of the nature of 10 and 11, but that he had no strong feelings either way. Kim Ashby suggested again putting it at the end, and Paul Regensdorf accepted the suggestion, which was seconded by Michael Korn.

John Hamilton suggested taking out the hyphen, which was accepted. Jack Aiello suggested changing "later" to "more." Paul Regensdorf accepted it, and

Michael Korn seconded. Paul Regensdorf then read the language as amended, and noted that it was now numbered subparagraph 11, and reads "Motions for mediation filed more than 30 days after the notice of appeal, rule 9.700(d)".

Vote: 45 for; 0 opposed; 0 abstain.

Mr. Ufferman reported that the Criminal Practice Subcommittee met telephonically on March 10, 2011, April 5, 2011, and May 3, 2011. Resulting from Honorable Chris W. Altenbernd's request to establish a special standard of review for post-conviction proceedings, the subcommittee recommends a change to *Fla. R. App. P.* 9.141(b) (Appeals from Post-Conviction Proceedings Under Florida Rules of Criminal Procedure 3.800(a), 3.850, or 3.853).

Mr Ufferman explained that the concern addressed by Judge Altenbernd relates to when a postconviction motion is summarily denied by a trial court without an evidentiary hearing, no briefs are required and the appellate court will review all of the issues that were denied if no briefs are filed. In contrast, when a postconviction motion is denied following an evidentiary hearing, rule 9.141(b)(3)(C) requires that briefs be filed. The confusion arises in two situations. The first situation involves a defendant who files a postconviction motion raising several claims – some of which are denied after an evidentiary hearing and some of which are summarily denied with no hearing. In this situation, a brief is required for the claims denied after an evidentiary hearing, but the question is whether the courts will review the claims summarily denied with no hearing if those claims are not addressed in the brief. The second situation involves a defendant who files a postconviction motion raising several claims – all of which are summarily denied without a hearing. If the defendant chooses to file a brief (even though no brief is required) and only addresses some of the claims in the brief, the question is whether the remaining claims not addressed in the brief are waived.

When Judge Altenbernd's concern was addressed by the subcommittee in December of 2010, the subcommittee decided to refrain from addressing the issue because the Second District had just certified the following question to the Florida Supreme Court:

> WHEN CONSIDERING A POSTCONVICTION APPEAL, UNDER RULE 9.141(b)(2)(D), MUST THE DISTRICT COURT OF APPEAL AFFORD REVIEW OF ALL SUMMARILY DENIED CLAIMS EVEN WHEN THE *PRO SE* APPELLANT, OR ONE REPRESENTED BY COUNSEL,

HAS FILED A BRIEF BUT HAS NOT BRIEFED OR OTHERWISE FURTHER PURSUED CERTAIN CLAIMS?

Walton v. State, 35 Fla. L. Weekly D856 (Fla. 2d DCA April 16, 2010). In light of this certified question, the subcommittee decided to wait to see if the Florida Supreme Court accepted jurisdiction in *Walton*.

After the ACRC meeting in January of 2011, the Second District granted a motion for rehearing in *Walton* and issued a new opinion; the new opinion did not certify the question to the Florida Supreme Court. *See Walton v. State*, 58 So. 3d 887 (Fla. 2d DCA 2011). Therefore, the Florida Supreme Court did not provide any resolution on this issue, the subcommittee readdressed it and, after several meetings, submits the following proposed changes to rule 9.141(b):

RULE 9.141. REVIEW PROCEEDINGS IN COLLATERAL OR POST-CONVICTION CRIMINAL CASES; BELATED APPEALS; BELATED DISCRETIONARY REVIEW; INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

(a) [No change]

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

(1) Applicability of Civil Appellate Procedures. Appeal proceedings under this subdivision shall be as in civil cases, except as modified by this rule.

(2) Summary Grant or Denial of <u>All Claims Raised in a</u> Motion Without Evidentiary Hearing.

(A) When a motion for post-conviction relief under rule 3.800(a), 3.850, or 3.853 is granted or denied without an evidentiary hearing, the clerk of the lower tribunal shall transmit to the court, as the record, copies of the motion, response, reply, order on the motion, motion for rehearing, response, reply, order on the motion for rehearing, and attachments to any of the foregoing, together with the certified copy of the notice of appeal.

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

(C) No briefs or oral argument shall be required, but any appellant's brief shall be filed within 15 days of the filing of the notice of appeal. However, if a brief is filed, the failure to address in the brief any claim that was raised in the post-conviction motion will result in waiver of the claim(s). The court may request a response from the appellee before ruling.

(D) On appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief.

(3) Grant or Denial of Motion after an Evidentiary Hearing was Held on One or More Claims.

(A)-(C) [No change]

(c) [No change]

Maria Armas offered a friendly amendment suggesting that (c) should include the word "then" after the phrase "if a brief is filed." Mr. Ufferman accepted her amendment. Paul Regensdorf offered a friendly amendment that substituted the wording "result in a waiver of the unaddressed claim" for the phrase "result in a waiver of the claim(s)" also found in (c). This amendment was also accepted. Siobhan Shea expressed her reservations to the change noting that pro se litigants may not understand the impact of the wording.

Vote: 42 for; 1 opposed; 2 abstain.

Reconsideration of Proposed Amendment to Florida Rule of Appellate Procedure 9.320 (Vote Required)

Jamie Moses reported that this matter was initially referred to the subcommittee, and an amendment was proposed and voted upon by the ACRC at the January 21, 2011 meeting. However, the matter was referred back to the subcommittee to address the use of "pleading" or "document" in the rule. While reconsidering that issue, the issue of defining specific days within which a request for oral argument must be served was revisited. The subcommittee approved an

amendment which defines a specific time within which a request for oral argument must be made. The proposed language is as follows:

RULE 9.320. ORAL ARGUMENT

Oral argument may be permitted in any proceeding. A request for oral argument shall be in a separate document served by a party: (1) in appeals, not later than ~~the time~~10 days after the last brief ~~of that party~~ is due to be served; (2) in proceedings commenced by the filing of a petition, not later than 10 days after the reply brief is due to be served; and (3) in proceedings governed by rule 9.146, in accordance with rule 9.146(g)(5). Each side will be allowed 20 minutes for oral argument, except in capital cases in which each side will be allowed 30 minutes. On its own motion or that of the party, the court may require, limit, expand, or dispense with oral argument.

Judge Wetherell wondered why a change was needed. John Hamilton explained that the changes were designed to address oral arguments in the context of original proceedings, and to allow parties in other contexts the ability to review a reply brief before determining if oral argument should be requested. Mr. Hamilton also noted that he surveyed the clerks on the issue, and they were divided on the change. Eduardo Sanchez suggested taking out the word "brief" after (2) in the proposed change.

Vote: 33 for; 13 opposed; 0 abstain.

Electronic Filing of Notices of Appeal in Workers' Compensation Cases: John Hamilton explained that this referral originated from Judge Kathryn Pecko, a subcommittee member, who raised the issue of whether rule 9.180(b)(3) should be amended to reflect the reality that notices of appeal in workers' compensation cases are electronically filed, rather than filed in hard-copy form, except by pro se litigants. The subcommittee discussion ended in the creation of the following proposed rule amendment:

RULE 9.180. APPEAL PROCEEDINGS TO REVIEW WORKERS' COMPENSATION CASES

(a) [No change]

(b) Jurisdiction.

(1)–(2) [No change]

(3) Commencement. Jurisdiction of the court shall be invoked by filing ~~two copies of~~ a notice of appeal with the lower tribunal, ~~accompanied by the filing fee prescribed by law unless a verified petition for relief from payment of the fee has been filed with the lower tribunal~~ within 30 days of the date the order to be reviewed is mailed by the lower tribunal to the parties, which date shall be the date of rendition. The filing fee prescribed by law must be provided to the clerk or a verified petition for relief of payment of the fee must be filed with the notice of appeal.

(4) [No change]

(c)–(i) [No change]

Vote: 42 for; 0 opposed; 0 abstain.

The Contents of the Record on Appeal in Workers' Compensation Cases: Wendy S. Loquasto, the vice-chair of this subcommittee, explained her issue which raised the question of whether subdivision (f) of rule 9.180 should be amended to require the record on appeal in workers' compensation cases to include motions for rehearing, orders on those motions, and trial memoranda. By a vote of 6-1, the subcommittee proposes the following rule amendment:

RULE 9.180. APPEAL PROCEEDINGS TO REVIEW WORKERS' COMPENSATION CASES

(a)–(e) [No change]

(f) Record Contents: Final Orders.

(1) Transcript, Order, and Other Documents. The record shall contain the claim(s) or petition(s) for benefits, notice(s) of denial, pretrial stipulation, pretrial order, trial memoranda, depositions or exhibits admitted into evidence, any motion for rehearing, response, order on motion for rehearing, transcripts of any hearings before the lower tribunal and the order appealed. The parties may designate other items for inclusion in or omission from the record in accordance with rule 9.200.

(2)–(8) [No change]

(g)–(i) [No change]

Paul Regensdorf noted that the word "response" sticks out in the draft, and Wendy Loquasto suggested that a semicolon could be added. Siobahn Shea suggested that "and" should be added after "rehearing," and John Hamilton accepted the friendly amendment.

Vote: 44 for; 0 opposed; 0 abstain.

Effect of Withdrawing Petition for Insolvency Upon Relevant Timeframes: Wendy S. Loquasto addressed her referral which raised the question of whether rule 9.180(g) should be amended to address the situation when a petition for insolvency is filed but later withdrawn before it is ruled upon, and the effect of that withdrawal upon the deadline for depositing the estimated cost of the record and the commencement of the 60-day period for the preparation of the record. After discussion, the subcommittee approved this proposed rule:

RULE 9.180. APPEAL PROCEEDINGS TO REVIEW WORKERS' COMPENSATION CASES

(a)–(f) [No change]

(g) Relief From Filing Fee and Costs: Indigency.

(1)–(2) [No change]

(3) Costs of Preparation of Record.

(A)–(F) [No change]

(G) Extension of Appeal Deadlines~~: Petition Granted~~. If the petition to be relieved of the entire cost of the preparation of the record on appeal is granted, the 60-day period allowed under these rules for the preparation of the record shall begin to run from the date of the order granting the petition.~~——~~

~~**(H) Extension of Appeal Deadlines: Petition Denied.**~~ If the petition to be relieved of the cost of the record is denied or only granted in part, the petitioner shall deposit the estimated costs with the lower tribunal within 15 days from the date the order denying the petition is entered. The 60-day period allowed under these rules for the preparation of the record shall begin from the date the estimated cost is deposited with the lower tribunal. If the petition to be relieved of the cost of the record is withdrawn before ruling, then the petitioner shall deposit the estimated costs with the lower tribunal at the time the petition is withdrawn and

the 60-day period for preparation of the record shall begin to run from the date the petition is withdrawn.

(~~I~~H) Payment of Cost for Preparation of Record by Administration Trust Fund. If the petition to be relieved of costs is granted, the lower tribunal may order the Workers' Compensation Administration Trust Fund to pay the cost of the preparation of the record on appeal pending the final disposition of the appeal. The lower tribunal shall provide a copy of such order to all interested parties, including the division, general counsel of the Department of Financial Services, and the clerk of the court.

(~~J~~I) Reimbursement of Administration Trust Fund If Appeal Is Successful. If the Administration Trust Fund has paid the costs of the preparation of the record and the appellant prevails at the conclusion of the appeal, the appellee shall reimburse the fund the costs paid within 30 days of the mandate issued by the court or supreme court under these rules.

(h)–(i) [No change]

Vote: 42 for; 0 opposed; 2 abstain.

APPELLATE COURT RULES COMMITTEE
Minutes of Meeting
Friday, January 27, 2012

Mr. Sanchez explained that it had come to the attention of the Committee that certain citations in Rule 9.800 were inaccurate and changes were made to correct those inconsistencies. Rule 9.800 also contained citations to rules and other such items that no longer existed. Rule 9.800 was amended to reflect those changes as follows:

RULE 9.800. UNIFORM CITATION SYSTEM

(a)–(b) [No change]

(c) Florida Circuit Courts and County Courts.

(1)–(2) [No change]

(3) For opinions not published in Florida Supplement, cite to Florida Law Weekly Supplement: ~~*State Y. Campeau*, 16 Fla. L. Weekly C65 (Fla. 9th Cir. Ct. Nov. 7, 1990)~~*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. March 5, 1991). If not therein, cite to the slip opinion: ~~*State v. Campeau*, No. 90-4363 (Fla. 9th Cir. Ct. Nov. 7, 1990)~~*Jones v. City of Ocoee*, No. CVAI-93-18 (Fla. 9th Cir. Ct. Dec. 9, 1996).

(d)–(h) [No change]

(i) Florida Rules.

Fla. R. Civ. P. 1.180. Fla. R.

Civ. P. – S.V.P. 4.010.

Fla. R. Jud. Admin. 2.110.

Fla. R. Crim. P. 3.850.

~~Fla. R. Work. Comp. P. 4.113.~~

Fla. Prob. R. 5.120.

Fla. R. Traf. Ct. 6.165.

Fla. Sm. Cl. R. 7.070.

Fla. R. Juv. P. 8.070.

Fla. R. App. P. 9.100.

Fla. R. Med. 10.100.

Fla. R. Arb. 11.010. Fla.

Fam. L. R. P. 12.010.

Fla. Admin. Code R. 62D-2.014.

R. Regulating Fla. Bar 4-1.10.

Fla. Bar Found. By-Laws, art. 2.19(b).

Fla. Bar Found. Charter, art. III, §3.4.

Fla. Bar Integr. R., art. XI, §11.09.

Fla. Jud. Qual. Comm'n R. 9.

Fla. Std. Jury Instr. (Civ.) 601.4.

Fla. Std. Jury Instr. (Crim.) ~~2.03~~3.7.

~~Fla. Std. Jury Instr. (Crim.) Robbery.~~

Fla. Stds. Imposing Law. Sancs. 9.32(a).

Fla. Bar Admiss. R. 3-23.1.

(j)–(p) [No change]

Ms. Moses pointed out some typographical errors that need to be corrected, including that in subsection (c)(3), where it states *State v. Ruoff*, the 17 should not be italicized; there should be a period after the close parenthetical after 2010;

March should be abbreviated to “Mar.”; the “v.” should be italicized in all three citations.

Judge Pecko indicated that there are now administrative rules in the code that have replaced the rules of worker’s compensation – referred to as Rules 60 Q.

Chair Moses called a vote to the revisions to Rule 9.800, with the revisions proposed and accepted during the meeting. If accepted, the issue raised by Judge Pecko would be referred back to the subcommittee to be revised accordingly.

Vote: 44 for; 0 against; 0 abstain.

APPELLATE COURT RULES COMMITTEE
Minutes of Meeting
Friday, June 22, 2012

Rule 9.310(b)(1)—Stays of Money Judgments Pending Review

This one was referred back to subcommittee by John Crabtree involving amendment of the rule to deal with situations when have a pure money judgment, specifically, whether there is any way to stay other than by posting the bond. The third and fourth have said no. Subcommittee proposed that language be adopted incorporating this approach to the rules and also voted to send an alternative approach, which is what got referred back.

Ms. Berman referred committee to pages 5-6 of agenda where proposed alternative rule revision is set forth. It was sent back to committee for consideration of some sort of standard as to discretion of court as to these types of stays, which is what has been added. Mr. Hamilton emphasized that the vote is not as to whether to recommend this, only as to recommend this as an alternative and that this alternative approach was drafted to embody the decision of the 2d DCA as far as the discretion it found was appropriate as to the stay.

New Draft Rule 9.310 #2 (following the Second District):

RULE 9.310. STAY PENDING REVIEW

(a) Application. Except as provided by general law and in subdivision (b) of this rule, a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief. A stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both.

(b) Exceptions.

(1) Money Judgments.

(A) If the order is a judgment solely for the payment of money, a party may obtain an automatic stay of execution pending review, without the necessity of a motion or order, by posting a good and sufficient bond equal to the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest.

Multiple parties having common liability may file a single bond satisfying the above criteria.

(B) If the order is a judgment solely for the payment of money and a party does not obtain an automatic stay of execution pending review as provided in subdivision (b)(1)(A) of this rule, a party may file a motion as provided in subdivision (a) of this rule seeking a stay of execution pending review. The lower tribunal may, in its discretion and upon a showing by the moving party of extraordinary circumstances that excuse compliance with subdivision (b)(1)(A) of this rule, enter a stay pending review that must be conditioned on the posting of a good and sufficient bond, other conditions, or both.

(2) [No change]

(c)–(f) [No change]

Mr. Solomon said that it makes no sense and no precedent to submit alternatives. Mr. Reiter agreed and said that unless court directs us to come up with alternative, the committee should not do this. Mr. Hamilton said that this vote was solely as to whether to submit this alternative as the broader subject of whether to submit an alternative was voted on at last committee meeting.

Ms. Norse questioned whether there would be a different vote on the first part had there not been the idea to have an alternative. Mr. Regensdorf said that since the committee doesn't have a formal referral, what the committee has one is address a problem and then proposing alternatives to the supreme court as to what the supreme court prefers. It has already been decided that the preferred alternative is the first one and that was voted on. The rule is that you must post a bond in a certain amount to get a stay, but since have a court that has ruled completely to the opposite, are proposing an alternative.

Chair Moses explained that the Parliamentarian said that a party who vote in favor of the winning vote at the last meeting can move to reconsider, which can be seconded, and then reconsidered. Mr. Regensdorf explained previous discussions and resolutions of the matter. Mr. Hamilton again said that voting against the alternative is not whether members think that alternatives should be submitted or not.

Ms. Eagan said that, to be clear, what will be submitted is both what was voted on last time as the first alternative and the second one being presented now together.

Chair Moses called for a vote on the alternative language on page 6 of the agenda, above, to be presented to the court.

This proposal is ready for a vote by the full ACRC: 43 for; 2 opposed; 1 abstain.

Rule 9.400(a)—Due Dates for Motions for Appellate Costs:

Mr. Hamilton explained that this is the second one that was referred back to the subcommittee. He explained that the problem is that the current rule says that filing of motion for appellate costs is tied to mandate but many appellate proceedings are resolved without a mandate and the rules do not address those situations. The amendment seeks to address all such types of appellate proceedings. Some revisions were approved last time, but the amendment was sent back to subcommittee to address situations in which mandates are stayed or recalled and also timing issues.

Mr. Regensdorf explained that there are three points – 1) 30 is changed to 45 days; 2) tied to rendition of order not mandate; and 3) addressing what happens if court makes an order affecting a mandate issued.

RULE 9.400. COSTS AND ATTORNEYS' FEES

(a) Costs. Costs shall be taxed in favor of the prevailing party unless the court orders otherwise. Taxable costs shall include

(1) fees for filing and service of process;

(2) charges for preparation of the record;

(3) bond premiums; and

(4) other costs permitted by law.

Costs shall be taxed by the lower tribunal on a motion served ~~within 30~~ no later than 45 days after ~~issuance of the mandate~~ rendition of the court's order. If an order is entered either staying the issuance of or recalling a mandate, the lower tribunal is prohibited from taking any further action on costs pending the issuance of a mandate or further order of the court.

Ms. Armas explains that where proposal says rendition of the court's order, it should be clarified to include appellate. Mr. Regensdorf said that court is usually a reference to the appellate court and lower court is the term used for lower tribunal. Mr. Hamilton agrees and says that if the amendment is to be accepted, it would have to be done across all the rules.

Mr. Solomon inquires as to whether 30 days is not more consistent with the general rule and consistent with the rest of rules. Mr. Hamilton explained that if give 30 days, the rule actually would be reducing the amount of time that party otherwise would have to file. Mr. Regensdorf explained that the number of days included is to maintain such timing consistent with current amount of time given.

Mr. Swanke raised question as to what "rendition" means. Ms. Eagans stated that rendition is defined but that acknowledged ambiguity. Ms. Wheeler says that rendition is defined in Rule 9.020. Rendition rule talks about rendition generally and rendition in other rules.

Mr. Swanke made a suggestion to insert "final" before order in first sentence after the use of the term rendition. Mr. Caldevilla says that, by necessity, party only gets costs at end of the case if it is a prevailing party so it is obvious either way. Mr. Hamilton is willing to take amendment or not. Mr. Regensdorf agreed that addition of final is ok as it means the same thing, but that looking at rules as a whole, rules generally do not specify "final" when talking about orders of this type, such as the rehearing rule and the mandate rule and concludes that he does not see the need for the revision in this case.

Ms. Moses called a vote on changes on page 7 of the agenda to Rule 9.400

Chair Moses called a vote on the proposal by the full ACRC: 43 for; 4 opposed; 0 abstain.

Rule 9.130(a)(4)—Appeals of Nonfinal Orders Rendered After Final Order:

Issue being considered is appeals from post-judgment orders, specifically, second sentence of Rule 9.130(a)(4). Extensive research as to all cases issued under this rule have been analyzed and neither the courts nor the sentence make sense.

Mr. Nutt explained that the question of what "an authorized motion" means and the cases interpreting that language do not lead to an obvious answer. Fifth

District takes it literally as to final orders. The Fourth DCA has rejected this and said that have to tie it to something that will escape review. If a non-final order, it always contemplates a later order or otherwise it is final. By removing sentence, would remove some orders from review as interpreted in 5th, but not otherwise.

Mr. Reiter asks whether this would convert a motion to set aside a foreclosure sale into a final or whether it would be reviewable under certiorari petition or what would be procedure? If it is denied it is final, if it is granted, then it would not be reviewable then until whole proceeding is resolved. Mr. Nutt explains that reviewability would be changed under this circumstance, but would bring in line to other instances, such as defaults. Mr. Nutt explains that revisions would treat post-judgment proceedings the same as prior final orders.

Mr. Hamilton explains that all orders are going to fall under one of three categories and, in the context of post-judgment orders, all DCA's except the 5th have said either orders are final or not and appeal as such and this language is irrelevant. Post-judgment orders should not be treated differently as to finality. Mr. Nutt further indicates that if there is anything that is going to escape review, always have certiorari review.

Ms. Berman said that committee struggled with why this language existed and it occurred to her that, in proceedings supplementary, have no remedy unless these orders are appealable. Mr. Reiter said that in lower tribunals should only have one final order and that the reason the language exists is so that you are not re-defining when final orders are entered and that there are not supposed to be successive final judgments and matters should end. Method needs to exist for review of these orders.

Ms. Berman explained that subcommittee looked and that no one uses this language for anything other than limited category in 5th DCA. Mr. Nutt made reference to example in comments where reference is made to a default judgment.

Ms. Gunn asked how it got in the rule to begin with. Mr. Nutt explained that whatever it may have been, it is not being used.

Mr. Hamilton explained that there are multiple final orders in cases all the time, with the most common example being final judgment and final costs and fees order. He explained that, as to escaping review, and that under every case decided under the rule, except in the 5th, there was some method of reviewing all of these orders. It was explained that note is being reviewed and will be ready for review at next meeting

Ms. Moses called the language on page 8 of the agenda to vote.

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

(a) Applicability.

(1)–(3) [No change]

(4) ~~Non-final o~~Orders ~~entered after final order on~~ disposing of motions that suspend rendition are not reviewable separately from a review of the final order; provided that orders granting motions for new trial in jury and non-jury cases are reviewable by the method prescribed in rule 9.110. ~~Other non-final orders entered after final order on authorized motions are reviewable by the method prescribed by this rule.~~[1]

(5)–(6) [No change]

(b)–(h) [No change]

The result of the vote by the full ACRC is: 36 for; 11 opposed; 0 abstain.

Rule 9.600(a)—Concurrent Jurisdiction of Appellate Court and Lower Tribunal.

Mr. Hamilton briefly introduced the issue. Mr. Reiter then stated that the issue here is certain aspects of jurisdiction not addressed in Rule 9.600 (a). The issue involves a struggle as to the distinction between record being transmitted and the record being docketed, after which he read the proposal.

Mr. Caldevilla inquired as to whether "thereafter" means that leave of court is required. Mr. Reiter explained that the word thereafter explains that leave of court is not required. Mr. Caldevilla suggested that a comma be added after "and" and after thereafter. Mr. Gyden proposes to take out "while the appeal is pending". Mr. Solomon asks what "if after notice" means and whether it is necessary. This was carried forward from Rule 9.540. Mr. Regensdorf explains that the notice

[1] The amendments indicated by underline and strikethrough were approved by the Committee in the June 2011 meeting and are only provided for information. The amendments marked in doublestrike through were approved by the Subcommittee and are now before the Committee for consideration and approval:

provision is in there so that the court does not act on its own. A suggestion was made that it can be fixed by moving the word notice to another portion of the rule.

Ms. Wheeler explains that it is already in the rule.

Mr. Gillen explained that, in existing rule, trigger is transmission of record and what the proposal is trying to do is to take language from the civil rule and make it consistent with this rule. A question was raised as to consistency with our own Rules. Ms. Wheeler answered that if going to incorporate Rule 1.540 of the Civil Procedure rules, should use the language they use. May be something we want to refer to civil procedure rules committee to make consistent.

Mr. Solomon suggested that instead of "transmitted," it should make reference to "docketed,' which would be more consistent with electronic filing. Mr. Gyden suggested that use of the word was for court convenience.

Chair Moses proceeded to read the Rule as amended during the course of the discussions of the committee.

RULE 9.600. JURISDICTION OF LOWER TRIBUNAL PENDING REVIEW

(a) Concurrent Jurisdiction. Only the court may grant an extension of time for any act required by these rules. Before the record is ~~transmitted~~ DOCKETED, the lower tribunal shall have concurrent jurisdiction with the court to render orders on any other procedural matter relating to the cause, subject to the control of the court, provided that clerical mistakes in judgments, decrees, or other parts of the record arising from oversight or omission may be corrected by the lower tribunal on its own initiative AFTER NOTICE or on motion of any party ON MOTION OF ANY PARTY before the record is docketed in the court, and, thereafter ~~while the appeal is pending~~ with leave of the court.

(b)–(d) [No change]

Chair Moses called for a vote by the full ACRC: 47 for; 1 opposed; 0 abstain.

Ms. Wheeler explains that voted against it because creates inconsistency between state rule and appellate rule.

Mr. Regensdorf suggest putting a comma after court and before and thereafter. Mr. Hamilton agrees and passes by acclamation as friendly amendment.

Rule 9.410(b)—Certificates of Service in Motions for Sanctions Under Section 57.105

Current rule essentially requires service twice. Current proposal tries to implement that. Tom Hall indicated that was somewhat confusing and that language needed to be cleaned up and clarified.

Mr. Byden further added that there was confusion as to certificate of filing versus certificate of service – when served on other party served certificate of service, but certificate of filing when filed with court, so amended rule in subparagraph (3) to try to address this and try to clarify that should provide a filing with a motion that reflects initial service and changes to sub (4) to change from 30 to 45 days, whichever is later, because the rule only gave you 30 days, which was inconsistent with 21 safe harbor of the statute so change to 45 days is intended to still give the safe harbor and give more than 9 days to get motion in such that it would be considered timely.

Chair Moses called for discussion. Ms. Wheeler suggests making revision to rule consistent with Supreme Court ruling on e-filing. Chair Moses says will do a global review and called a vote on suggestions on pages 10 and 11 of agenda.

RULE 9.410. SANCTIONS

(a) [No change].

(b) Motion by a Party.

(1) Applicability. Any contrary requirements in these rules notwithstanding, the following procedures apply to a party seeking an award of attorneys' fees as a sanction against another party or its counsel pursuant to general law.

(2) Proof of Service. A motion seeking attorneys' fees as a sanction shall include an initial certificate of service, pursuant to rule 9.420(d) and subdivision (3) of this rule, and a certificate of filing, pursuant to subdivision (4) of this rule.

(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 or, if no response is permitted as of right, within 15 days after a challenged paper 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) and that reflects service pursuant to this subdivision shall accompany the motion and shall be taken as prima facie proof of the date of service pursuant to this subdivision. ~~The~~ A certificate of filing pursuant to subdivision (4) of this rule shall also accompany the motion, but should remain undated and unsigned at the time of initial service pursuant to this subdivision.

(4) Filing and Final Service. If the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected within 21 days after initial service of the motion under subdivision (3), 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~~ 45 days after initial service of the motion, whichever is later.

The movant shall serve upon all parties a copy of the motion filed with the court. A certificate of ~~service of that copy~~ filing, which complies in substance with the form below, and which shall be dated and signed at the time of final service pursuant to this subdivision, shall be taken as prima facie proof of such final service.

I certify that on (date) ___, 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. _____

(5) Response. A party against whom sanctions are sought may serve 1 response to the motion within 10 days of the final service of the motion. The court may shorten or extend the time for response to the motion.

Chair Moses called a vote by the full ACRC: 46 for; 0 opposed; 0 abstain.

Rule 9.350—Voluntary Dismissals

Issue arose out of the supreme court decision Pino involving voluntary dismissals. Question was whether amendments were needed in order to incorporate issues in case law, such as non-self-executing nature of such filings and ability of court not to accept them, among other things.

Subcommittee reported that issue was looked at closely and ultimately supported suggestion of amendment that would allow for automatic stay in the event of a voluntary dismissal due to language in a committee note that said that a clerk will dismiss in the event of a voluntary dismissal, which created ambiguity. Rule should be clear that it applies equally to DCA and to Supreme Court. Also amendment to rule is meant to make sure that there were correct expectations of parties reading rule.

Mr. Hamilton clarified that modification just incorporates what the law is and does not really change the law.

Mr. Carlyle asked whether it was considered whether the committee note could be changed to change the committee note to say clerk "will" dismiss the case and inconsistency between committee note and rule. Mr. Hamilton says that committee cannot change committee notes and Mr. Lean explained that since could not remove prior language, this was best we could do in light of Supreme Court and prior precedent.

RULE 9.350. DISMISSAL OF CAUSES

(a)–(c) [No change]

(d) Automatic Stay. The filing of a stipulation for dismissal or notice of dismissal automatically stays that portion of the proceedings for which a dismissal is being sought, pending further order of the court.

Committee Notes

2012 Amendment. The addition of subsection (d) clarifies that the filing of a stipulation or notice of dismissal does not itself dismiss the cause, while now providing for an automatic stay once a stipulation or notice is filed. The

amendment is intended to limit any further litigation regarding matters that are settled or may be voluntarily dismissed, until the court determines whether to recognize the dismissal.

Chair Moses called to vote by the full ACRC: 44 for; 2 opposed; 0 abstain.

Rule 9.720—Appellate Mediation

Proposal to amend rule arose due to changes to civil rule on mediation and it was suggested to us that similar revision should be made to appellate rules.

Ms. Gunn explained that changes to civil rules was definition of full authority to settle and to require certification by attendees that they have full authority to settle. To make consistent with this, proposal appears on page 13 of the agenda, as set forth below as (f) and (g). There are requirements in state rule that are not in appellate rule and proposal is not requiring those further strictures in the appellate rules.

Mr. Caldevilla explains that does not address governmental entities that are subject to the Sunshine Law. Ms. Gunn states that (a) refers to public entities and that that portion was not amended.

Mr. Ufferman notes whether committee note should be subdivision instead of subsection, with which Mr. Hamilton agreed.

Mr. Gyden wonders whether committee note should reference case from Supreme Court which Chair Moses indicated is something Krys can change.

Mr. Regensdorf indicated that should keep in mind that many of recent changes to mediations are being proposed by mediators not practitioners and need to be vigilant of that.

RULE 9.720. MEDIATION PROCEDURES

(a)–(e) [No change]

(f) Party Representative Having Full Authority to Settle. Except as provided in subdivision (a) as to public entities a "party or its representative having full authority to settle" shall mean the final decision maker with respect to all issues presented by the case who has the legal capacity to execute a binding

settlement agreement on behalf of the party. Nothing herein shall be deemed to require any party or party representative who appears at a mediation conference in compliance with this rule to enter into a settlement agreement.

(g) Certification of Authority. Unless otherwise stipulated by the parties, each party, 10 days prior to appearing at a mediation conference, shall file with the court and serve upon all parties a written notice identifying the person or persons who will be attending the mediation conference as a party representative or as an insurance carrier representative, and confirming that those persons have the authority required by THIS RULE ~~subdivision (f)~~.

Committee Note

2012 Amendment. The amendment adding subdivision (f) and (g) is intended to make this rule consistent with the November 2011 amendments to Florida Rule of Civil Procedure 1.720.

Ms. Boreant had a question as to a stylistic point and it was explained.

Mr. Sanchez brought up the issues as to governmental entities and Mr. Caldevilla said that perhaps the beginning of subsection (f) can state "except as provided in subsection (1)" and Ms. Gunn indicated that current language does not change the way governmental entities are addressed. Mr. Lien further indicated that the terminology used for representatives and the like is ambiguous in its applicability to governmental entities and officials. Ms. Gunn explained that it is addressed in state court.

Mr. Korn says that if civil rule is flawed, there is no reason to make our rule consistent with flawed state court rule. Mr. Sanchez clarifies that (f) and (g) only modifies what is set forth in (a)(1) as far as to definition, though he has some concern as to treatment of governmental entities. Ms. Gunn suggests adding a sentence as to the issue in the committee notes. Mr. Lean asks whether governmental entities then would only have to comply with (a).

Mr. Korn offers friendly amendment of addition of "upon" to subsection (g), which was accepted.

Chair Moses read rule as it reads as amended.

Ms. Russell raises issues as to Ms. Gunn's proposed friendly amendment to subdivision (g) to make reference to "this rule," instead of the prior subsection.

Chair Moses called proposal for a vote by the full ACRC: 45 for; 1 opposed.

9.420(f)(2)

It was brought to the attention of the committee that Josh Heller is on the phone with us and brought the prisoner mail box rule inconsistency with mail box rule to attention of committee. Mr. Hamilton offered to help and they have met on this again for further consideration and reached a good working copy with great language as to various changes that are being submitted for approval. Mr. Greenberg thanked committee members for contribution to issues.

Chair Moses asked whether there was any discussion on what is set forth in pages 14 of agenda.

The proposed modified language to the Rule and the notes are as follows:

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

(a) Filing.

(1) [No change]

(2) Inmate Filing. ~~A document filed by a pro se inmate confined in an institution is timely filed if the inmate places the document in the hands of an institution official for mailing on or before the last day for filing. Such a document shall be presumed to be timely filed if it contains a certificate of service certifying that the inmate placed the document in the hands of an institution official for mailing on a particular date, and if the document would have been timely filed had it been received and filestamped by the court on that date.~~The filing date of a document filed by a pro se inmate confined in an institution shall be presumed to be the date it is stamped for filing by the clerk of the court, except as follows:

(A) The document shall be presumed to be filed on the date the inmate places it in the hands of an institutional official for mailing if the institution has a system designed for legal mail, the inmate uses that system, and the institution's system records that date, or

(B) The document shall be presumed to be filed on the date reflected on a certificate of service contained in the document if the certificate is in

substantially the form prescribed by subdivision (d)(2) of this rule and either: (i) the institution does not have a system designed for legal mail; or (ii) the inmate used the institution's system designed for legal mail, if any, but the institution's system does not provide for a way to record the date the inmate places the document in the hands of an institutional official for mailing.

(b)–(f) [No change]

Committee Notes

1977-1980 [No change]

2012 Amendment. Subdivision (a)(2) has been completely rewritten to conform this rule to *Thompson v. State*, 761 So. 2d 324 (Fla. 2000), and the federal mailbox rule adopted in *Haag v. State*, 591 So. 2d 614 (Fla. 1992). The amendment clarifies that an inmate is required to use the institutional system designed for legal mail, if there is one, in order to receive the benefit of the mailbox rule embodied in this subdivision. If the institution's legal mail system records the date the document is provided to institutional officials for mailing (e.g., Rule 33-210.102(8), Florida Administrative Code (2010)), that date is presumed to be the date of filing. If the institution's legal mail system does not record the date the document is provided to institutional officials—or if the institution does not have a system for legal mail at all—the date of filing is presumed to be the date reflected on the certificate of service contained in the document, if the certificate of service is in substantial conformity with subdivision (d)(2) of this rule. If the inmate does not use the institution's legal mail system when one exists—or if the inmate does not include in the document a certificate of service when the institution does not have a legal mail system—the date the document is filed is presumed to be the date it is stamped for filing by the clerk of the court.

Chair Moses called the proposal for a vote by the full ACRC: 44 for; 0 opposed; 0 abstain.

Rule 9.200 - Mr. Gyden explained the reason for the amendment to the committee note and reads the suggested committee note. Supreme Court decision yesterday may address some of these issues, though this committee note is meant to clarify not change any law.

Chair Moses asked whether recent opinion would have effect on this rule or note. Ms. Wheeler indicated that she was not sure.

Mr. Solomon indicated he is opposed to clarification by comment and that if unclear in Rule, then should amend rule and that the committee note makes no difference.

Chair Moses asserted Chair's prerogative based on recent Supreme Court opinion to defer pending consideration of recent Supreme Court opinion. Ms. DiFiore indicated that in Orange County they are scanning papers and that it is still a problem on appeal, still requiring supplements to record on appeal.

Mr. Gyden thanks his subcommittee for great work and contribution.

Tom Hall indicated that what will happen with record as far as electronic filing is not clear yet and likely will be decided on by various groups before it comes back to the subcommittee.

Addition of Committee Note to Rule 9.200

RULE 9.200. THE RECORD

(a)–(g) [No change]

Committee Note

1977–2006. [No change]

_____ Amendment. The phrase ―all exhibits that are not physical evidence in subdivision (a)(1) is intended to encompass all exhibits that are capable of reproduction, including, but not limited to, documents, photographs, tapes, CDs, DVDs, and similar reproducible material. Exhibits that are physical evidence include items that are not capable of reproduction, such as weapons, clothes, biological material, or any physical item which cannot be reproduced as a copy by the clerk's office.

Amendment of Rule 9.180(b)(3), to bring into conformity with section 440.25(4)(e).

Ms. Loquasto explained that there is one issue on the agenda. There was a concern as to whether the office of compensation claims was not rendering certain orders as to make them final in the context of electronic filing. Since then, Section 440.25(4)(e) was amended by the legislature and it was proposed that the

committee might want to amend the rules, which the subcommittee unanimously agreed with and approved.

Mr. Berman indicated that she did not like phrase "sends to" and indicated whether it should be "served on". The proposed amendment was rejected by Ms. Loquasto.

RULE 9.180. APPEAL PROCEEDINGS TO REVIEW WORKERS' COMPENSATION CASES

(a) [No change]

(b) Jurisdiction.

(1)–(3) [No change]

(3) Commencement. Jurisdiction of the court shall be invoked by filing ~~two copies of~~ a notice of appeal with the lower tribunal, accompanied by the filing fee prescribed by law unless a verified petition for relief from payment of the fee has been filed with the lower tribunal, within 30 days of the date the lower tribunal sends to the parties the order to be reviewed ~~is mailed by the lower tribunal to the parties~~ either by mail or by electronic means approved by the deputy chief judge, which date shall be the date of rendition.

(4) [No change]

(c)–(i) [No change]

Committee Notes

[No change]

Chair Moses called the proposal for a vote by the full ACRC: 46 for; 0 opposed; 0 abstain.

Chair Moses explained that when a suggestion is made by a non-member, the referring individual needs to be written and told what happened with the referral. It need not be lengthy, but we do have to let the referrers know what we are doing. This is the case when it comes to members of the bar who are not involved in process, including Mr. Hall.

Rule 9.110(*l*), Mr. Hamilton explained that the question had been whether, in the case of a notice of appeal having been prematurely filed before rendition of the final order sought to be appealed, the appellant was required to seek relinquishment of jurisdiction from the appellate court in order to allow the lower tribunal to enter the final order. He reported that the Subcommittee had reviewed all case law on the issue and concluded that relinquishment was not required. The proposed amendment, which adds a reference to rule 9.020(h) at the outset, adds a specific statement that the lower tribunal retains jurisdiction to render a final order, modifies the last sentence in the rule to permit the lower tribunal to extend the time to obtain the final order, and adds a Committee Note comment.

As to **rule 9.020(h)(3)**, Mr. Hamilton explained the proposed amendment jettisons the current rule that the filing of a notice of appeal abandons all motions filed by the appellant that are still pending at the time the notice is filed, which was a referral from John Mills. The proposed amendment, which appears on pages 8-9 of the agenda, adopts the federal rule for temporary abeyance of appeal until motion is ruled on.

Subcommittee Member Elliott Kula, one of those who undertook initial responsibility on the rule **9.110(*l*)** referral, commented that the referral had been thoroughly discussed by the Subcommittee members, including Frances Guasch De La Guardia, Debbie Klauber, and Betty Wheeler, as indicated in Item C in Mr. Hamilton's September 4, 2012, Subcommittee Report (see pages 53-55 of the agenda.) An amazing memorandum that went through all case law pertaining to relinquishment of jurisdiction had been submitted and considered. Mr. Kula explained that there was a lot of resistance to the proposal even though it was well supported by the law. The Subcommittee ultimately concluded that it was neither necessary nor appropriate to request relinquishment from appellate court and that the proposed language begins at the bottom of page 5 of the agenda. Mr. Kula explained that the proposal carves out rule 9.020(h), which is a distinct kind of appeal; specifically states that the trial court retains jurisdiction to render a final order; and allows the grant of additional time to obtain the final order.

Chair Michael Ufferman summarized that the ACRC has two proposals to act on: First, the proposed amendment on agenda pages 5-6 on the premature appeal rule 9.110(l), and then the proposed amendment on pages 7-9 of the agenda

pertaining to the abandonment of post-judgment motions in rule 9.020(h)(3). He then called for discussion.

Subcommittee Member Craig Leen opened discussion on the second proposal to rule 9.020(h)(3) with concern about the phrase "rendered as to any party" by questioning whether there were times when a party is dismissed early with prejudice from the case and the time for appeal runs as to that party at that time. Then when the final order is later entered to another party, which closes the case, can that case be interpreted to be reopened for the first party who was dismissed in that the proposal states "rendered as to any party"?

Mr. Hamilton responded that he did not think so because once the case is dismissed with prejudice, that person is no longer a party to litigation. Moreover, rule 9.110(k) has specific language about appealing as to one party, so he did not think so.

Committee Member Angela Flowers commented that she understands Florida Rule of Civil Procedure 1.540 allows one year to take certain actions, so a dismissed party is still a party. Subcommittee Chair Hamilton responded that it was fair to say the dismissed party was still a party.

Committee Kristin Norse suggested that the proposed amendment could be altered to add the word "remaining" to describe "party, so it would read "rendered as to any remaining party."

Chair Ufferman read the proposal, as amended by Ms. Norse, and asked for comments by Subcommittee Chair Hamilton and Mr. Leen. Mr. Leen suggested using the word "existing," as opposed to "remaining." Committee Member Jim Nutt then pointed out that use of the word "existing" does not address attorney's fees, and he proposed use of the word "current" as better language when one considers attorney's fees. Vice Chair Ed Sanchez then commented that rule 9.020 defines "party," which includes appellant, appellee, respondent, and petitioner, and includes parties whether they file in the appeal or not. Therefore, Mr. Sanchez offered that adding the word "existing" or "current" may not take care of problem. Chair Ufferman returned to Subcommittee Chair Hamilton to determine if he accepted any of the proposed language as a friendly amendment to the proposal. He did not believe either was necessary, but he had no problem with either "existing" or "current." His preference, however, was for "existing" and he was willing to accept that as a friendly amendment.

Chair Ufferman then called for a vote in favor of the proposed amendment to **rule 9.020(h)**, with the addition of the word "existing" to the phrase "rendered as to the existing party" in the second line of **rule 9.020(h)(1)**. Bar Liaison Heather Telfer and Vice Chair Sanchez counted the vote in the room; those appearing by phone then voted (Committee Members Northcutt, Daiker, Serafin, and Shelley voted yes and Members Wetherell, Reiter, and Shea voted no).

RULE 9.020. DEFINITIONS

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

(a)-(g) [No change.]

(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) If such a motion or motions have been filed, the final order shall not be deemed rendered <u>as to any existing party</u> ~~with respect to any claim between the movant and any party against whom relief is sought by the motion or motions~~ until the filing of a signed, written order disposing of ~~all~~ <u>the last of</u> such motions ~~between such parties~~.

(2) If such a motion or motions have been filed, a signed, written order granting a new trial shall be deemed rendered when filed with the clerk, notwithstanding that other such motions may remain pending at the time.

(3) If such a motion or motions have been filed and a notice of appeal is filed before the filing of a signed, written order disposing of all such motions, ~~all motions filed by the appealing party that are pending at the time shall be deemed abandoned, and the final order shall be deemed rendered by the filing of the notice of appeal as to all claims between parties who then have no such~~

~~motions pending between them. However, a pending motion to correct a sentence or order of probation or a motion to withdraw the plea after sentencing shall not be affected by the filing of a notice of appeal from a judgment of guilt. In such instance, the notice of appeal shall be treated as prematurely filed and~~ the appeal shall be held in abeyance until the filing of a signed, written order disposing of the last such motion.

(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~~ withdrawn or resolved by the filing of a written order.

THE FINAL VOTE COUNT WAS 45 IN FAVOR, 3 AGAINST, WITH NO ABSTENTIONS, AND THE PROPOSED AMENDMENT TO RULE 9.020(h), AS AMENDED, WAS PASSED.

Rule 9.110(*l*) Next, Chair Ufferman called for a vote in favor of the first proposal by the Subcommittee on page 5 of the agenda, pertaining to rule **9.110(*l*)** and premature appeals. Bar Liaison Telfer and Vice Chair Sanchez counted the vote in the room; those appearing by phone then voted (Committee Members Northcutt, Wetherell, Daiker, Serafin, and Shelley all voted yes; Reiter, who asked if the vote pertained to the Committee Note, to which Chair Ufferman responded negatively, voted no; and Shea was not present at the time of the vote).

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

(a)-(k) [No change.]

(*l*) Premature Appeals. Except as provided in rule 9.020(h), i~~I~~f a notice of appeal is filed before rendition of a final order, the appeal shall be subject to dismissal as premature. However, the lower tribunal retains jurisdiction to render a final order, and if a final order is rendered before dismissal of the premature appeal, the premature notice of appeal shall be considered effective to vest jurisdiction in the court to review the final order. Before dismissal, the court in its discretion may ~~permit the lower tribunal to render~~ grant the parties additional time to obtain a final order from the lower tribunal.

(m)-(n) [No change.]

Committee Notes

2012 Amendment. This amendment is intended to clarify that it is neither necessary nor appropriate to request a relinquishment of jurisdiction from the court to enable the lower tribunal to render a final order.

THE FINAL VOTE COUNT WAS 46 IN FAVOR, 1 AGAINST, AND NO ABSTENTIONS, AND THE PROPOSED AMENDMENT TO RULE 9.110(l) WAS PASSED.

Rule 9.130(f) — Jurisdiction of Lower Tribunal While Appeals From Non-final Orders Are Pending, which appears on page 9 of the agenda, Subcommittee Chair Hamilton explained that this provision currently provides that, in the absence of a stay, the lower tribunal has jurisdiction to do anything but enter a final order while the appeal is pending. The lower tribunal can, however, enter a final order if the DCA gives authority to do so, yet there is no such authority expressly stated in the rule. The Subcommittee therefore proposed amending the rule to specifically allow lower tribunals to enter final orders while the appeal is pending when there is leave of court to do so.

Chair Ufferman called for discussion.

Committee Member Kim Ashby stated opposition to the amendment by commenting that the rule was not broken and did not need fixing. She explained that she has served on the ACRC for a long time and often votes against proposals when the rules aren't broken. She said that when you make changes to the rules, it gives the impression that the rule is broken, so she errs on side of no amendment.

Subcommittee Chair Hamilton stated that this amendment is based in reality in that it was a referral that arose is a case in which an ACRC member had an issue and there was a question about whether the trial court could enter the final order. Thus, it was his position that the rule is unclear and needs amending — the rule is unclear because the questions arose in a real, live case.

Committee Member Craig Leen questioned whether it would be useful when there is an appeal from a non-final order that should be consolidated with an appeal from a final order, because it would give authority to allow entry of the final order so the two appeals can be consolidated and promote judicial efficiency.

Committee Member Kristin Norse expressed concern that changing the rule will encourage people to ask for leave of court for entry of a final order. Currently,

the court has discretion to allow final orders to be entered, but the amendment would suggest that seeking leave for entry of final orders is approved.

Subcommittee Chair Hamilton question how much does this occur. He offered that it would not be often that proceedings in the trial court will reach this stage without a final order being entered. Is there a reason to have a non-final appeal sit and wait the final order appeal? There are often good reasons why the final order should be entered to allow review of both the final and non-final orders at one time. He did not see floodgates of motions for entry of final orders, because the scenario does not arise often. Plus, DCAs can say no.

Ms. Norse offered that such requests could often happen in contentious divorce cases. The non-final is fully teed up and ready for appeal, but the proposal will encourage delay of those non-final appeals so a final order can be obtained.

Committee Member Lance Curry questioned the use of the phrase "lower tribunal" in the rule and whether we needed to add "appellate" to "absent leave of the [appellate] court" to distinguish between the courts for clarity.

Subcommittee Chair Hamilton responded negatively. The rules clearly define "court" as meaning the appellate court, so that is implied in the rule. If a change to "appellate court" is needed, it should be done on a whole-scale basis, not piecemeal in isolated rules.

Committee Member Angela Flowers noted rule 9.600(c)(1) already addresses the lower tribunal's retention of jurisdiction of matters in family law cases.

Mr. Leen offered that there are times when a party is moving against a governmental entity in a time-sensitive case and the proposal recognizes the ability to ask for a final order.

Chair Ufferman called for a vote on the proposed amendment to rule 9.130(f) and Bar Liaison Telfer and Vice Chair Sanchez counted the vote in the room; those appearing by phone (Committee Members Daiker, Northcutt, Reiter, Serafin, Shea, Shelley, and Wetherell all voted yes).

RULE 9.130(F)—JURISDICTION OF LOWER TRIBUNAL WHILE APPEALS FROM NON-FINAL ORDERS ARE PENDING (12-AC-12 (D-3))

(f) Stay of Proceedings. In the absence of a stay, during the pendency of a review of a non-final order, the lower tribunal may proceed with all matters, including trial or final hearing~~:,~~ ~~provided~~ except that the lower tribunal may not render a final order disposing of the cause pending such review absent leave of the court.

THE FINAL VOTE COUNT WAS 43 IN FAVOR, 4 AGAINST, AND 1 ABSTENTION, AND THE PROPOSED AMENDMENT TO RULE 9.130(f) WAS PASSED.

Rule 9.130(b) — List of Appealable Non-final Orders, which appears on pages 9-10 of the agenda, Subcommittee Chair Hamilton summarized the proposal for Committee Member Serafin, who was primarily responsible for the proposal. It was very simple. Rule 9.130 had language concerning appeals from class certifications in one place and appeals from orders denying class certification in another place. In June 2011, the ACRC approved the elimination of subsection (a)(6) and the combination of the two class certification provisions into subdivision (a)(3)(C)(vi). In so doing, the reference to subdivision (a)(6) appearing in subdivision (b) was overlooked and it needs to be eliminated.

Chair Ufferman called for discussion. Committee Member Betty Wheeler noted that the rule continues to provide for the filing of 2 copies of the notice of appeal and she questioned whether we were going to fix that now since appeals are being efiled. Chair Ufferman asked where we were on the full-scale review of the rules based on the efiling changes. Vice Chair Regensdorf offered that we had already done such a review once, but we probably need to do it again. Subcommittee Chair Hamilton said we had talked about it. Chair Ufferman, Kristin Norse, and Sandy Solomon had done this last year, but it needed to be done again because of all the progress with efiling. It was agreed that we needed to consult with RJA as to the status of this work. Chair Ufferman agreed to do so and if something needed to be done, he would contact the Subcommittee Chairs to get the work started. Vice Chair Sanchez questioned if this work would need to be done by the end of the three-year cycle (January 2013), and, if so, he suggested we were way behind. Florida Supreme Court Clerk Tom Hall, a guest who was present at the meeting, reported that the court pushed back all the deadlines last week. A couple of other rules committees had asked the same question. Mr. Hall suggested that it was appropriate to do a scrub of the rules now. For instance, the word "paper" would need to be changed to "document" throughout, and he said it would be a big job that was best to start now. Chair Ufferman reiterated that he will contact RJA to determine if there is a uniform effort in this regard already

underway and to receive directions how best to proceed. He noted, however, that this discussion does not affect today's proposal.

Hearing no other discussion, Chair Ufferman called for a vote on the proposed amendment to **rule 9.130(b)** on pages 9-10 of the agenda, and Bar Liaison Telfer and Vice Chair Sanchez counted the vote in the room; those appearing by phone (Committee Members Daiker, Northcutt, Reiter, Serafin, Shea, Shelley, and Wetherell) all voted yes.

RULE 9.130(B)—LIST OF APPEALABLE NON-FINAL ORDERS (12-AC-12 (F-2))

(b) Commencement. The jurisdiction to seek review of orders described in subdivisions (a)(3)-(a)~~(6)~~(5) shall be invoked by filing 2 copies of a notice, accompanied by any filing fees prescribed by law, with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed.

THE FINAL VOTE COUNT WAS 49 IN FAVOR, 0 AGAINST, AND NO ABSTENTIONS, AND THE PROPOSED AMENDMENT TO RULE 9.130(b) WAS PASSED.

Form 9.900(b) — Cross-Appeal of Non-final Order, Subcommittee Chair Hamilton reported that the ACRC had previously amended 9.130 to authorize cross-appeals in non-final order appeals, but the form for notice of cross-appeal in rule 9.900(b) remains limited to cross-appeals from final orders. Consequently, the Subcommittee developed a form for cross-appeals from non-final orders.

Committee Member Craig Leen, who took primary responsibility for the form, explained that the proposal does not do anything new. It just adds a form for a notice of cross-appeal from non-final orders. If you look at rule 9.990, you will see a form for a notice of appeal, then a notice of cross-appeal, then a notice of appeal from a non-final order, but you don't then see a form for a notice of cross-appeal from a non-final order, rather the rule then goes on with forms for other kinds of appeals and documents. Mr. Leen explained that the proposed form was the same kind of form that currently exists — the same language is used. He also noted that there was no email in the signature block, because that did not appear in any of the other forms currently. A change to include email in the signature block will, however, need to be added eventually. Finally, Mr. Leen noted that the new form would be numbered as 9.900(c)(2) to avoid renumbering all the forms that follow it.

Chair Ufferman called for discussion. Committee Member David Caldevilla opened discussion with a question about whether notices of cross-appeal are filed in the DCAs, rather than in the lower tribunal as indicated by the form. The consensus was that notices of cross-appeal must also be filed in the lower tribunal, which then transmits it to the DCA, just as it does for notices of appeal.

Vice Chair Regensdorf reiterated Committee Member Betty Wheeler's earlier point about reviewing the rules for efiling and Mr. Leen's point about adding email to the signature block by January, and Chair Ufferman indicated that will be part of the communication to RJA.

Committee Member Maria Armas then asked about the style of case, which includes the titles "defendant" and "plaintiff." Subcommittee Chair Hamilton responded that is how all the forms are written, and they tried to model this form like the other forms that are already approved. He acknowledged that a plaintiff can be either an appellant or appellee; same for the defendant. The forms had previously arbitrarily picked the defendant to be the appellant, so that was continued. Vice Chair Regensdorf commented that since the notices are filed in the lower tribunal, it makes sense to use the trial court party designations.

Hearing no other discussion, Chair Ufferman called for a vote on the proposed amendment to form 9.990(c)(2) on pages 10-11 of the agenda, and Bar Liaison Telfer and Vice Chair Sanchez counted the vote in the room; those appearing by phone (Committee Members Daiker, Northcutt, Reiter, Serafin, Shea, Shelley, and Wetherell) all voted yes.

FORM 9.900(B)—CROSS-APPEAL OF NON-FINAL ORDER (12-AC-12 (F-4))

The subcommittee unanimously approved the following proposed amendment:

(c)<u>(1)</u> Notice of Appeal of Non-Final Order.

[No change]

<u>(c)(2) Notice of Cross-Appeal of Non-Final Order.</u>

<u>IN THE . . . . (NAME OF LOWER TRIBUNAL WHOSE</u>

NON-FINAL ORDER IS TO BE REVIEWED)

Case No. _____

_____,		
Defendant/Appellant/ Cross-Appellee,	)	
v.	)	NOTICE OF CROSS-APPEAL OF A NON-FINAL ORDER
_____,	)	
Plaintiff/Appellee/ Cross-Appellant.	)	
_____	)	

NOTICE IS GIVEN that _____, Plaintiff/Cross-Appellant, appeals to the . . . . (name of court that has appellate jurisdiction) . . . ., the order of this court rendered [see rule 9.020(h)] . . . . (date) . . . .The nature of the order is a non-final order . . . . (state nature of the order) . . . . . .

_____

Attorney for . . . . . (name of party) . . . . .
. . . . . (address and phone number) . . . . .
Florida Bar No
. . . . . .

THE FINAL VOTE COUNT WAS 49 IN FAVOR, 0 AGAINST, AND NO ABSTENTIONS, AND THE PROPOSED AMENDMENT TO FORM 9.990(c)(2) WAS PASSED.

Rule 9.400(b) made by Committee Member John Hamilton regarding attorney's fees motions. The Subcommittee approved the amendment to rule 9.400(b) appearing on pages 14-15 of the agenda, which moves the phrase requiring that the motion "shall state the grounds on which recovery is sought" and adds a phrase stating that motions for fees shall be served in original proceedings no later than the time for service of the petitioner's reply. The purpose of the

proposal was to clarify that motions for attorney's fees can be filed in original writ proceedings, not just appeals. He explained that there was an opinion from the Fifth DCA that suggests that motions for attorney's fees cannot be filed in certiorari proceedings, and the proposal would clarify that. The report on this item starts on page 121 of the agenda.

Chair Ufferman called for discussion on the proposal to rule 9.400(b) appearing on pages 14-15 of the agenda. Committee Member Tracy Gunn questioned whether the Subcommittee had considered if motions for fees could be filed before briefing, for example, with a motion to dismiss.

Subcommittee Chair Caldevilla said that he has considered that personally and agrees you can file such motions, but that it is unusual to file motions for attorney's fees before briefing. He said that the Subcommittee did not consider that issue, however, and that it should be considered, although that may be another matter.

Chair Ufferman called for a vote on the proposed amendment to rule 9.400(b) and Bar Liaison Telfer and Vice Chair Sanchez counted the vote in the rule; those appearing by telephone (Committee Members Daiker, Northcutt, Reiter, Shea, Shelley, and Wetherell (Serafin was not present)) all voted yes.

RULE 9.400 COSTS AND ATTORNEYS' FEES
12-AC-21

(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 ~~may~~ be served not later than: (1) in appeals, the time for service of the reply brief ~~and shall state the grounds on which recovery is sought.~~; or (2) in original proceedings, the time for service of the petitioner's reply to the response to the petition. 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 the payment.

THE FINAL VOTE COUNT WAS 47 IN FAVOR, 0 AGAINST, AND NO ABSTENTIONS, AND THE PROPOSED AMENDMENT TO RULE 9.400(b) WAS PASSED.

APPELLATE COURT RULES COMMITTEE
FEBRUARY 22, 2013 MEETING
TAMPA SHERATON EAST, PALM ROOM
10221 PRINCESS PALM AVENUE, TAMPA, FLORIDA
8:00 AM TO 1:20 PM

1. Civil Practice Subcommittee – John Hamilton, Chair

The Subcommittee report and minutes begin on page 78 of the agenda packet.

11-AC-04b – Rule 9.130(a)(4) – Appeals of Nonfinal Orders Rendered After Final Order: This is a referral from John Hamilton that concerned the language in rule 9.130(a)(4) providing that "[o]ther non-final orders entered after final order on authorized motions are reviewable by the method prescribed by this rule." Chair Hamilton reported that the full ACRC previously approved amendments to 9.130(a)(4) and it approved the notion of a committee note. Previous submission of the proposed committee note had, however, been rejected and referred back to the subcommittee for further review and revision. Mr. Hamilton reported that three proposals were suggested, one of which was approved by majority of the subcommittee and it is before the full ACRC for vote. It appears on page 6 of the agenda.

Vice Chair Regensdorf noted that since this was a recommendation by a subcommittee, no motion to approve was required. He called for discussion; there was none.

Vote: Vice Chair Regensdorf then call for a vote: 24 members in the room voted in favor of the proposed committee note, 5 opposed. On the telephone, the 12 members voted in favor. The proposed amendment carried 36 in favor, 5 opposed.

Chair Hamilton reported that the Civil Practice Subcommittee had four other matters that were still pending and would be reported on at the June meeting.

2. Criminal Practice Subcommittee – Michael Greenberg, Chair (appearing by phone)

The subcommittee report and minutes begin on page 131 of the agenda packet.

Criminal Court Steering Committee Add-on: As an add-on to the agenda, Chair Greenberg reported that Criminal Court Steering Committee proposed a rule requiring all attorneys involved in adult felony cases to take a 100-minute CLE course on discovery requirements under Brady and Giglio. That rule was approved and now the question put to the ACRC is whether the rule should be extended to criminal appellate attorneys. This request was referred to the Criminal Practice Subcommittee for its consideration and report to the ACRC. Mr. Greenberg reported that there are 15 members on the subcommittee, 10 of whom responded and were unanimously opposed to extension of the rule to appellate attorneys. He had drafted letter to that effect, but believed, based on the referral source, that it was best that the matter be presented to the full ACRC for consideration and comment.

Vice Chair Regensdorf commented that this was the last add-on to the agenda. He questioned why this CLE rule should be an appellate rule and suggested that the requirement is a matter of professional obligation, perhaps, and he questioned why appellate attorneys need a class on matters that are trial work. Mr. Greenberg concurred with the last statement. He explained that the major comment was that discovery was important to trial attorneys, but not so much for appellate attorneys. He explained that in the 250 criminal appeals he handled while at the Attorney General Office, there was not one case in which discovery was an issue at appellate level. The members of the subcommittee had concurred that discovery issues are not often raised in criminal appeals, and that if and when they were, the appellate attorney's job is to perform all the research to find the current law.

Vice Chair Regensdorf indicated that under the circumstances he was not inclined to put the request to a vote by the full ACRC, but rather suggested that the letter drafted by Mr. Greenberg should be transmitted to Chair Ufferman for him to convey to the Criminal Court Steering Committee. He asked if there was any disagreement with the subcommittee's recommendation or comment.

Mr. Hamilton offered that he has done a lot of criminal appeals, often as *pro bono* appointments, and that he never had to know anything about Brady or Giglio. He also oversees the *pro bono* work done by the Appellate Practice Section, which tries to provide an appellate mentoring experience to someone who volunteers for pro bono cases, which are oftentimes in the Florida Supreme Court. Mr. Hamilton commented that it was tough enough to find someone to handle the cases, hard to even find mentor, and he did not think we needed to add another hurdle for appellate lawyers. He concluded that it was a bad idea.

Maria Armas commented that she also worked as an Assistant Attorney General in criminal appeals and the comment is quite correct. Brady rarely comes up as appellate issue. If it does come up, appellate counsel, are experienced researchers, and can easily find the most current law to resolve the issue.

Kristin Norse commented that Siobhan Shea had made a good point during subcommittee discussion that the rule was so broadly written that she wondered if a comment should be specially included to exclude appellate appeals attorneys.

Tom Hall commented that in death cases, discovery is common issue. He noted that a recent federal court decision reversed a 30-year death row case based on one of those issues. He said there used to be a specific class every year on death cases before the commission went away. But he concurred that appellate lawyers are unique because of the individuality of appellate issues. Appellate lawyers have very little knowledge of any substantive issue, but rather have to educate themselves about the issue through research and discussion with trial counsel. That's what we do.

Vice Chair Regensdorf concluded that the ACRC was generally in favor of Mr. Greenberg's letter, which he would give to Chair Ufferman to submit.

12-AC-13 – Rule 9.141(b)(2)(C) – Review Proceedings in Collateral or Post-conviction Criminal Cases: Chair Greenberg reported that the subcommittee's proposal to amend rule 9.141(b)(2)(C) appeared on page 8 of the agenda. He reported that John Hamilton had sent an email last week with comments to the entire ACRC (a copy of that email is attached to these minutes), but that the subcommittee did not have an opportunity to discuss his comments prior to the meeting. He explained that the first four suggestions by Mr. Hamilton are technical changes, such as not capitalizing, and that the subcommittee will accept them as a friendly amendment and put that before the ACRC. The fifth issue is more substantive.

The subcommittee proposal is to amend rule 9.141(b)(2)(C) as follows:

(C) ~~No briefs or oral argument shall be required, but any appellant's brief shall be filed within 15 days of the filing of the notice of appeal. The court may request a response from the appellee before ruling.~~

(1) Briefs are not required, but appellant may serve an Initial Brief within 15 days of filing the notice of appeal. The appellee need not file

an answer brief unless directed by the court. Answer and reply briefs shall be served as prescribed by rule 9.210.

(2) The court may request a response from the appellee before ruling, regardless of whether appellant filed an initial brief. Appellant may file a reply brief within 20 days after service of the response. The response and the reply shall not exceed the page limits set forth in 9.210 for answer briefs and reply briefs, respectively.

(3) Oral argument may not be requested.

In his friendly amendment, Mr. Hamilton first noted that the 15-day period in (C)(1) should be changed to 30 days per the previous amendment by the ACRC in June 2010. Second, he noted that there are capital letters on "Initial Brief" in (C)(1) that should be changed to lower case. Third, we have started using "appellant/appellee" instead of "the appellant/the appellee" (see (C)(1) "The appellee" and contrast with "appellant" in (C)(1) and (2)) and we should be consistent throughout the rules. Fourth, before 9.210 in (C)(2), the word "rule" should be inserted.

In the substantive fifth comment, which is fully set out in the attached email, Mr. Hamilton perceived confusion or inconsistency arising from the last two sentences of subdivision (C)(1) (i.e., "The appellee need not file an answer brief unless directed by the court. Answer and reply briefs shall be served as prescribed by rule 9.210") and the first two sentences of subdivision (C)(2) (i.e., "The court may request a response from the appellee before ruling, regardless of whether appellant filed an initial brief. Appellant may file a reply brief within 20 days after service of the response."). He recognized that the provision in subdivision (C)(2) is probably meant to cover situations in which an appellee files a "response" rather than a true "answer brief," but he thought the duplication in subdivisions (C)(1) and (C)(2) regarding the due date for a reply brief was unnecessary and he recommended deleting the last sentence of subdivision (C)(1). He also saw technical conflict in the due date for reply briefs because subdivision (C)(1) cross-references rule 9.210, which provides that a reply brief is to be "served" within 20 days after service of an answer brief, while subdivision (C)(2) provides that an appellant is to "file" a reply brief within 20 days after service of a response. He recommended changing "file" in subdivision (C)(2) to "serve." Mr. Hamilton acknowledged that the proposed amendment might intend to distinguish between (1) cases in which an appellee files an answer brief (which would be governed by subdivision (C)(1)) and (2) cases in which an appellee merely files a "response"

(which would be governed by subdivision (C)(2)). But if so, that is not clear or self-evident, so he suggested clarifying language. Finally, Mr. Hamilton objected altogether to subdivision (C)(3), which precludes oral argument requests. He acknowledged that most postconviction cases do not warrant oral argument, but he pointed out that some of the most significant cases in the history of American jurisprudence have arisen in the context of postconviction proceedings. He concluded that the appellate courts are fully capable of deciding when to allow oral argument, so a blanket prohibition against even asking for oral argument in these types of cases is just a bad idea and he recommended deleting (C)(3) altogether. With those comments in mind, Mr. Hamilton recommended the following amendment to rule 9.141(b)(2)(C):

(C) ~~No briefs or oral argument shall be required, but any appellant's brief shall be filed within 15 days of the filing of the notice of appeal. The court may request a response from the appellee before ruling.~~

(1) Briefs are not required, but the appellant may serve an initial brief within 30 days of filing the notice of appeal. The appellee need not file an answer brief unless directed by the court.

(2) The court may request a response or an answer brief from the appellee before ruling, regardless of whether the appellant filed an initial brief. The appellant may serve a reply brief within 20 days after service of the response or answer brief. The response, answer brief, and reply brief shall not exceed the page limits set forth in rule 9.210 for answer briefs and reply briefs.

Chair Greenberg questioned whether Acting Chair Regensdorf wanted to proceed with Mr. Hamilton's fifth suggestion since it was substantive and would strike the entire subcommittee proposal and replace it with a different proposal. Mr. Regensdorf commented that this situation demonstrates the problem with not having a two-reading rule — we must go forward today if it is important enough to submit for this triennial, which may require drafting on the spot, or, if it is more technical and less important, we can table it and wait for the next meeting and next triennial submission. It is up to the subcommittee to decide.

Mr. Hamilton said that he and Judge Wetherell, who is vice chair of the subcommittee, talked about a further change in addition to what he had already proposed, and Judge Wetherell's suggestion was to not take it up today.

Judge Wetherell then stated that this referral came from Chair Ufferman and it was important to him. He would hate to think about tabling this referral and then

later having Mr. Hamilton's suggestion, at some point in the future, take us back to where we are today. Mr. Hamilton's suggestion is not so different a proposal. He therefore recommended that the Hamilton comments be taken up today. Kristin Norse seconded that recommendation.

Chair Greenberg said he would defer to the recommendation of Judge Wetherell, since he was head of the *ad hoc* committee that considered this. Thus, the subcommittee would like offer its proposal and Mr. Hamilton's email proposal to the full ACRC. Vice Chair Regensdorf agreed, stating it would be included in the submission for this triennial if completed today.

Chair Greenberg then provided the background for the subcommittee's proposed amendment. He explained that the main thing this rule will effect is to allow defendants to file a reply brief, which is an issue of fairness. The ability to file reply briefs is not present in rule now. Comment was then solicited.

Craig Leen was concerned about subsection (C)(2) where it says the court may request a response from an appellee, and he questioned whether that is "required."

Judge Wetherell offered the following background for the rule. The rule applies to postconviction cases. The trial court may summarily deny the motion and deny an evidentiary hearing, so then the record on appeal is essentially the motion, order, and any attachments to the order that refute motion. The way rule worksin that situation no briefs are required. The DCA reviews the case and determines if the record attachments refute the motion allegation, if so, the DCA summarily affirms. If the attachments do not refute the allegations, the DCA sends out a "Toler order" (case law) that asks the state to respond to specific issue(s). The state files a "response" to the Toler order. The issue Chair Ufferman raised in his referral is whether the defendant can file a reply to state's response to the Toler order. The courts has taken different views. The First DCA says no you cannot. Mr. Ufferman's recommendation is that the defendant can. So, the subcommittee looked at rule and revised it to allow the defendant to file a brief, pro se, and state will file a document saying it will file no answer brief unless the court so directs. So, there are two paths: (1) if an initial brief is filed by the defendant, and (2) if no initial brief is filed by the defendant and the court requests or directs a response from the state. The rule would allow a reply. That's why there are two subdivisions in rule. Somewhat duplicative, but that's what the subcommittee proposed. Judge Wetherell then commented that Mr. Hamilton's proposal captures it in a clear way. Mr. Hamilton offered that he and Judge Wetherell had talked before the meeting

today and agreed that if the 4th, 5th, and 7th of his suggestions in the email would be addressed, it would make a better rule.

Stefanie Shelley posed a question on the prohibition of oral argument in subdivision (C)(3) and whether it could be altered to provide that oral argument would be held upon request of the court, rather than an all-out prohibition.

Vice Chair Regensdorf commented that the court can always require oral argument.

Judge Wetherell responded that the proposed amended was intended to reflect a better writing for what is in the current rule. Oral argument is not typically requested by inmates. He's never heard an oral argument in one of these cases since he's been at the court, even when the inmate is represented. But, he concluded, the provision can be removed.

Vice Chair Regensdorf urged the ACRC to take action. He questioned Subcommittee Chair Greenberg about going forward with the proposal appearing on page 8 of the agenda with the four friendly amendments by Mr. Hamilton. Mr. Greenberg deferred to Subcommittee Vice Chair Wetherell. Mr. Regensdorf asked if everyone had Mr. Hamilton's email proposal which is a strike-all proposal for the proposed rule appearing on page 8 of the agenda and would substitute the version he proposed in the email. It would be an entirely new 9.141(b)(2)(C) than what appears in the agenda. Mr. Hamilton's proposal, as set out above, was then read. Mr. Regensdorf recapped that the proposed rule would deal with two situations — one when appellant files an initial brief and the state is ordered to file an answer brief and the other when no brief is filed and the court requests a response to an order to show cause. Mr. Regensdorf asked Judge Crenshaw if this was the same procedure used in the Second DCA, so this rule would not be DCA-specific, and she nodded that it was the same procedure. Mr. Greenberg said it is also consistent with the Third DCA's practice. Mr. Regensdorf then asked Judge Wetherell and Mr. Hamilton to draft the language for the new proposal, which could then be incorporated into the minutes.

John Hamilton moved to approve the rule with the amendments discussed today. David Caldevilla seconded the motion.

Angela Flowers proposed a friendly amendment to subsection (C)(2) to insert "If no initial brief is filed . . . ." Craig Leen then asked if that would mean we would have to wait 30 days to see if an initial brief was filed before filing a response? Judge Wetherell pondered if this would cause a procedural problem in

the actual operation of the court. Vice Chair Regensdorf agreed with Mr. Leen's comment, however, that Ms. Flowers' suggestion would require the court to wait 30 days before it could act on the case. Tom Hall offered that when he worked at the First DCA, just through the normal process the case would not be assigned to anyone within 30 days. Mr. Hamilton said he would accept Ms. Flowers' friendly amendment; Judge Wetherell was indifferent, but okay with it, so Mr. Regensdorf directed that it could be added to the proposal. Then Maria Armas pointed out that Ms. Flower's amendment appears redundant to the balance of that sentence, which states "regardless of whether appellant has filed an initial brief" and she questioned whether that portion of the rule would be stricken. Judge Wetherell agreed with Ms. Armas that the present language covers Ms. Flowers' situation and his "indifference" to her friendly amendment turned to rejection. He said the rule, as proposed, already covers that. Mr. Hamilton agreed, and Mr. Regensdorf announced that Ms. Flowers' friendly amendment is rejected. Ms. Flowers suggested that her language is less confusing to inmate reading, but no further action was taken.

Debra Klauber questioned about the removal of all the text out of subsection (C), with text only appearing in (1) and (2). Mr. Hamilton confirmed that. Ms. Klauber offered that she used to work at a DCA. She was concerned that (C)(1) in newly proposed rule doesn't clarify that a reply brief is permitted, and she understood that one of reasons for the amendment was to clarify that reply briefs are permitted. Mr. Hamilton responded that reply briefs are authorized in (C)(2) and that (C)(1) is distinguished because there is no initial brief in (C)(1) cases.

Vice Chair Regensdorf came back to Ms. Klauber's comment about the empty (C) and asked if that is prohibited in our procedures? He's never seen it. If there is no proposed language to fill it, is that what we are voting on – an empty (C)? He asked if there was a friendly amendment on that.

Judge Gillen commented that the term "response" is word of art. He understood that the idea is to utilize the court to enable it to require appellee to file a response, but what is the appellee responding to if there is no initial brief. Is the appellee responding to the motion itself or to a general comment? Judge Wetherell responded that the First DCA sends out a Toler order that directs the state to respond to specific issue, and Vice Chair Regensdorf commented that we had already confirmed that is the procedure in the other DCAs, to which Judge Crenshaw nodded in agreement and Kristin Norse commented that they had looked at it and the procedure was the same at the different courts. Mr. Regensdorf also commented that the term "response" is used throughout the rules.

Stephanie Zimmerman then commented that because reply brief is used in the second subsection, but not the first, we need to clue in on the first and distinguish the two procedures and clarify that only when an answer brief is filed is a reply brief permitted. She suggested adding heading title such as "Briefs."

Lance Curry offered that there was nothing in prominent headings in (A) or (B) that proceeds (C), so we could eliminate (1) and (2) and have all text as (C) under the rule. Mr. Hamilton liked that idea and would accept that as a friendly amendment. Mr. Curry then restated the friendly amendment as making a single paragraph and placing all the text in (C), (C)(1) and (C)(2) simply in (C). Kristin Norse stated that would confuse the notion that there are two tracks and it would confuse the distinction between responses and briefs. Subcommittee Chair Greenberg suggested that we might include spaces or line returns between the paragraphs, but then questioned if we had to include a letter or number for paragraphs. Vice Chair Regensdorf said that it best to have a letter or number. He then asked if discussion was complete on the empty (C). Judge Wetherell said the amendment was unfriendly and rejected.

Vice Chair Regensdorf then directed the discussion back to "briefs." Ed Sanchez suggested that instead of briefing being the distinction, should the rule simply say the case shall proceed under one of these two alternatives?

Judge Wetherell responded that he maybe he overreacted. For postconviction appeals, subsection (b)(2) covers summary denial of motions, while subsection (3) addresses denial of motions after evidentiary hearing, but subsection (3) also includes provisions for transcription in (3)(A), the record in (3)(B), and its (C) is briefs and it provides that the initial brief should be served within 30 days. The court expects briefs to be filed in appeals after evidentiary hearing. So it is not inconsistent that subsection (2)(C) has briefs and then subsections (1) and (2) under it outlines the two tracks. This way rule (b)(2) looks like (b)(3). So it would look like this:

C. Briefs

1.

2.

David Caldevilla commented that since the courts are allowing briefs and responses, then perhaps a heading title should be "Briefs and Responses."

Vice Chair Regensdorf called the question on the issue of title heading. Jim Nutt pointed out that subsection (3) deals with oral argument, but Judge Wetherell said he was not proposing OA. Lance Curry suggested that instead of (C)(1) and (C)(2), we could make (C) into (D) and renumber (D) to (E). Mr. Hamilton did not accept that proposal because it makes research and shepards difficult. He will accept a title to (C) of "Briefs or Responses" as a friendly amendment.

David Caldevilla commented on the reply brief issue that we needed to split the rule up more and numbers after (C) must be lower roman numbers — i, ii, etc. So (C)(i) would be briefs not required. Then (C)(ii) would begin after the first sentence and would say something like "To allow a reply brief . . . ." Then (C)(iii) would permit an appellant to serve a reply brief within 20 days after the answer brief. Because the rule now allows an answer brief, just add a reply. Then (C)(iv) should be responses, answer briefs, and reply briefs should not exceed page limits

Vice Chair Regensdorf asked if this was considered a friendly amendment and Judge Wetherell responded no. He explained that we were trying to set up two tracks that the courts are already using and would do all briefs in (1) and responses (2). It is slightly duplicative, but it is from the proposers and is best and final. He concluded, the proposal was

"(C) Briefs or Responses."

(i) Briefs are not required, but the appellant may serve an initial brief within 30 days of filing of the notice of appeal. The appellee need not file an answer brief unless directed by the court. The appellant may serve a reply brief as prescribed by rule 9.210.

(ii) The court may request the appellee to file a response, regardless of whether the appellant filed an initial brief. The appellant may serve a reply brief within 20 days after service of the response. The response and reply shall not exceed the page limit in rule 9.210.

John Hamilton moved to adopt this language as the proposed amended rule. David Caldevilla seconded the motion. Vice Chair Regensdorf asked if there were any other suggestions.

Michael Davis asked a question about adding reference to 9.210 to (C)(i), but John Hamilton maintained the proposed amendment was as read. Vice Chair Regensdorf pointed out there was more detail in (C)(ii) and page length was not there, but Judge Wetherell said the intent was to deal with time for serving,

because the answer brief and reply brief are already subject to rules by definition. Mr. Regensdorf then questioned why the 20-page limit was in (ii), and Judge Wetherell explained it was because (ii) deals with responses, which are not answer or reply briefs and thus need a stated page limit. Mr. Regensdorf then announced that the Davis amendment was rejected.

Lance Curry stated that the letters (A), (B), and (C) were not bolded and should be. Bar liaison Heather Telfer said they will be bolded in finalized version, and Vice Chair Regensdorf said that Ms. Telfer is in charge of the stylistic presentation and bolding. Briefs or Responses will be bolded.

Vice Chair Regensdorf concluded that we had spent a lot of time on this referral, but it was important to do. He asked for final comments, and hearing none, he directed Judge Wetherell and John Hamilton to submit the final language to Secretary Wendy Loquasto and Heather Telfer by the end of the meeting for inclusion in the minutes. He then announced this will be a final vote.

Vote: on Referral 12-AC-13 – Amendment to Rule 9.141(b)(2) – New Language Proposed at the 2/22/13 ACRC Meeting by John Hamilton and Judge Wetherell (which also contains proposed editorial headings to subsections (A)-(D) to conform to the proposed rule to the style and headings in Rule 9.141(c)):

RULE 9.141. REVIEW PROCEEDUBGS IN COLLATERAL OR POST-CONVICTION CRIMINAL CASES

(c) [No change]

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

(A) Record. When a motion for post-conviction relief under rule 3.800(a), 3.850, or 3.853 is granted or denied . . . [same].

(B) Index. Unless directed otherwise by the court . . . [same].

(C) ~~No briefs or oral argument shall be required, but any appellant's brief shall be filed within 15 days of the filing of the notice of appeal. The court may request a response from the appellee before ruling.~~**Briefs or Responses.**

(i) Briefs are not required, but the appellant may serve an initial brief within 30 days of filing the notice of appeal. The appellee need not file an answer brief unless directed by the court. The appellant may serve a reply brief as prescribed by rule 9.210.

(ii) The court may request a response from the appellee before ruling, regardless of whether the appellant filed an initial brief. The appellant may serve a reply within 20 days after service of the response. The response and reply shall not exceed the page limits set forth in rule 9.210 for answer briefs and reply briefs.

(D) Disposition. On appeal from the denial of relief, unless . . . [same].

Vote: 32-0 in the room in favor of the amended rule. On the telephone, all 12 present were in favor. So the proposal passed unanimously 44-0.

Vice Chair Regensdorf thanked everyone for their hard work on this and asked the Internal Operating Procedures Committee to draft an amendment that will require two readings. Subcommittee Chair Greenberg also thanked the subcommittee on this proposal.

12-AC-17 – Rule 9.145(c)(1)(B) Appeal Proceedings in Juvenile Delinquency Cases: Chair Greenberg explained that the subcommittee has a second proposal, which is to rule 9.145. The rule currently includes "and/or" and the recommendation is to cross out the "and/" and leave "or" so the rule will simply say "search or seizure." Mr. Greenberg said that this referral came from John Hamilton and it was one the subcommittee liked.

Vice Chair Regensdorf asked for any comments. He thought the term of art was "search and seizure," but Chair Greenberg said there can be items that come out of a pocket and Tom Hall said there are searches that gain information, which is not a seizure. Mr. Regensdorf concluded there was a good reason for "or" then and he called for a final vote.

Vote on Referral 12-AC-17

RULE 9.145. APPEAL PROCEEDINGS IN JUVENILE DELINQUENCY CASES.

(c)

(1)

(B) suppressing confessions, admissions, or evidence obtained by search ~~and/~~or seizure before the adjudicatory hearing;

Vote Count: In the room, the vote in favor was a unanimous 32. On the telephone, 11 members voted in favor. The proposed amendment passed 43-0.

Chair Greenberg reported that there was nothing else on the agenda from the Criminal Practice Subcommittee and he thanked everyone for their work, as did Vice Chair Regensdorf. Mr. Greenberg was then excused from the meeting due to the illness of his spouse.

3. General Practice – Elliot Kula, Chair:

This subcommittee's summary starts on page 9 of the agenda; its report and minutes begin on page 144 of the agenda packet.

Chair Kula said the subcommittee had several matters and he asked the members of the subcommittee who were primarily responsible to speak.

A. 12-AC-10 – Rule 9.210 Briefs: This is a referral from Paul Cherry regarding structure and organization of briefs. Craig Leen and Ed Sanchez were primarily responsible for it.

Craig Leen reported that the idea of the proposed amendments was to reflect the practice. In subsection (b)(1), for the table of contents for the initial brief, which appears on page 10 of the agenda, the amendment is to add headings and subheadings that identify the issues to be reviewed so as to clarify that these must be included in the table of contents. The subcommittee wants it to be clear that issues must be included in the table of contents. The proposed amendment inserts a new subsection (b)(4) that requires a jurisdictional statement to be included in the initial brief, which is consistent with the federal rule. The subcommittee thought that this was part of federal rule that makes good sense. It makes people think twice and would prompt appellee to think about the jurisdictional basis and possibly file a motion to dismiss, which might end the appeal sooner. This addition would result in renumbering the subsections thereafter.

Subsection (b)(6) expands the argument portion of the rule to include reference to appropriate authorities and the standard of review, since that is the practice.

Subsections (b)(8) and (b)(9) on page 11 of the agenda add the certificate of service and certificate of compliance with type font, which are also the practice.

Subsection (c) concerning the contents of the answer brief on page 11 of the agenda adds that the jurisdictional statement need not be included if appellant's statement is satisfactory.

Subsection (d) addresses the contents of reply briefs. The rule currently does not require the same sections as the initial and answer brief and these amendments would add the table of contents, table of citations, certificate of service, and certificate of compliance with type font so that reply briefs are consistent with other briefs and to reflect the practice.

Craig Leen concluded that the above recommendations clean up the rule generally.

Ed Sanchez added that the referral itself had a lot of other suggestions, but the subcommittee decided against that level of detail. So the referral was addressed in full.

Mr. Leen also reported that an amendment was recommended to subsection (a)(5), which appears on page 9 of the agenda, which would clarify that the signature block is excluded from the 50-page limit.

Vice Chair Regensdorf asked if the all proposed changes to rule 9.210 be discussed together or if aspects should be considered separately.

Kristin Norse offered that for section (b)(1) on page 10, which says what the table of contents should contain, she was looking for a colon to be used. Or she suggested rewording to say: "A table of contents listing the sections of the brief set forth below, including headings and subheadings that identify . . . ." That suggestion was accepted by Craig Leen as a friendly amendment.

David Caldevilla objected to the inclusion of the new subsection (b)(4) requiring a jurisdictional statement. He reasoned that the jurisdictional basis for an appeal should be in the notice of appeal and that should provide sufficient notice to appellee and the court. Requiring a jurisdictional statement in the brief takes up space and he needs 50 pages. Vice Chair Regensdorf stated this was an unfriendly amendment and Craig Leen rejected it.

Duane Daiker returned to Kristin Norse's suggestion that section (b)(1) say "listing the sections of the brief . . ." omits the word "following" that appears in the proposal. Craig Leen accepted the deletion of the word "following."

Vice Chair Regensdorf directed the discussion back to subsection (b)(4) and the addition of the jurisdictional statement. Marjorie Gadarian Graham pointed out that in the Fourth District, subsection (4) is not needed because the docketing statement asks for what rule jurisdiction is invoked under. If there is a jurisdictional problem, then an order to show cause is issued. Ms. Gadarian Graham commented that when she clerked at Fourth DCA, clerks checked for jurisdiction.

Vice Chair Regensdorf questioned whether the jurisdictional statement is something the courts would like and he addressed that question to members who were court personnel. Judge Wetherell agreed with David Caldevilla that the jurisdictional basis should be in the notice of appeal. He explained that at the First DCA, there are two people that live in bowels of courthouse who review jurisdictional issues immediately as briefs are filed. They have good sense of jurisdiction, but the panel may yet find a jurisdictional problem, so including the provision doesn't trouble him, but it should be in notice of appeal. Judge Crenshaw commented that jurisdiction needs to be dealt with before briefing. If the statement is in the body of the brief, then there will be more argument. So she thought it was more expeditious for the jurisdiction to be in the notice of appeal and she agreed with Mr. Caldevilla.

Craig Leen responded that maybe the jurisdictional statement should be included in the notice of appeal. Having a jurisdictional statement requirement forces appellant to think about jurisdiction, which is particularly important in nonfinal order appeals. It requires the filer to point out the jurisdictional basis and results in dismissal if there is no jurisdiction. He questioned what if jurisdiction is not be raised by the parties and offered that having the statement avoids confusion. The practitioner must state a basis for jurisdiction and doing so is a professional requirement. Jurisdiction is required as the basis for an appeal, so the subcommittee thought it was worthwhile to include and it is required under the federal rule.

Judge Wetherell said he had no objection to it being in brief, but it could affect the page limit.

Vice Chair Regensdorf commented there are two suggestions, one that the jurisdictional statement be in the notice of the appeal and one that it be in the brief, but the proposal before the ACRC is that it be included in the brief. He then called for a vote on the jurisdictional statement.

Vote on subsection 9.210(b)(4) to include a jurisdictional statement: In the room, 12 were in favor and 17 were opposed. On the phone, of those still present, 1 was in favor and 9 were opposed. In total, 26 were opposed and only 13 were in favor, so the proposed inclusion of a jurisdictional statement in the initial brief failed and it was stricken from the proposal, which returned the subsection number to that which it had before the new (b)(4) was added.

David Caldevilla then observed that the reference to the jurisdictional statement in (c) on page 11 for contents of the answer brief also needed to be deleted, which Craig Leen accepted.

Craig Leen then questioned whether the vote would change if the jurisdictional statement was an item that was excluded from the page limitation, like the tables of contents and citations. David Caldevilla reiterated that it should be in the notice of appeal. There was some discussion about sticking to the amendment as proposed or changing it and John Hamilton suggested an amendment that would require the jurisdictional statement, but move it outside the page limit. Mr. Hamilton said it could be included in subsection (3). Mr. Leen accepted that as a friendly amendment and said it should be included in subsection (3) and (a)(5) to exclude from the page limit.

In discussion, Wendie Cooper questioned if we would exclude argument against jurisdiction by appellee? She suggested that argument against jurisdiction could be a longer that the jurisdictional statement itself. Craig Leen responded the jurisdictional statement and argument would be excluded from the page limit in both briefs.

Vice Chair Regensdorf noted that the addition to subsection (a)(5) of the jurisdictional statement before the signature block was a friendly amendment.

John Hamilton commented that it was okay to address the jurisdictional question in the notice of appeal, but rule 9.100(k) on partial final judgment in the notice of appeal, but doesn't say much, so it really needs to be addressed in the brief and explained. The point is that jurisdictional issues can be elaborate and need more space than a notice of appeal.

David Caldevilla offered that if appellee is not buying the jurisdictional basis stated in the notice of appeal, then appellee can respond to it with a motion to dismiss. Vice Chair Regensdorf offered that is one avenue or it could be included in the docketing statement.

Jeff Kuntz suggested that ten pages could be allowed for the jurisdictional statement, but Vice Chair Regensdorf said the current proposal is an unlimited number of pages to discuss jurisdiction.

Judge Wetherell offered that at the First DCA, the motion panel would review a motion to dismiss, but that the panel could still revisit the jurisdictional issue.

Tom Hall then stated that as with most rules, it is unclear whether it applies to the supreme court, where jurisdictional briefs are required in most cases. He offered that if we are going to exclude these statements from the page limit, it will be very problematic. He asked if we could clarify this proposal's application to the supreme court. Vice Chair Regensdorf responded that at the time of briefing in the supreme court, jurisdiction is already resolved, but not finally. Mr. Hall said that 40 % of the cases initially accepted for review by the supreme court are ultimately discharged for lack of jurisdiction after briefing on the merits.

Jim Nutt suggested that if we exclude the jurisdictional statement from the page limit, could we assign a maximum page limit, as is done for the summary of argument? Craig Leen then suggested saying that the jurisdictional statement not exceed two pages. Lance Curry said that jurisdiction could be a big issue and might require much more than two pages. Mr. Leen countered that the jurisdictional statement is just to state the basis. Argument could then follow in the brief's argument section, as is done in federal practice. Vice Chair Regensdorf commented that the appellee could then write a longer response. John Hamilton said he's written eight pages on jurisdiction as an appellant in federal court. Mr. Nutt then withdrew his suggestion for a page limit.

Michael Davis expressed concern that jurisdictional questions usually only arise in nonfinal order appeals. In most criminal appeals, there is no jurisdictional issue, so this requirement is just extra stuff added to brief. He suggested if there is a requirement of a jurisdictional statement, it should be tailored to cases in which jurisdiction is an issue.

Vice Chair Regensdorf said he would exercise the prerogative of chair and call for a vote on this issue. He offered that we can revisit it in the next three-year

cycle. He then called for a vote on adding the jurisdictional statement and excluding it from the page limit.

Vote on including the jurisdictional statement, but excluding it from the page limit: In the room, 7 were in favor and the vast majority was opposed, so the proposal failed. No jurisdictional statement would be required in brief.

Turning to the balance of the proposal for rule 9.210, Debra Klauber commented that subsection (e) on page 11 requires a space between the words "of" and "compliance."

Duane Daiker returned to subsection (a)(5) on page 9, and questioned whether it should read "tables of . . . .citations of authorities," and whether it should just be citations. Craig Leen agreed table of contents and table of citations – "of authorities" would be deleted.

Stephanie Zimmerman suggested adding the certificate of service and certificate of typeface compliance to subsection 9.210(a)(2), under the general provisions for briefs. [That subsection is where the font requirements is stated.] Craig Leen responded that it fit better in the contents of the brief section of the rule, and Vice Chair Regensdorf announced that friendly amendment was rejected.

Tom Hall commented that certificates of service and type font are not included in the contents of the answer brief and reply brief subsections anywhere, and he questioned if they were somehow incorporated by reference. Stephanie Zimmerman also said she did not see where they were added to the answer brief. Craig Leen responded that by adding them to the list in subsection (b), they are required in the answer brief by virtue of the first sentence in subsection (c), which states "The answer brief shall be prepared in the same manner as the initial brief[.]" But they are not required in the reply brief under the current subsection (d) language, so they amended (d) to add that requirement.

Wendie Cooper questioned the language in subsection (c) about the statement of facts being omitted in the answer brief if appellant's statement "is deemed satisfactory." She explained that in her office they just argue the facts in argument section of the brief. It will add to answer brief if they have to include statement of the facts. She understood the practice was no statement of the facts in the answer brief. The proposal says that it "may be omitted if the corresponding section is deemed satisfactory." This amendment would, therefore, eliminate the practice of just doing the disputed facts in argument section. Vice Chair Regensdorf commented that under the new proposal, one cannot leave discussion

of the facts to the argument. You have to include a statement of the facts if the appellant's statement is not satisfactory. John Hamilton said answer briefs may exclude statements of the fact unless appellee disagrees with the appellant's statement. He explained that provision was taken out of the rule long ago, but the committee notes state that the intention is the answer brief needs no statement of the facts if there is no disagreement. Omitting a statement of the fact is not what the rule intends. Mr. Regensdorf said that if there was disagreement, omitting the statement of the facts would be in noncompliance of amendment.

David Caldevilla questioned why "omitted" was underlined in subsection (c) since it was part of the rule currently, not added, and Mr. Leen agreed.

RULE 9.210. BRIEFS

(a) [No change]

(5) The initial and answer briefs shall not exceed 50 pages in length, provided that if a cross-appeal has been filed, the answer brief/initial brief on cross-appeal shall not exceed 85 pages. Reply briefs shall not exceed 15 pages in length; provided that if a cross-appeal has been filed, the reply brief shall not exceed 50 pages, not more than 15 of which shall be devoted to argument replying to the answer portion of the appellee/cross-appellant's brief. Cross-reply briefs shall not exceed 15 pages. Briefs on jurisdiction shall not exceed 10 pages. The tables of contents and citations, ~~and~~ the certificates of service and compliance, and the signature block for the brief's author, shall be excluded from the computation. Longer briefs may be permitted by the court.

(b) Contents of Initial Brief. The initial brief shall contain the following, in order:

(1) A table of contents listing the sections of the brief, including headings and subheadings that identify the issues presented for review, with references to the pages on which each appears.

(2) A table of citations with cases listed alphabetically, statutes and other authorities, and the pages of the brief on which each citation appears. See rule 9.800 for a uniform citation system.

(3) A statement of the case and of the facts, which shall include the nature of the case, the course of the proceedings, and the disposition in the lower

tribunal. References to the appropriate volume and pages of the record or transcript shall be made.

(4) A summary of argument, suitably paragraphed, condensing succinctly, accurately, and clearly the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged. It should seldom exceed 2 and never 5 pages.

(5) Argument with regard to each issue, with citation to appropriate authorities, and including the applicable appellate standard of review.

(6) A conclusion, of not more than 1 page, setting forth the precise relief sought.

(7) A certificate of service.

(8) A certificate of compliance for computer-generated briefs.

(c) Contents of Answer Brief. The answer brief shall be prepared in the same manner as the initial brief~~;~~, provided that the statement of the case and of the facts may be omitted if the corresponding section of the initial brief is deemed satisfactory. If a cross-appeal has been filed, the answer brief shall include the issues in the cross-appeal that are presented for review, and argument in support of those issues.

(d) Contents of Reply Brief. The reply brief shall contain argument in response and rebuttal to argument presented in the answer brief. A table of contents, a table of citations, a certificate of service, and, for computer-generated briefs, a certificate of compliance shall be included in the same manner as in the initial brief.

(e) Contents of Cross-Reply Brief. The cross-reply brief is limited to rebuttal of argument of the cross-appellee. A table of contents, a table of citations, a certificate of service, and, for computer-generated briefs, a certificate of compliance shall be included in the same manner as in the initial brief.

(f) – (h) [No change]

Vote: 12-AC-10 – Rule 9.210 Briefs with these changes: (1) deleting the references to the required jurisdictional statement in (b)(4) and (c) and the renumbering required by that, (2) deleting the word "following" in subsection

(b)(1), (3) adding the space between "of" and "compliance" in (e), and (4) deleting "of authorities" in (a)(5). In the room, 30 voted in favor and 3 were opposed. Of those still present on the phone, 7 were in favor and none were opposed. So the amendment passed 37 to 3.

B. 12-AC-22 and 12-AC-23 – 9.300 Motions. Chair Kula explained these were referrals by at Roy Wasson for changes to rules 9.125 and 9.300, which begin on page 11 of the agenda, were spearheaded by Dottie DiFiore.

Dottie DiFiore explained that the case cited by Mr. Wasson in support of his suggestion to change rule 9.125 had been overturned, so the subcommittee rejected this proposal.

As for the referral for rule 9.300, Mr. Wasson's suggestion had been to add motions for sanctions to the list of motions that do not toll time. The subcommittee agreed and the proposal is on page 12 of the agenda. It adds "Motions relating to sanctions, rule 9.410" as (d)(9) and then renumbers subsections (9) and (10) as (10) and (11).

Wendy Loquasto questioned why renumbering was done, instead of just adding this to the end of the list. Chair Kula responded that the subcommittee had looked at that and decided renumbering was best for the appearance of the rule. They did not want the motion for sanctions to come after the motions relating to the supreme court in subsections (9) and (10) at the end of the rule.

Vote on Referrals 12-AC-22 and 12-AC-23: In the room, 30 were in favor of the subcommittee recommendations; 1 opposed. On the telephone, 9 were in favor and none opposed. So Referral 12-AC-22 was rejected and the amendments to rule 9.300 were approved by a vote of 39 to 1.

C. 12-AC-15 – Rules 9.210, 9.140, 9.141, 9.160, 9.200, 9.420, and 9.430: Chair Kula explained that this referral came from John Hamilton and begins on page 12 of the agenda. Stephanie Serafin volunteered to handle the referral.

Stephanie Serafin explained that rule 9.210 was sent back at last meeting due to stylistic changes. There had been concern about the phrase "brief's text" and the subcommittee tried to address that by saying "text in the body of the brief." The amendment, which is on pages 12-13, also moves the last sentence in 9.210(a)(3) concerning headings and subheading font size up into subsection (a)(2) and allows for them to be single spaced.

There being no comment, Vice Chair Regensdorf called for a vote.

RULE 9.210. BRIEFS

(a) [No change]

(1) [No change]

(2) The lettering in briefs shall be black and in distinct type, double-spaced, with margins no less than 1 inch. Lettering in script or type made in imitation of handwriting shall not be permitted. Footnotes and quotations may be single spaced and shall be in the same size type, with the same spacing between characters, as the text in the body of the brief. Headings and subheadings shall be at least as large as the brief's text and may be single-spaced. Computer-generated briefs shall be submitted in either Times New Roman 14-point font or Courier New 12-point font. All computer-generated briefs shall contain a certificate of compliance signed by counsel, or the party if unrepresented, certifying that the brief complies with the font requirements of this rule. The certificate of compliance shall be contained in the brief immediately following the certificate of service.

(3) Paper copies of briefs shall be securely bound in book form and fastened along the left side in a manner that will allow them to lie flat when opened or be securely stapled in the upper left corner. ~~Headings and subheadings shall be at least as large as the brief text and may be single spaced.~~

(4) [No change]

Vote on Referral 12-AC-15 and the amendments to rule 9.210: It was unanimously approved by the members in the room – 26 to 0. On the telephone, the eight members present all voted unanimously in favor. The amendment was thus approved 34 to 0.

As to the suggested amendments in the remaining rules, 9.140, 9.141, 9.160, 9.200, 9.420, and 9.430, Ms. Serafin explained these were also part of the John Hamilton referral. The proposal was for several changes sprinkled throughout these rules that removed the word "appellate" before the word "court" since the term "court" is understood in the rules to mean "appellate court," and the addition of "lower" to describe court when the reference was meant to be the trial court, not the appellate court.

Vice Chair Regensdorf summarized that the rules sometimes include the phrase "appellate court" but since rules define "court" as "appellate court" including the word "appellate" is redundant. So the proposed amendment eliminates the modifier "appellate" in all rules. John Hamilton confirmed.

Chair Kula offered that a few entries were a little more involved because some were actual corrections. For instance, on page 16 there is a change in a subheading in rule 9.142(d)(2)(A) because it was incorrect. There was an addition of "or the lower tribunal" to rule 9.146(c)(2) on page 16, insertion of "county" before "court" in rule 9.160(e)(1) on page 17, and change of "court" to "clerk" in rule 9.420(a)(2) on page 18 because the wrong word was used.

Chair Kula asked those who practice criminal dependency to look carefully at rule 9.146 on pages 16-17 since there were various changes to that and most of the subcommittee had no experience in that area of the law.

Judge Wetherell commented regarding the proposed striking of "appellate in rule 9.141 on pages 15-16, stating that most of those cases are coming to the court from pro se litigants, so perhaps more direction is appropriate for these inmate litigants.

Vice Chair Regensdorf stated that he does not criminal work, but inmate litigants have to comply with a lot of rules in their litigation. Hearing no further discussion, the vote was called.

Vote on Referrals 12-AC-22 and 12-AC-23 regarding rules, 9.140, 9.141, 9.160, 9.200, 9.420, and 9.430 (pages 13 to the top of 19): In the room, 33 in favor and none opposed. On the phone, 8 in favor and 1 opposed. Siobhan Shea, the one in opposition, offered that she did not think that the Committee should redraft for all changes. So the measured passed, 41 to 1.

Vice Chair Regensdorf thanked Chair Kula and all the members of the General Practice Subcommittee for their work.

The ACRC took a ten minute break between 10:35 and reconvened at 10:45.

4. Family Practice — Robin Bresky, Chair

The Subcommittee report and minutes begin on page 311 of the agenda packet; the proposed amendments are on pages 19-21 of the agenda.

Chair Bresky explained that the ACRC had two issues to vote on and she thanked the subcommittee for their work on the proposals.

A. 11-AC-06 – Rule 9.130(a)(3)(C)(iii) Proceedings to Review Non-final Orders and Specified Final Orders: Chair Bresky explained that this referral originally came from a letter from Tom Sasser, Chair of the Family Law Section, who suggested that the interlocutory appeals include challenges rulings on the validity and nonvalidity of prenuptial agreements, and that change was previously voted on as amendment to rule 9.130(a)(3)(C)(iii)c. The balance of the suggested changes to 9.130(a)(3)(C)(iii) a. and b. were sent back to the subcommittee by Chair John Crabtree to look at and refine the proposed language in subsections (a) and (b), so today's consideration was limited to rule 9.130(a)(3)(C)(iii)a. and b., which appear on page 19. The idea was to add subpart listings to the current subsection (iii) concerning family law interlocutory appeals to clarify that orders ruling on the right to immediate monetary relief are appealable, as well as rulings that determine the rights or obligations of a party regarding child custody or time sharing under a parenting plan. These amendments are ready for vote.

Vice Chair Regensdorf called for discussion and Lance Curry offered as a friendly amendment that all the other subsections in the rule had periods after, as opposed to parentheses around the letters. Chair Bresky accepted that amendment.

Richard Swank offered that the current proposal has too deep an indent and Chair Bresky agreed.

Richard Swank also offered by way of background that it was his concern about using time-sharing under a parenting plan, instead of the word "custody," to reflect the current statutory language that prompted this amendment a year and a half ago. He stated that he thinks the proposal is a good amendment and it covers his concern.

Vice Chair Regensdorf commented that he always wondered if the right to immediate monetary relief in (iii) was that suppose to be in family law, or if it could be other types of appeal, so this amendment clarifies that question. He explained that the rule would have been used to pursue interlocutory appeals involving immediate monetary relief in other areas, but now that will only provide a jurisdictional basis in family law appeals.

Craig Leen then stated it was his understanding as well, and in representing cities and counties, if there was an order for immediate monetary relief, he'd want to appeal right away. He'd get a stay. So, Mr. Leen questioned whether this

amendment would end that right of appeal. Vice Chair Regensdorf responded that the amendment is clear — only in family law cases will an order concerning the right to immediate monetary relief be appealable as a nonfinal order. David Caldevilla commented that rulings on the right to property are appealable, and Vice Chair Regensdorf said one can argue that money is property. John Hamilton said that case law allows such appeals, so there is authority. Hearing no other discussion, a vote was called for.

RULE 9.130. APPEALS OF NONFINAL ORDERS RENDERED AFTER FINAL ORDER

(a) Applicability.

(1) – (2) [No change]

(A) – (B) [No change]

(C)

(i) – (ii) [No change]

(iii) ~~the right to immediate monetary relief or child custody~~ in family law matters:

a. the right to immediate monetary relief;

b. the rights or obligations of a party regarding child custody or time sharing under a parenting plan; or

c. the invalidity of a marital agreement as a whole;

Vote on 11-AC-06 – Rule 9.130(a)(3)(C)(iii) Proceedings to Review Non-final Orders and Specified Final Orders: In the room, 33 voted in favor of the amendment, 0 opposed. On the telephone, 10 voted in favor and 0 opposed. So the amendment passed unanimously 43-0.

B. 12-AC-19 – Rule 9.147 Appeal Proceedings to Review a Final Order Dismissing a Petition for Judicial Waiver of Parental Notice of Termination of Pregnancy: Chair Bresky pointed out that this was a referral from John Hamilton and it appears on pages 19-21 of the agenda. The amendment transform what is

currently subsection (n) of rule 9.110 into a stand-alone rule to be numbered 9.147. The subcommittee had previously approved this amendment, but it was sent back due to concerns about the timing requirement of 7 versus 10 days in different print and electronic versions of the rule. The subcommittee had sorted that out and the proposal appears on pages 20-21 of the agenda. The subcommittee had approved Mr. Hamilton's proposal with some small changes. Original rule may be conflict but we did not address that because not part of the referral.

Vice Chair Regensdorf opened the issue for discussion and Kristin Norse stated that she had spent a lot of time on this item recently and she suggested that "district court of appeal" appearing in subsections (d) and (e) be changed to simply "district court." John Hamilton agreed and Chair Bresky accepted that as a friendly amendment.

Angela Flower asked since 9.110(n) was being transformed into rule 9.147, would we be eliminating 9.110(n) too. Chair Bresky indicated that she assumed so.

Chair Bresky commented that there had been concern about the electronic transmission of the record required within two days in rule 9.110(n), which should appear in subsection 9.147(c) as saying that "the clerk of the lower tribunal shall prepare and electronically transmit the record as described in rule 9.200(d) within 2 days from the filing of the notice of appeal." It was noted that rule 9.200(d) does not require clerks to electronically transmit records, but this rule amendment does.

Craig Leen commented that 9.147(e) provides that oral argument may be ordered at the discretion of the "district court of appeal" and that "district" and "of appeal" should be eliminated, to which John Hamilton agreed.

Craig Leen also pointed out that subsection 9.147(d) requires the appellate court to rule within 7 days and provides for automatic reversal if no decision is rendered within that 7 days. He questioned whether the rule should allow for an extension by court. John Hamilton responded that the statute so provides and that the rule would be in conflict with the statute if it differed. Siobhan Shea commented there could be due process concerns if the rule was changed, and Mr. Leen said he was satisfied with that 7 day period.

Craig Leen also asked about the certificate that is to be issued in subsection (d) and whether that is self-effectuating so no mandate is required. John Hamilton responded yes.

Tracy Gunn questioned subsection 9.147(e)'s provision that an appellant may move for leave to file a brief and whether such a motion should be listed in rule 9.300 as a motion that does not toll the time. Vice Chair Regensdorf commented that is an important substantive question. Siobhan Shea agreed that the motion should not toll the time. Chair Bresky agreed, but pointed out that it was not in the previous rule and was outside the scope of this referral. Mr. Regensdorf asked if this was a friendly amendment and if there was any disagreement that the motion should not toll the time. Hearing none, he requested John Hamilton to draft an additional exception in rule 9.300 to exclude motions made under rule 9.147(e).

Tom Hall commented that the rule states that subsection 9.147(d) provides that clerks will issue the certificates without charge and that the rules cannot waive fees. John Hamilton responded that the language is in the statute, so the rule complies with the statute.

Lance Curry asked if we needed an amendment to rule 9.110 to delete subsection (n), which was offered as a friendly amendment and accepted.

Vice Chair Regensdorf commented this rule involves an appeal by unmarried minor female, and he questioned whether the father had any rights that needed to be considered in the rule. John Hamilton responded that it was not in the statute and that this rule was intended to implement the statute and the procedure mandated in the statute.

Vice Chair Regensdorf then questioned subsection 9.147(f) in that it says "The appeal and all proceedings thereon." He suggested it say "therein," not "thereon," as proper English. Chair Bresky responded that the original rule used the word "thereon," but agreed "therein" was correct and accepted that as a friendly amendment.

Chair Bresky stated that because the appeal could be filed by the unmarried minor or another person on her behalf, they used the term "appellant." Vice Chair Regensdorf offered that the father would likely be against the mother.

John Hamilton announced he had the proposed corresponding language for rule 9.300 on the tolling issue. He suggests inserting it as rule 9.300(d)(10) and then renumbering (9) and (10) as follows:

(10) Motions for leave to file briefs in appeal proceedings to review a final order dismissing a petition for termination of pregnancy under rule 9.147(e).

(11) Motions relating to expediting the appeal.

(12). All motions filed in the supreme court, unless accompanied by a separate request to toll time.

Vice Chair Regensdorf summarized that in addition to this change, there would also be the deletion of "district" and "of appeal" in subsections 9.147(d) and (e).

David Caldevilla suggested that the amendment to rule 9.300(10) be shortened to say "Motions for leave to file a brief under rule 9.147(e)." John Hamilton responded that would be inconsistent form. All the other subsections describe the kind of motion so the proposed language was stylistic and that suggestion was rejected.

Vice Chair Ed Sanchez commented that he had read the rule and that the 9 day period cannot be tolled, so any motion filed under the rule cannot be tolling. Vice Chair Regensdorf suggested that the amendment say "Any motion filed in a proceeding . . . ." John Hamilton agreed.

Craig Leen asked what if the clerk does not transmit the record in 2 days and someone has to file a motion with respect to that, would that toll the 9 day period?

Siobhan Shea responded that under subsection (d) for disposition of appeal, the time is based on 7 days from transmittal of the record, and she questioned if that should be 7 days from the filing of the notice of appeal. Chair Bresky responded that the original rule had notice of appeal. John Hamilton then offered that the supreme court had implemented rule 9.110(n) that requires disposition within 10 days from the filing of the notice of appeal, which is in conflict with the statute.

Vice Chair Regensdorf explained that the way the rule is written is that the notice of appeal starts the time clock. The clerk has 2 days to transmit record. Within 7 days thereafter, the court has have to decision. The rule is based on the statute that says 2 and 7 days, but should it be 9 days? John Hamilton responded it should be 2 and 7. So delay in the 2-day period extends the 7 days to rule. A 9-day deadline doesn't run the same way. It's 7 days from record. That's what statute says. It's section 390.01114(4)(b) noted on the top of page 20 of the agenda.

Tom Hall said that the ACRC is bound by statute. When the Legislature passes a statute that requires a rule change, the court has control over procedure

and is not bound by statute. The court has to affirmatively develop the procedure. Generally timing is a court prerogative and the court is not bound by a statute. Everyone recognizes this cases must move fast, but courts are not bound by the statute.

Vice Chair Regensdorf commented that the rule says a decision must be made within 7 days from record. Stephanie Zimmerman commented that section 390.01114(4)(b)(2) says "7 days after receipt of appeal." It's 7 days, not 9, and transmittal of record is a problem. Judge Wetherell reads the rule as the court's clock does not start ticking until the record is received. The rule is inconsistent with the statute on purpose. Mr. Regensdorf summarized that the court has said it is setting its own time line of 2 days for the record and 7 days from transmittal of the record and he asked if we were all comfortable with that. Siobhan Shea said she was not, because sometimes clerks don't do what they have to do. This creates a loophole would undo the due process protections in the statute. She quested what was the purpose of the statute if rule is inconsistent with statute.

Vice Chair Regensdorf said that the rule cannot be fixed without 7 days even if that's without the record. It's 7 days and that's it or we write a rule to adopt the time limit in 9.110(n) that gives the court 2 days to look at record before ruling, although that may extend the time. That's the choice. He will accept a motion to go one way or the other.

Angela Flowers comment that the 9.110(n) does not say 7 days. It says "as expeditiously as possible and no later than 10 days." John Hamilton responded that is why the rule was sent back. In March 2012, the supreme court rule was adopted because of the legal amendment. The court changed the rule to 10 days. The legislature said 7 days. The court changed it to 7 days and added the 2 days for the record.

Siobhan Shea suggested that we vote on the rule with the friendly amendment and that the 7-days-from-transmission-of-the-record can be addressed in the subcommittee. Chair Bresky agreed.

Vice Chair Regensdorf then summarized that 9.147(d) will then provide that the decision must be made within "7 days from the transmittal of the record" because that's what the supreme court put in rule 9.110(n). Angela Flowers asked that it be clarified with the most current version of the updated rules as of 3/1/12, which is on the Bar's website. Mr. Regensdorf responded that the current rules provide "no later than 7 days from the transmittal of the record."

Vice Chair Regensdorf called for a vote on rule 9.147 as amended to delete "district" and "of appeal" in subsections (d) and (e) and to amend 9.300 to add motions under rule 9.147 to the nontolling motion list, and to delete 9.110(n).

Chair Bresky added that rule 9.147(c) would also include the word "electronically" before "transmit the record," and Mr. Regensdorf agreed. Elizabeth Wheeler stated, however, that we do not need to add "electronically" because rule 9.200 now says the record has to be electronic. Chair Bresky then accepted that "electronically" did not need to be added.

Stefanie Shelley asked if subsection 9.147(b) should say "any party" as opposed to "any part," but upon closer inspection, she agreed that "any part" was correct.

RULE 9.147. APPEAL PROCEEDINGS TO REVIEW A FINAL ORDER DISMISSING A PETITION FOR JUDICIAL WAIVER OF PARENTAL NOTICE OF TERMINATION OF PREGNANCY.

(a) Applicability. Appeal proceedings to review final orders dismissing a petition for judicial waiver of parental notice of the termination of a pregnancy shall be as in civil cases, except as modified by this rule.

(b) Fees. No filing fee shall be required for any part of an appeal of the dismissal of a petition for a judicial waiver of parental notice of the termination of a pregnancy.

(c) Record. If an unmarried minor or another person on her behalf appeals an order dismissing a petition for judicial waiver of parental notice of the termination of a pregnancy, the clerk of the lower tribunal shall prepare and transmit the record as described in rule 9.200(d) within 2 days from the filing of the notice of appeal.

(d) Disposition of Appeal. The court shall render its decision on the appeal as expeditiously as possible and no later than 7 days from the transmittal of the record. If no decision is rendered within that time period, the order shall be deemed reversed, the petition shall be deemed granted, and the clerk shall place a certificate to that effect in the file and provide the appellant, without charge, with a certified copy of the certificate.

(e) Briefs and Oral Argument. Briefs, oral argument, or both may be ordered at the discretion of the court. The appellant may move for leave to file a brief and may request oral argument.

(f) Confidentiality of Proceedings. The appeal and all proceedings therein shall be confidential so that the minor shall remain anonymous. The file shall remain sealed unless otherwise ordered by the court.

(g) Procedure Following Reversal. If the dismissal of the petition is reversed on appeal, the clerk shall furnish the appellant, without charge, with either a certified copy of the decision or the clerk's certificate for delivery to the minor's physician.

Vote on 12-AC-19 – Rule 9.147 and 9.300 – Appeal Proceedings to review a Final Order Dismissing a Petition for Judicial Waiver of Parental Notice of Termination of Pregnancy and Rule 9.300 addition of motion under 9.147 as non-tolling, which was added at the meeting: In the room, 29 voted in favor of the proposed amendments, 1 opposed, and 1 abstained. Of those still present on the telephone, 9 voted in favor and 0 opposed. The amendment passed 38-1-1.

5. Original Proceedings – David Caldevilla, Chair

The subcommittee report and minutes begin on page 320 of the agenda packet and the subcommittee's proposed amendments are on pages 21-26 of the agenda.

A. 12-AC-21 – Rule 9.100(b) and (c) Original Proceedings: Chair Caldevilla said there were several rules up for amendment, the first being 9.100. It suggests changes to 9.100(b),(c),(d) and (e). Much of the suggested changes are housekeeping matters brought to subcommittee's attention by John Hamilton. Some of the change is, however, reorganization of the rule to make better sense and to move language under the subdivisions where they should belong. He concluded that there are no substantive changes in this amendment at all.

Kristin Norse questions the amendment to subsection 9.100(b) on page 21 for "Commencement," where it says "clerk of the court to have jurisdiction," and she questioned that removing the word "deemed" before "to have jurisdiction" makes it poor English. Chair Caldevilla said they intended to say "having jurisdiction" and he agreed to that change "to have" to "having" as a friendly amendment.

Vice Chair Regensdorf noted that on page 22, under subsection 9.100(c), there is a 30-day time limit and four petitions listed, yet there are other things in 9.100 that are not listed, for instance, subsection (d) concerning access to public records. Mr. Regensdorf questioned why list 4 that have 30 days, but not others? Chair Caldevilla was unsure if he understood the question, but offered that no substantive changes were being made to subsection (d), they were only proposing eliminating the word "Exception." Mr. Regensdorf followed up by asking why there was no inclusive list of petitions that had a 30-day time limit. John Hamilton offered that the 30-day time limit does not apply to mandamus, but Mr. Regensdorf said that was before us and he asked us to think about it.

RULE 9.100. ORIGINAL PROCEEDINGS

(a) [No change]

(b) Commencement; Parties. The original jurisdiction of the court shall be invoked by filing a petition, accompanied by any filing fees prescribed by law, with the clerk of the court ~~deemed to have~~having jurisdiction. The parties to the proceeding shall be as follows:

(1) ~~If the original jurisdiction of the court is invoked to enforce a private right, the proceeding shall not be brought on the relation of the state.~~ If the petition seeks review of an order entered by a lower tribunal, all parties who are not named as petitioners shall be named as respondents.

(2) If the original jurisdiction of the court is invoked to enforce a private right, the proceeding shall not be brought on the relation of the state.

(3) The following officials shall not be named as respondents to a petition, but a copy of the petition shall be served on the official who issued the order that is the subject of the petition:

(A) Judges of lower tribunals shall not be named as respondents to petitions for certiorari;

(B) Individual members of agencies, boards, and commissions of local governments shall not be named as respondents to petitions for review of quasi-judicial action; and

(C) Officers presiding over administrative proceedings, such as hearing officers and administrative law judges, shall not be named as respondents to petitions for review of non-final agency action.

(c) ~~Exceptions;~~ Petitions for Certiorari; Review of Non-Final Agency Action; Review of Prisoner Disciplinary Action. The following shall be filed within 30 days of rendition of the order to be reviewed:

(1) A petition for certiorari.

(2) A petition to review quasi-judicial action of agencies, boards, and commissions of local government, which action is not directly appealable under any other provision of general law but may be subject to review by certiorari.

(3) A petition to review non-final agency action under the Administrative Procedure Act.

(4) A petition challenging an order of the Department of Corrections entered in prisoner disciplinary proceedings.

~~Lower court judges shall not be named as respondents to petitions for certiorari; individual members of the agencies, boards, and commissions of local government shall not be named as respondents to petitions for review of quasi-judicial action; and hearing officers shall not be named as respondents to petitions for review of non-final agency action. A copy of the petition shall be furnished to the person (or chairperson of a collegial administrative agency) issuing the order.~~

(d) ~~Exception;~~ Orders Excluding or Granting Access to Press or Public.

(1) – (3) [No change]

(e) ~~Exception;~~ Petitions for Writs of Mandamus and Prohibition Directed to a Judge or Lower Tribunal

(1) –(3) [No change]

Vote on 12-AC-21 – Rule 9.100(b) and (c) Original Proceedings and the changes on pages 21-23: In the room, 33 voted in favor and none were opposed. On the phone, 8 voted in favor and none opposed. The amendments were thus approved 41 to 0.

B. 12-AC-21 – Rule 9.100(h) Original Proceedings: Chair Caldevilla explained that this was a referral from John Hamilton. He explained that when a petition for writ of prohibition is filed and the court issues an order to show cause (OTSC), that will give automatic stay in prohibition cases. In practice, the DCAs not issuing OTSCs and are instead issuing orders requiring a response or saying no automatic stay is granted. Mr. Caldevilla said there was a Third DCA decision that explains this. The subcommittee believes that whether there is an automatic stay should be clear in the rule. The rule now says that only an OTSC in prohibition petitions creates an automatic stay. The subcommittee wants clarity, so it drafted three options, which appear on pages 23-25. Option #1 disallows the practice by requiring the courts to ask for a response only by means of an OTSC and that appears on page 24. The subcommittee feels that for prohibition, if the petition is facially sufficient, then it should be stayed. Option #2 on page 24 would authorize an order to be issued, either an OTSC or one directing a response, but whichever is done creates an automatic stay in prohibition cases. This option is similar to #1 but gives effect to stay what the courts are doing. Option #3 on page 25 allows for either an OTSC or order requesting a response, but states that issuance of only an OTSC will create an automatic stay in prohibition. The subcommittee's thought was to give the court the option to pick one of the three options, but to get a clear rule about the stay in prohibition cases.

Vice Chair Regensdorf commented that we typically do not send options to the court, although we have done it in the past; however, he will let Chair Ufferman address this. So, he summarized that the question is whether we let the DCAs continue to issue orders that direct a response, rather than OTSCs, or require them to give a stay no matter what they do.

Tom Hall offered that the supreme court has not written on this, but it uses same practice as described and that practice has spread to the DCAs. Candidly, there are instances when the justices do not want the stay.

Vice Chair Regensdorf concurred and offered that the courts are sometimes required to make a tough call to stop trial without sufficient information. If option #3 is adopted, the courts can wait to decide the stay until they have more information.

John Hamilton commented that there are two distinct issues embodied in this amendment. First, what is mechanism for addressing a petition filed in original proceeding? This mechanism can apply to prohibition and other types of petitions. The question is can a court issue an order merely requesting a response or must

issue an OTSC? Right now the rule does not authorize an order just requesting a response. It only authorizes issuance of an OTSC. That issue is distinct from the automatic stay. The rule currently does not authorize what courts are doing. We can ignore that or we can alter rule to recognize what the courts are doing or prohibit what they are doing. The second distinct issue is the automatic stay itself.

Vice Chair Regensdorf offered that in everything but prohibition, the OTSC is archaic, is meaningless, and you are not going to win automatically. So should courts have the option to not make an automatic stay.

Judge Wetherell echoed what Vice Chair Regensdorf and Tom Hall were saying. He explained that is how the court does business. The question is whether the rule should be modified to reflect the practice? A court can do whatever it wants and issue an order as opposed to an OTSC. Option #3 codifies the practice and allows a court do what it sees fit.

Craig Leen stated that if he understood option #3 correctly, there was no distinction between and OTSC and a response order and he questioned why, if the jurisdictional circumstances were met, why there should not be a stay? Vice Chair Regensdorf responded that with option #3, if the petition looks good, the court can issue an OTSC or a response order and then decide about the stay later. If a response order is issued, then there will be no stay unless it is later ordered.

Tom Hall commented that in other cases, not prohibition, it is not uncommon to have an OTSC issue but then to also ask a voluntary response from the judge or court involved, even though they are listed as a party under the rule.

Judge Gillen asked what if there is a petition for certiorari and one for prohibition and prohibition is just an add-on to a cert petition. Courts can ask for things all the time, so can't order courts to do certain things.

David Caldevilla stated he doesn't want the committee to tell courts what to do or set policy. In all options, the party can ask for stay or set conditions. Option #1 requires the OTSC and stay. He explained that if I have the guts to file prohibition and I satisfied the court that I met requirements, the proceeding in the lower tribunal should be stopped because there's no jurisdiction.

Chris Carlyle commented that the rule was clear that there is one way to get a response – OTSC – but the courts have sidestepped rule by calling for response. He liked options #1 or #2, because the stay would be in place for prohibition, but not option #3.

John Hamilton offered that the worst thing to do is to make no change. The change should embody what is happening so people don't need to research and find the Third DCA decision. He echoes David Caldevilla's request for clarity in the rule. The standard for an OTSC is that the petition sets forth a preliminary basis for relief. In prohibition, that's a big deal. There's no reason not to get stay. The burden is on other side to move for relief, to vacate or modify stay. If you said enough to get the order, you should get the stay. That was the policy of supreme court when it first enacted this rule. What's going on now, courts are not following the rule. They are not giving you the automatic stay and that is not consistent with the rule or intent of supreme court. That's why Mr. Hamilton favors option #1. He apologizes for stepping on the court's discretion, but he's just requiring the others to ask for a change in the stay.

Vice Chair Regensdorf said that if it is an appropriate case for prohibition, there should be an OTSC and one would get the stay. But what if petition is "iffy"? What if the court wants to hear more. Why are we forcing courts to do more.

Siobhan Shea called the question, but Vice Chair Regensdorf said he would not do so on this important issue.

Judge Wetherell said that as a practical argument, as Clerk Tom Hall said, this practice came from the supreme court. He was looking at a recent supreme court order that asked for a response instead of issuing an OTSC. The supreme court started it and they are using it. They are not going to approve this rule because they are not using that process.

Vice Chair Regensdorf said that if we have appropriate jurisdiction then, we should tell them, but he thinks what the courts are doing is appropriate. Sometimes more information is needed to determine the stay. The question is does the court have the power to not grant the automatic stay.

Lance Curry stated that the dispute is that subcommittee made recommendations in the form of options to select, but recommended no specific option. If the ACRC is not in uniformity, we can just present the options to the court without any recommendations and let the court know that we disagree? The 1977 committee note swayed him. We want the Court to decide and let people know this is an option for the courts. Can we present three options without some recommendation?

Vice Chair Regensdorf said that he does not like going to the court with three neat ideas. We should make a recommendation. Either the court has no power – options #1 and #2 – or it has the power, option #3. That's the issue.

Tom Hall spoke to Lance Curry's point. We cannot propose three alternatives. We have to recommend a rule change. We can say we like one and here are some other proposals that were discussed, but we need to recommend a rule change.

Vice Chair Regensdorf agreed – we need to make a rule recommendation – and he called for a straw vote.

Gigi Rollini offered that we can look at this differently. She thinks that the court has discretion to enter any order it wants to. If it is not an OTSC, then it's confusing about whether there's a stay. Option #2 allows the two kinds of orders, but gives an automatic stay. But the assumption is that any order will create automatic stay unless the order states otherwise.

Vice Chair Regensdorf said option #1 just gives the order a different title, but still requires the automatic stay, so it is not different. The question is whether the court can stay or not stay, and that's option #3.

Ed Sanchez said he agreed with John Hamilton and David Caldevilla. He thinks the way the rule is done allows the court to vacate stay. If jurisdiction is met for prohibition, you get the stay. Then the court can vacate the stay. If the petition is significant enough for the court to get involved, then there should be a stay. The parties should not have to litigate in two tribunals. The stay is in place unless court acts affirmatively to modify or vacate the stay.

Vice Chair Regensdorf responded that the reality is the DCAs are not giving the stays. He agrees that if the petition is important enough for the court to get involved but not important enough for a stay, then there should be no OTSC.

John Hamilton said we were writing the rule to reflect that the courts are not following the law and that he was not willing to write a rule that violates the law. Vice Chair Regensdorf asked what law we are violating, and Mr. Hamilton responded that courts are not committed to get involved unless the petition is sufficient.

Elizabeth Wheeler suggested that option #2 provides unless "otherwise stated by the court", which gives the court an option. Chair Caldevilla corrected that was option #3.

Vice Chair Regensdorf suggested that we were now just parsing language and he called the question.

Vote on 12-AC-21 – Rule 9.100(h) Original Proceedings: Those in favor of the current practice, which is option #3, vote yes, or if they want the current rule to continue, meaning the courts need to issue an OTSC and get an automatic stay, then vote no. This is a vote for the principle. In the room, 14 voted in favor of giving the authority to the courts to decide and 17 voted in favor of the automatic stay being required. On the phone, 3 voted in favor of giving the courts authority, while 5 voted for the automatic stay. So the vote was 17 in favor of giving the courts authority to decide about the stay by how they issue the order (option #3) and 22 voted against giving discretion. So option #3 failed, and options #1 and #2 remain for consideration.

John Hamilton suggested that we confine the vote to option #1, which confines the courts to issuing an OTSC. That's option #1, not #2, which includes other orders. Vice Chair Regensdorf responded that he did not like nondescript orders and he agreed we needed to pursue option #1.

Marjorie Gadarian Graham commented that she did not vote, but would have voted no except for the fact that it was phrased as a yes or no. So that changed the vote to 23.

Vice Chair Regensdorf focused the attention on option #1. The question is whether to take option #1 as written or to wordsmith it and vote on it. Discussion ensued.

Judge Wetherell said that if the purpose of the amendment is to prohibit what is currently going on in the courts, then the language has to say something else rather than "directed." We are asking or requesting you to file a response. It's a fine distinction. So if we are trying to prohibit what can be done, then we need to make it clear that the court cannot request a response. John Hamilton suggested it could be changed to say "required to seek a response to a petition only through the issuance of an order to show cause." And Judge Wetherell then suggested, "if a response is required."

Vice Chair Regensdorf said there is a friendly amendment to change the word "require" to "request" so the amendment would read "The court shall request a response to a petition only through the issuance of an order to show cause." This would prohibit the court from sending out an informal order to request a response. It must issue an OTSC. Chair Caldevilla agreed.

Vice Chair Regensdorf then called for a vote on option #1, appearing on page 24 of the agenda. Dottie DiFiore then asked for clarification as to whether the committee would be recommending option #1 but sending the two other options with it. Mr. Regensdorf clarified that option #1 would be recommended and option #3 would be presented with it.

Vote on 12-AC-21 – Rule 9.100(h) Original Proceedings: All in favor of option #1 on page 24 with the change of the word "require" to "request" were 23 in the room, with 7 opposed. On the phone, 2 were in favor.

The question was raised again about whether option #3 was being presented too. It was clarified that option #1 was the preferred option and we had already voted to recommend it. Vice Chair Regensdorf said that was a straw vote and he wants to present a final vote.

Tom Hall said that if option #1 is for issuance of only an OTSC and, therefore, a stay, the wording doesn't do it, but then what they will do is issue an OTSC, not request a response, and then the stay provisions don't apply. You will change the response to that. Vice Chair Regensdorf commented that the court will find a way around the language. We just want clarity and the best language we can get.

Lance Curry said he is in favor of option #1 and wants to vote on option #3.

Gigi Rollini, who was attending on the phone was not listed in the phone vote above, asked if we voted on the language in option #1. Chris Carlyle said that option #1 had won. He was unclear if there was a no vote on option #2 and if that means we like option #3. Vice Chair Regensdorf said it was option #3. A straw vote was called for the language of option #1. Vice Chair Regensdorf asked members to vote even if they preferred option 3. We were voting on the wordsmithing of "require" to "request." John Hamilton clarified that one can oppose #1 and favor #3 and still vote yes if the language in option #1 is ok.

Straw Vote on the Language in Option #1: In the room, the vote was unanimous in favor of language of option #1. On the phone, everyone voted in favor of the language except Siobhan Shea.

Straw Vote on the Language in Option #3: Vice Chair Regensdorf explained that the members can vote in favor of option #3 for the language, even if they don't like the option itself. It appears on page 25 of the agenda.

Discussion then ensued about changing the word "directing" in the fourth line from the bottom to "requesting" so it reads ""why relief should not be granted or requesting the respondent to otherwise file . . . ."

Tracey Gunn commented that "within the time set by the court" is in the rule twice and she questioned if it could be shortened. Vice Chair Regensdorf responded that he prefers to keep it in.

Gigi Rollini made a suggestion for final sentence, "In prohibition proceedings, the issuance of an order to show cause shall stay further proceedings in the lower tribunal," to say "issuance of an order directing respondent to show cause" so only the first type of order triggers the stay. Chair Caldevilla rejected that suggestion. Ms. Rollini commented that she was worried that people will see this as the same and the question of the automatic stay will still be out there. Judge Gillen agreed that there might be confusion by the two types of orders If the real goal is to give courts options about what orders it will choose, then it could provide for a stay unless the court orders otherwise. Vice Chair Regensdorf said that sounds like option #2. Craig Leen asked why option #2 was not there, and John Hamilton responded that we needed a majority and minority view. The amendment needs to accomplish what is going on. Ms. Rollini stated that it needs to be crystal clear about the stay for prohibition. Chair Caldevilla then stated that he was okay with Ms. Rollini's suggested language.

Straw Vote the Language of Option #3: In the room, the vote was unanimous in favor, as was the vote on the phone.

Vote: Vice Chair Regensdorf then called for a final vote on recommending option #1 with the language amendment (changing "require" to "request"), which appears on page 24. Judge Wetherell asked if option #2 was off the table and whether no change at all was on the table. Mr. Regensdorf responded that change was desired, so we voted on option #1 vs. option #3 and no one said leave it alone. Judge Wetherell then said he will vote no on option #3 because no change is wanted. Mr. Regensdorf then noted that

several people say no change is an option. So the vote will be option #1, option #3, and no change.

Majority Opinion

(h) Order to Show Cause. If the petition demonstrates a preliminary basis for relief, a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy by appeal, or that review of final administrative action would not provide an adequate remedy, the court may issue an order directing the respondent to show cause, within the time set by the court, why relief should not be granted. The court shall request a response to a petition only through the issuance of an order directing respondent to show cause. In prohibition proceedings, such orders shall stay further proceedings in the lower tribunal.

Minority Opinion

(h) Order to Show Cause. If the petition demonstrates a preliminary basis for relief, a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy by appeal, or that review of final administrative action would not provide an adequate remedy, the court may issue an order either directing the respondent to show cause, within the time set by the court, why relief should not be granted or directing the respondent to otherwise file, within the time set by the court, a response to the petition. In prohibition proceedings, the issuance of an~~such~~ order~~s~~ directing respondent to show cause shall stay further proceedings in the lower tribunal.

Final Vote on 12-AC-21 – Rule 9.100(h) Original Proceedings: In the room: Option #1 – 17 in favor. Option #3 – 6 in favor. No change – 7 in favor. On the phone: Option #1 – 3 voted in favor. Option #3 – 3 voted in favor. No change: 1 voted in favor. So the final vote was 20 to 17.

C. 12-AC-21 – Rule 9.100(e)(3) Original Proceedings: Chair David Caldevilla explained that this amendment, which appears on page 25 of the agenda, was intended to accommodate the problem in rule 9.100(h) that we just discussed. It amended subsection (e)(3) to acknowledge that there is some other kind of order other than an OTSC. John Hamilton offered that no matter what the supreme court does with (h), we are okay with this change. Hearing no other discussion, Vice Chair Regensdorf called for a vote.

RULE 9.100. ORIGINAL PROCEEDINGS

(e)

(3) Response. Following the issuance of an order pursuant to subdivision (h), ~~T~~the responsibility ~~to~~for responding to a~~n order to show cause~~ petition is that of the litigant opposing the relief in the petition. . .

Vote on 12-AC-21 – Rule 9.100(e)(3) Original Proceedings: In the room, 30 in favor, 0 opposed to 9.100(e)(3). On the phone: 7 voted in favor, none against. So the amendment was approved 37 to 0.

6. Administrative Law Practice – Cristy Russell, Chair

The subcommittee report and minutes begin on page 354. The amendments proposed are on pages 27-28 of the agenda.

Chair Russell announced that there are two issues, one is a voting issue and one is nonvoting.

A. 12-AC-20 – Rule 9.190(a) Judicial Review of Administrative Action: Chair Russell said that the first issue is an amendment to rule 9.190(a) proposed by John Hamilton, which appears on page 27 of the agenda. It deletes the statement that judicial review of administrative action shall be "governed by the general rules of appellate procedure" and substitutes that they shall be "as in civil cases." Chair Russell said the subcommittee recommended this change to make the rule consistent with the rules in other places.

Vice Chair Regensdorf asked: "What are rules in civil cases. What is that?" John Hamilton responded that is what the rules say in other places. Mr. Regensdorf commented that doesn't say what the rules are. David Caldevilla offered that means the general rules of appellate procedure. Mr. Regensdorf then asked what is a civil case governed by. We have rule 9.146, 9.180, and other places say 9.170.

Elizabeth Wheeler questioned the phrase "as specifically modified in this rule" and suggested it should read "as specifically modified by this rule." Change "in" to "by."

Kristin Norse referred back to the problem Craig Leen had mentioned earlier. Administrative action is sometimes a cert proceeding or statutory. It may be different than an appellate procedure. John Hamilton responded that the type of cases Mr. Leen was mentioning were encompassed in rule 9.100 and are not within

rule 9.190. Hearing no further discussion, Vice Chair Regensdorf called for a vote on the amendment to 9.190(a).

RULE 9.190. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

(a) Applicability. Judicial review of administrative action shall be ~~governed by the general rules of appellate procedure~~as in civil cases except as specifically modified ~~herein~~by this rule.

Vote on 12-AC-20 – Rule 9.190(a) Judicial Review of Administrative Action with the language change of substituting "by" for the word "in" so it reads "by the rule" : In the room, 27 voted in favor, and 0 opposed. On the phone, 5 voted in favor and 0 opposed. So the amendment passed 32 to 0.

7. Record on Appeal – Maria T. Armas, Chair, Stefanie Shelly, Vice Chair

The subcommittee's report and minutes begin on page 402 of the agenda packet, and proposed amendments appear on pages 28-29 of the agenda.

A. 12-AC-18 – Rule 9.200 The Record: Chair Armas reported that this was a referral from John Hamilton which adds the phrase "of the lower tribunal" after the work "clerk" in 9.200(a)(4). There was no discussion.

RULE 9.200. THE RECORD

(a) Contents

(4) The parties may prepare a stipulated statement showing how the issues to be presented arose and were decided in the lower tribunal, attaching a copy of the order to be reviewed and as much of the record in the lower tribunal as is necessary to a determination of the issues to be presented. The parties shall advise the clerk of the lower tribunal of their intention to rely on a stipulated statement in lieu of the record as early in advance of filing as possible. The stipulated statement shall be filed by the parties and transmitted to the court by the clerk of the lower tribunal within the time prescribed for transmittal of the record.

Vote 12-AC-18 – Rule 9.200 The Record: In the room, 30 voted in favor, 0 opposed. On the phone, 5 voted in favor, 0 opposed. The amended passed 35 to 0.

8. E-Filing – Jim Nutt, Chair

The subcommittee's report and minutes begin on page 405 of the agenda, and the proposed amendments are on pages 29-30 of the agenda.

A. Amendments to Rules 9.020, 9.146, 9.180, and 9.420: Chair Nutt reported that this subcommittee was formed for the purpose of looking for consistency in the rules on e-filing. Three weeks after they commenced their work, the supreme court issued the October orders and now the subcommittee has two proposals on pages 29-30, which were unanimously approved by the subcommittee. In rule 9.020(k), a definition of the word "signed" is added consistent with rule 2.515(c) and as a guide to people about the signature in rule 9.020. The remainder of the changes substitutes the word "documents" for "papers." This language had been missed in four places during the previous review, so the subcommittee was recommending those four changes.

John Hamilton recommended that the amendment to rule 9.020(k) appearing on page 29 be changed to say "provided by Rule of Judicial Administration 2.515(c)" as opposed to "Rule 2.515(c), Rules of Judicial Administration" for consistency throughout the rules. This would invert the order of the rule title. This friendly amendment was accepted.

RULE 9.020. DEFINITIONS

(k) Signed. A signed document is one containing a signature as provided by Florida Rule of Judicial Administration 2.515(c).

Vote on Amendments to Rules 9.020, 9.146, 9.180, and 9.420: The amendments were voted on as a package. In the room, 29 were in favor, and none opposed. On the phone, 5 were in favor and none opposed. The amendments carried 34 to 0.

APPELLATE COURT RULES COMMITTEE
MINUTES
SEPTEMBER 27, 2013 MEETING
TAMPA AIRPORT MARRIOTT, DUVAL ROOM
TAMPA INTERNATIONAL AIRPORT
4200 GEORGE BEAN PARKWAY, TAMPA, FLORIDA 33607
9:00 AM TO 12:00 PM

B. CHAIR'S REPORT – CHAIR EDUARDO I. SANCHEZ

4. Public comments on the 2014 three-year cycle packet: The Chair stated that several written public comments were received, and instead of addressing each set of comments individually, he would entertain motions concerning the comments.

(a) Request for Clarification: Ms. Gunn asked for clarification concerning the committee's preference or procedure on how to handle comments concerning matters that have already been decided. The Chair stated that we do not have a procedure or rules that address this, but the RJA rules state that the committee shall consider any comments submitted, and thereafter report to the Board of Governors no later than October 15th any revisions to the proposed rules. So, it is up to us how we consider the comments. Ms. Gunn stated that if we are going to solicit comments, that we should consider all of the comments, even if that means reconsidering decisions that were previously made concerning the same subject matter.

- Mr. Hamilton stated his position is that we should not reopen decisions concerning subjects that have already been considered, but if the comments raise new issues that were not previously considered, reconsideration would be appropriate.

- The Chair added that many of the comments raised issues that have already been thoroughly considered and debated, prior to being voted upon by the committee. Therefore, the Chair reiterated that he would prefer to entertain any motions that any committee member wanted to make in response to the comments that we received, instead of rehashing issues that have already been thoroughly debated.

- Ms. Flowers stated that our rules and operating procedures contemplate that any written comments we receive are going to be included as an appendix attached to our rule submission. Ms. Telfer confirmed that was correct.

(b) Rule 9.141: Mr. Leen moved to amend the proposed changes to Rule 9.141(b)(1)(2)(i), by striking the sentence which states, "However, if a brief is filed, the failure to address in the brief any claim that was raised in the post-conviction motion will result in waiver of the claim(s)." Mr. Hamilton seconded the motion.

- Mr. Leen and Mr. Hamilton stated that the comments received from Judge Chris Altenbernd and Second DCA Staff Attorney Christina McAdams were well-taken because these briefs are often filed by prisoners, and they should be entitled to raise their arguments, and as written, the proposed rule might result in a less consideration than is currently afforded. Mr. Stanton agreed, and thinks that this sentence makes the process confusing and inconsistent.

- Judge Wetherell indicated that this point was already debated by the committee, and that this sentence was intended to address a conflict between the First and Second DCAs. The First DCA reviews only those issues that are presented in the prisoner's brief. He believes the Second DCA reviews all claims that were raised in the trial court and in the prisoner's brief. This language resolves the conflict between the district courts.

- The Chair stated that he reviewed the history, this amendment originated as a referral from Judge Altenburg to resolve the conflict. Because the Second DCA had certified the question to the Florida Supreme Court, the committee decided to wait for the Supreme Court to decide the matter. However, the Second DCA subsequently amended its opinion and withdrew its certification. As a result, the issue came back when Mr. Ufferman was the chair of the criminal subcommittee, and they proposed to insert this sentence. It went to the full committee and was approved 42 in favor, one opposing and two abstaining. So, it was clearly the view of the committee at the time that this was the appropriate way to resolve the conflict among the district courts.

- Ms. Norse questioned if we should be resolving conflicts by committee, and indicated that she thinks the proper way to resolve

the conflict was by certification. She is concerned about our committee taking one court's position over another.

- The Chair responded that we do that frequently in our proposed rules, but our committee does not actually resolve the conflict. We send a proposed rule to the Florida Supreme Court, which then resolves it by either adopting it or not adopting it. This gives the Florida Supreme Court the procedural opportunity to resolve a conflict without having to wait for an actual case to be before the Court.

- Ms. Gunn responded that if we present only this option, which says there will be a waiver, then we are not really giving the Court a way to resolve the conflict. We are giving them the opportunity to approve the First DCA's procedure and not giving them an opportunity to resolve the conflict in favor of the way the Second District does it.

- After hearing Judge Wetherell's comments, Mr. Hamilton said he is now favor of trying to resolve the conflict, because he did not recall that there was a conflict between the district courts. He appreciates Ms. Gunn's comments. He prefers to eliminate the confusion and eliminate the conflict. We should eliminate a situation in which somebody in Tampa who seeks review would have a greater level of review than someone who seeks review in Tallahassee. That situation will not be resolved if we strike this sentence. He also believes that Ms. Gunn is right, that sending this version of the amendment to the Supreme Court without an alternative, is probably not the best way either. Perhaps we should develop an alternative option that embodies the Second DCA's approach, send both, and identify the option that we favor. We have precedence for doing that. However, he does not have any language in mind to embody Judge Altenbernd's suggestion. Therefore, Mr. Hamilton withdrew his second to Mr. Leen's motion.

- Ms. Norse stated that she would prefer providing two options, instead of doing nothing.

- Mr. Leen amended his motion, as an alternative amendment, to remove the word "however," and then say, "if a brief is filed, the failure to address in the brief a claim that was raised in the post-conviction motion will not result waiver of that claim." Mr. Hamilton seconded that amended motion.

- Ms. Swank pointed out that the comments will accompany the

proposed rule amendment. So, the Supreme Court will be in a position review the comments as an alternative approach to the committee's proposed amendment.

- Mr. Stanton said that if we agree it is a mistake, we should rectify it before sending it up. He is concerned that prisoners have limited resources to raise the issues, they are often very bad at identifying the best issues, and they are charged for the paper as well as the copies for anything they want to file. So, the economy becomes very important to them. So, rather than forcing them to identify and limit their issues, it would be fairer to resolve it or suggest a resolution.

- The Chair clarified that Mr. Leen's motion is to submit two alternative versions, with the current language identified as the committee's preferred version. Mr. Leen agreed.

- The Chair called for a vote. The motion failed, with 13 votes in favor and 35 votes against.

- Mr. Hamilton moved that we submit the same two options, but that the committee should identify the second option as the preferred option. Mr. Stanton seconded that motion.

- Judge Wetherell said that if the Supreme Court adopts the second option, the First DCA will comply, but his personal opinion is that the second option does not make sense. In every other type of case, there are two adverse parties making arguments. In these post-conviction cases, if a prisoner's brief raises only one issue, then the State is only going to respond to that one issue. If the court is required to review other issues, that will result in the court issuing an order requiring the State to respond to additional issues not raised in the prisoner's brief. We will be creating a situation that is essentially turning the court's staff attorneys into the lawyers for the prisoners. He personally thinks that is a bad idea.

- Ms. Loquasto compared Judge Wetherell's concerns to an *Anders* brief situation.

- Mr. Curry expressed concern that this was a matter which was specifically referred to our committee, that a subcommittee specifically considered it, decided that this was the appropriate way to resolve the issue, and now we are proposing to flip the recommendation to the opposite result. He indicated that he would like to hear comments from the subcommittee members who studied the issue.

- Mr. Hamilton stated that his motion was not being done on a whim, and was based on a philosophical view. As is in the *Anders* brief context, there should not be a problem with adding an extra level of work to the staff attorneys and the DCAs, if that process reveals an inmate was wrongfully convicted or sentenced, but did not have enough sophistication to realize the correct issue. Whatever administrative burden that imposes on the courts is far outweighed by the full review that would be necessitated by the language Mr. Leen suggested.

- The Chair stated that the committee looked at it, and he does not think everyone in the room has looked at it in the same depth again. We may be addressing something that we are not fully informed about, as Mr. Curry suggested, and overturning the recommendation made by those who studied this in depth.

- Ms. Loquasto stated that she was on the subcommittee, and her recollection is that the subcommittee wanted clarity as to whether these issued would be considered waived when a criminal defendant seeks habeas relief.

- The Chair called for a vote. The motion failed with 14 votes in favor and 33 votes against.

- Ms. Gunn moved to strike the sentence. Ms. Flowers seconded the motion.

- Mr. Stanton expressed concern that we will be inviting the court not to clarify the rule in a way that will resolve the conflict between the district courts.

- The Chair stated that the comments will be provided to the Court. We can add to the report that the DCAs are doing it differently and encourage the Court to pick a side. Otherwise, this may be the only chance to get clarity before the next three year cycle.

- The Chair called for a vote. The motion passed with 33 votes in favor, and 15 against.

- **<u>Approved Action</u>: The proposed amendment to Rule 9.141(b)(1)(2)(i) will omit the sentence which states, "However, if a brief is filed, the failure to address in the brief any claim that was raised in the post-conviction motion will result in waiver of the claim(s)."**

(c) Rule 9.020(h): Ms. Farrell stated that the condition under 9.020(h) in the cycle amendments and (i) in the update, has an omission. She does not know if it ever came up before. Regarding a motion to correct dispositional error, the rule does not correspondingly point to that as staying rendition in the context of a juvenile case. She is not sure whether that would be a new referral.

- The Chair stated that would be a new referral, and asked whether there are any other motions that deal with the three-year cycle amendments.

(d) Rule 9.320(b): Ms. Gunn stated that in Rule 9.320(b), governing oral arguments, the amendment currently states that a request for oral argument in an original proceedings shall be no be filed no later than 10 days after the "reply brief" is due to be served, and she thinks it should just say "reply."

- The Chair and Ms. Telfer responded that had already been fixed, along with other typographical errors.

(e) Rule 9.420(a)(2): Mr. Hamilton moved to withdraw the proposed amendment to 9.420(a)(2), which concerns the "mailbox" rule for inmate filing. Mr. Stanton seconded the motion.

- Mr. Leen stated that when he previously worked at the Miami-Dade County Attorney's Office, he handled these types of cases for the County Court Correctional System. He originally supported this rule because he thought it provided more clarity as to when the document was actually filed. Sometimes they may write a date on a document that they don't actually send over to the prison system until later on. For the purpose of discussion, he was concerned about one of the comments which indicated that the court does not know if that jail has that system.

- The Chair stated this one was adopted in June 2012, and was unanimously adopted by Committee (44 to 0), and he believes that Mr. Hamilton did the draft back then. The committee notes identify concerns about back-dating documents filed with the court to circumvent procedural deadlines, and that was the reason it was done.

- Ms. Norse stated that the committee discussed this at length, and she thinks the first vote on whether to change the rule was more divided but was obviously still in favor of proposing a change to the "mailbox" rule. This was discussed both at the subcommittee and the full committee.

- Judge Wetherell stated this was referred to the committee by Josh Heller, who is an Assistant AG. He read Judge Altenbernd's email and the staff attorney's email, and can't understand why this is confusing to them. It is a simple concept, and he thinks Mr. Hamilton did a good job in putting into rule form. The way this issue is presented is typically through a motion to dismiss or an order to show cause, when a filing comes in and something appears to be wrong with it. For example, a prisoner has disciplinary action that was resolved on January 1st and the petition for writ of mandamus doesn't get to the court until June 1st. The document appears to be on its face untimely, but it has a certificate of service saying the prisoner provided it to prison officials on the last day it was due. Under the Supreme Court's precedence, there is a presumption that it was timely filed when he said he gave it to the officials. The problem with that case law is that since those cases were decided, the prison systems have gotten smart and created internal prison mailing systems that document when these things are actually handed over. The prisoner initials them, the staff initials them, and there is no dispute as to when it was actually turned over to prison officials, and thus, is deemed filed. So, some prisoners will back-date it, and then the burden shifts to the State to prove that it wasn't. This rule prevents that. In order to get the benefit of the presumption, the prisoner must utilize the mailing system if one is available; otherwise, there is no presumption. The issue will be raised by the State filing a motion to dismiss on the grounds of untimeliness. Under the circumstances, Judge Wetherell recommends that we submit the proposed rule, as it stands, to the Florida Supreme Court.

- Mr. Hamilton withdrew his motion.

- Ms. Gunn asked whether the court would review each filing to make sure it is timely. Judge Wetherell responded that the court typically has people who check jurisdiction and send out orders to show cause to the prisoners. However, under the current rule, the certificate of service could be pre-dated. As such, when the jurisdictional people review it, it appears to be timely, and the only time it really would become an issue is if the State challenges the timeliness.

- Mr. Stanton moved to strike the language. However, the motion failed without a second.

(f) Rule 9.110: The Chair addressed the proposed committee note for the 2014 amendment of Rule 9.110, which states, "This amendment is intended clarify that it is neither necessary nor appropriate to request a relinquishment of jurisdiction…." This note addresses one of multiple different amendments to Rule 9.110. He wanted to make it clear, by beginning the note with the phrase, "The amendment to subdivision (*l*) is intended…."

- Mr. Hamilton adopted the Chair's suggestion as a motion. Mr. Leen seconded the motion.

- The Chair called for a vote. The motion passed unanimously with 49 votes in favor, and 0 against.

- **Approved Action: The committee note for the 2014 amendment of Rule 9.110 will state, "The amendment to subdivision (*l*) is intended to clarify that it is neither necessary nor appropriate to request a relinquishment of jurisdiction from the court to enable the lower tribunal to render a final order."**

(g) Rule 9.110: With respect to p. 68 of the agenda packet, Ms. Telfer said that the committee note associated with the 2006 Amendment refers to subdivision (n), which has now been moved to its own stand-alone rule. So, she asked if we want to have that in there or not, and if we should explain where (n) has been moved.

- The Chair stated the language of what is now Rule 9.147 (see agenda packet at p. 113). He suggested that we keep the deletion of the 2006 committee note, but thinks it would be useful to explain that the language was moved to 9.147. When we added 9.147, we did not indicate it came from anywhere in the committee note.

- Ms. DiFiore moved to add a committee note to the new Rule 9.147 which states, "The previous version of this rule was found at Rule 9.110(n)." Mr. Hamilton seconded the motion.

- The Chair called for a vote. The motion passed unanimously with

49 votes in favor, and 0 against.

- **<u>Approved Action</u>: A committee note will be added to the new Rule 9.147 which states, "<u>The previous version of this rule was found at Rule 9.110(n).</u>"**

(h) The Chair confirmed that there were no other motions concerning the Three-Year Cycle Report.