
GUARDIAN AD LITEM APPELLATE PRACTICE

INTRODUCTION

This chapter does not attempt to mimic or condense the many books and articles that convey the secrets and technical aspects of effective legal writing and appellate advocacy. It is not intended to be exhaustive, nor is it intended to substitute for thorough preparation and knowledge of the Florida Rules of Appellate Procedure. Rather, the purpose of the chapter is to provide a practical guide to basic Florida appellate procedure in the specific context of dependency and termination of parental rights (TPR) cases. Because appellate review most often begins in a district court of appeal, and because the district courts are the courts of last resort for the vast majority of dependency and TPR cases, this chapter focuses primarily on issues relevant to practice in the district courts.¹

PURPOSE OF THE APPELLATE PRACTICE

Appellate courts exist for three primary purposes: to correct harmful error in lower courts, to clarify and develop law, and to administer justice. See, e.g., Philip J. Padovano, *Florida Appellate Practice* § 7.1 (West 2006 ed.). First and foremost, the Florida Guardian ad Litem Program (“the Program”) appellate practice section strives to correct harmful errors which prevent the best interests of the children and youth we represent from being served. Further, as a unified, statewide organization, the Program has a unique perspective that allows it to proactively identify and address trends and issues affecting children and youth through its appellate advocacy. Without a uniform appellate practice, the Program and the children it represents go unrepresented in appellate cases, and the Program gives up its rightful place at the table of those shaping the law and policy governing dependency and TPR cases. While the Program’s appellate practice does not guarantee that the Program’s perspective will always carry the day, the Program’s practice assures that its perspective will be heard and considered as legal and policy issues are clarified and shaped.

SUCCESSFUL APPEALS BEGIN IN THE TRIAL COURT

The lawyer who begins planning an appeal after the trial judge has announced an adverse ruling is more likely to lose on appeal than the lawyer who incorporates appellate planning into trial preparation. Planning ahead is not a concession of defeat but an essential component of competent

¹ At the time this chapter went to print, the Commission on District Court of Appeal Performance and Accountability had just released its final report concerning recommended rules and practices to expedite appellate review and disposition of dependency and termination of parental rights cases. The Commission’s report foreshadows potential changes to the Florida Rules of Appellate Procedure and the Florida Rules of Juvenile Procedure. Consequently, some of the procedures and rules discussed in this chapter may be replaced by different procedures and rules in the near future.

representation. If the Program determines that an adverse ruling on a particular issue in the trial court will be detrimental to the child's best interests, competent representation requires that the attorney be thoroughly prepared to protect the record for appellate review. Thorough preparation, in turn, requires that the attorney know (1) the essential elements of the issue before the trial court, (2) the governing statutes, regulations, and case law under both federal and state law, and (3) the applicable standard of review on appeal. By consulting and working with the Program's appellate attorneys, as well as other Program attorneys, the trial attorney is more likely to identify all essential elements and controlling principles of law, which in turn makes success in the trial and appellate courts more likely.

STANDARDS OF REVIEW

Florida Rule of Appellate Procedure 9.210(b)(5) and (c) require that all initial and answer briefs contain a statement of the standard of review that governs the appellate court's consideration of the appeal. The rule exists, at least in part, because appellate courts want attorneys filing appeals to know and appreciate the applicable standard before they waste time and resources filing appeals and writing briefs making arguments that will be flatly rejected under the governing standard.

Trial court decisions fall generally into three categories: discretionary, factual, and legal. Padovano, Florida Appellate Practice at § 9.1. Decisions may also involve mixed question of law and fact. Discretionary rulings are reviewed under the onerous abuse of discretion standard of review, *Id.* at § 9.5, while rulings on matters of law are reviewed under the least stringent de novo standard of review. *Id.* at § 9.4. Factual determinations meanwhile are reviewed under the exacting substantial, competent evidence standard of review. *Id.* at § 9.6.

For example, the standard of review applicable to most orders changing a foster child's placement is either the abuse of discretion or the substantial, competent evidence standard. *M.A. v. Dep't of Children & Fams.*, 906 So. 2d 1226 (Fla. 1st DCA 2005). Knowing that standard should cause an attorney opposing a motion to change the placement to enter the hearing loaded with evidence establishing the harm that will come to the child if the placement is changed. Such evidence might include not only the report and testimony of the guardian ad litem but also the testimony of appropriate fact witnesses such as teachers, day care personnel, friends and church acquaintances of the custodian(s). When possible, expert testimony establishing to a reasonable degree of probability that changing the child's placement will harm the child's well-being should be introduced. In most cases, such evidence will carry the day in the trial court and will go a long way toward assuring victory on appeal. On the other hand, a record containing the bare best interests recommendation of a guardian ad litem on the premise that the current placement is "ideal" or "preferable" is likely to be deemed inadequate.

As the above example demonstrates, knowledge and appreciation of the applicable standard of review is an integral part of preparation for trial court proceedings. Without knowing the standard of review that will be applied to a given issue on appeal, trial attorneys are far more likely to make an inadequate record for appellate review, and the presumed correctness of the trial court's order will defeat the appeal. See *Applegate v. Barnett Bank*, 377 So. 1150 (Fla. 1979).

Identifying the general nature of the ruling appealed is only the first step in determining the applicable standard of review. The second step involves consideration of the specific substance of the ruling. For example, most evidentiary rulings are reviewed under the abuse of discretion

standard of review, Dessaure v. State, 891 So. 2d 455 (Fla. 2004), but a judge has no discretion to misapply the law. Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980). Thus, an order admitting evidence protected by the attorney-client privilege would be reviewed under the de novo standard of review because trial judges do not have discretion to admit evidence in violation of a privilege. Padovano, Florida Appellate Practice at § 9.5; *see also* Johnston v. State, 863 So. 2d 271 (Fla. 2003) (the trial court's discretion is limited by rules of evidence).

In the end, the only way to know for certain which standard of review will apply is to identify the challenged order and the context in which it was made, then independently verify the applicable standard of review by researching case law and secondary authorities.

PRESERVATION OF ERROR AND WAIVER

An appellate court's ability to review error correlates directly to the presentation of the case in the trial court. An appellate court will generally not consider issues raised for the first time on appeal. Matters not preserved for review are, as a general rule, waived. *See, e.g.,* Keech v. Yousef, 815 So. 2d 718 (Fla. 5th DCA 2002).

To assure appellate review, an issue must be raised and argued in the trial court. Preserving factual and legal issues means the trial attorney must file timely motions arguing the correct and controlling law, present relevant and admissible evidence, make timely and appropriate objections, and, when necessary, proffer excluded evidence into the record. *See generally* Padovano, Florida Appellate Practice at § 8.1. Here again, adequate preparation is critical, for untimely objections, proffers, and arguments will not preserve an issue for review. Motions and objections must be made in sufficient time to permit the trial judge to take corrective action. *Id.* at § 8.2.

Exceptions to the waiver rule exist, but they are rarely applied. Thus, an exception should only be relied upon when an inadequate record has been made in the lower court. Invocation of the exceptions should itself be an exception rather than the rule.

The first exception, the "fundamental error" rule, applies to appellants and petitioners who seek to have an appellate court review a matter that was not preserved in the lower court. Fundamental error is error that goes to the foundation of the case or to the merits of the cause of action. Because of its nature, appellate courts have inherent power to correct fundamental error. *Id.* at § 8.4. Fundamental error is rare. For example, even constitutional error does not constitute fundamental error in all cases. The best way to assure appellate review on the merits is not by fishing for exceptions but, instead, by thoroughly preparing for all contested hearings. When a hearing becomes contested because of an unexpected oral motion or similar circumstance, the prudent attorney will object to the lack of notice and request an opportunity to file a memorandum of law instead of fielding the issue off the cuff.

A second exception to the waiver rule is the "right for the wrong reason" rule, which is also known as the "tipsy coachman" doctrine. Carraway v. Armour & Co., 156 So. 2d 494 (Fla. 1963). By its very nature, the tipsy coachman doctrine is of no use to the party complaining of error on appeal. An appellee or respondent may, however, rely on the doctrine to argue for affirmation of the trial court on grounds that are legally proper but that were not presented to the trial court. Because of the appellate court's general duty to affirm lower courts where possible, an appellee or respondent arguing for affirmation of a judgment is not limited to legal arguments expressly asserted as

grounds for the judgment in the court below. Malu v. Security Nat'l Ins. Co., 898 So. 2d 69 (Fla. 2005) (citations omitted).

Lastly, advance preparation also minimizes the likelihood of invited error, which appellate courts will not review. Invited error is error that might well constitute reversible error but for the fact the complaining party opened the door to inadmissible evidence or requested the erroneous action before realizing the negative implications of such action. Arsenault v. Thomas, 104 So. 2d 120 (Fla. 3d DCA 1958) (alleging error in the grant of requested relief); Guy v. Knight, 431 So. 2d 653 (Fla. 5th DCA 1983)(induced testimony).

EXPEDITED REVIEW

Appellate review does not provide attorneys and their clients a second bite at the apple; rather, it is primarily a safeguard to remedy harmful legal error. Children are unique in that their best interests may be harmed not only by legal error in the lower court but also by delay in the appellate court. A child's perception of time is markedly different from that of adults. Unlike adults, who measure the passing of time by clocks and calendars, children have their own built-in time sense based on the urgency of their instinctual and emotional needs. What seems like a short wait to an adult can be an intolerable separation to a young child to whom a week can seem like a year and a month forever.... French v. French, 452 So. 2d 647 (Fla. 4th DCA 1984) (Glickstein, J., concurring and dissenting) (citations omitted).

For this reason, attorneys representing children should consider the likelihood of delay on appeal and the specific consequences delay will have on the specific child in question. In appropriate cases, a stay of the lower court's order should be requested. A stay request usually should be made in the trial court first. An appellate court is unlikely to grant a stay if the issue has not first been presented to the lower court. Fla. R. App. P. 9.146(c). Cases involving disputed placement and custody orders are particularly suitable for stay orders. For instance, while an order granting a change of custody from a stable, long-term placement may harm a child's best interests, a second change of placement following a year or more of appellate litigation may do even more harm. See T.D. v. Fla. Dep't of Children & Fam. Servs., 930 So. 2d 611 (Fla. 2006) (Pariente, C.J. concurring and Quince, J. dissenting).

Florida statutes and appellate rules require appellate courts to give priority to dependency and TPR cases, but they do not specify how the courts are to accomplish that task. Consequently, the district courts employ different procedures. For instance, the fourth and fifth districts have standing orders that require the filing of answer briefs within 15 days instead of the 20 days otherwise specified in the appellate rules. In addition to paying close attention to specific orders affecting the briefing schedule, attorneys representing children in appellate courts should file thorough briefs, petitions, responses, and the like as quickly as possible. Likewise, they should be vigilant in monitoring the progress of an appellate case, filing appropriate motions when necessary to avoid delay.

APPELLATE JURISDICTION

Appellate cases fall under one of three types of appellate jurisdiction: appeal, certiorari, or original. Art. V, § (4)(b)(1), Fla. Const. Because the type of jurisdiction determines the type of document required to initiate an appellate proceeding, as well as the time for and place of filing,

understanding the nuances of appellate jurisdiction is critical. A must read for persons not familiar with the distinctions between appellate jurisdiction, certiorari jurisdiction, and original jurisdiction is In re R.B. (D.K.B. v. Dep't of Children & Fam. Servs.), 890 So. 2d 1288 (Fla. 2d DCA 2005).

Appeal Jurisdiction

Article V, section (4)(b)(1) of the Florida Constitution confers appellate jurisdiction to review final orders and nonfinal orders “to the extent provided by rules adopted by the supreme court.” Thus, the first step to determining whether a district court has jurisdiction to review a circuit court order by direct appeal is to determine whether the order appealed is final or nonfinal. If the order is a final order, the district court has appeal jurisdiction. If the order is nonfinal, the district court only has jurisdiction if the order falls within the narrow list of direct appeals permitted by Florida Rule of Appellate Procedure 9.130.

Determining whether an order is final or nonfinal may also require a multi-pronged inquiry. A final order disposes of a matter on its merits, leaving nothing for the circuit court other than enforcement of the order. Padovano, Florida Appellate Practice at § 4.3. A nonfinal order, conversely, is one that does not dispose of a matter on its merits.

Although the definition of a final order is rather simple and provides some guidance on the question of whether an order is final or nonfinal, the unique nature of dependency cases requires more than superficial evaluation of the order appealed. Unlike other civil cases that ordinarily end neatly with a judgment for the plaintiff or defendant, dependency cases usually have an extended life during which the circuit court renders many orders.

For example, the district courts uniformly treat adjudicatory and disposition orders of dependency as final even though judicial labor continues, often for months and in extreme cases years, after the adjudication of dependency. At least two district courts have also determined that orders permanently placing a child in a living arrangement such as guardianship, with a fit and willing relative, or in another planned permanent living arrangement are final orders that may be directly appealed. In re K.M., 946 So. 2d 1214 (Fla. 2d DCA 2006); Bembry v. Dep't of Children & Fam. Servs., 716 So. 2d 806 (Fla. 3d DCA 1998).

Only by carefully considering the nature and context of the order appealed and by reviewing case law when necessary can one determine with any degree of certainty whether an order is final or nonfinal in nature. When in doubt as to the proper proceeding, the most prudent course is to assume the worst and file according to the most rigorous filing requirements.

Certiorari Jurisdiction

Certiorari is commonly understood as a means through which appellate courts review the orders of lower courts. In Florida, a district court has the power to issue writs of certiorari under both its certiorari and original jurisdiction. Compare Fla. R. App. P. 9.030(b)(2) with Art. V, § 4(b)(3), Fla. Const. Although there is a dual basis for jurisdiction, certiorari proceedings are not complex.

Certiorari jurisdiction simply represents the district courts' authority to review nonappealable, nonfinal orders. In other words, if an order is final or is an appealable, nonfinal order under Rule 9.130, appellate review falls within the district courts' appeal jurisdiction and is governed by the procedures set forth in Rules 9.110, 9.130, 9.146, 9.200, 9.210, and 9.220. Review of all other nonfinal orders is discretionary under the district courts' certiorari jurisdiction. Before a district

court will exercise its authority to grant a writ of certiorari, the petitioner must demonstrate that the lower court's order constitutes a departure from the essential requirements of law and that harm from the error cannot be cured on a later appeal from a final order. Fla. R. App. P. 9.100(h).

Original Jurisdiction

The Florida constitution also grants district courts the power to issue the extraordinary writs of prohibition, mandamus, certiorari, habeas corpus, and quo warranto, and all writs necessary to the complete exercise of their jurisdiction. Art. V, § 4(b)(3), Fla. Const.; *see also* Fla. R. App. P. 9.100. Each writ exists to serve a clearly defined purpose. In the practice of dependency law, the most common writs sought are those of prohibition and certiorari.

The writ of prohibition is used to restrain the unlawful exercise of jurisdiction by a lower tribunal. Padovano, Florida Appellate Practice at § 3.14. Not infrequently, a party may petition for a writ of prohibition and, alternatively, for a writ of certiorari. This practice is indicative of a misunderstanding of the distinct purposes of the two writs because they serve different purposes; they are not alternative routes to the same end. A writ of prohibition is used to prohibit the unlawful exercise of jurisdiction; once the court has exercised its jurisdiction, the appropriate remedy is either a direct appeal in the case of a final or appealable nonfinal order or certiorari proceedings in the case of nonfinal orders not appealable by rule of appellate procedure. See Hamlin v. East Coast Properties, Inc., 616 So. 2d 1175 (Fla. 1st DCA 1993).

The writ of habeas corpus is a remedy for illegal restraint of a person. In dependency cases, common uses of habeas corpus are testing the legality of commitment to residential treatment and obtaining otherwise untimely appellate review. M.W. v. Davis, 756 So. 2d 90 (Fla. 2000); In re E.H., 609 So. 2d 1289 (Fla. 1992). Generally speaking, the writ of habeas corpus is not a substitute for an appeal and cannot be used as a method to review prior petitions for a writ of habeas corpus. Padovano, Florida Appellate Practice at § 4.9.

Writs of mandamus enforce established legal rights by compelling a person in an official position to perform a legal duty required of his or her office. Id. at §§ 4.9, 28.2. Because one must have an "established right" to the action sought and the person against whom the writ is sought must have a legal duty to take the action, mandamus is not a common remedy sought in dependency cases. One example of a circumstance that might warrant a petition for writ of mandamus would be a court that declines to schedule an evidentiary hearing within the time frames required by Chapter 39, Florida Statutes, despite prior requests that a hearing be scheduled. J.S.C. v. Dep't of Children & Fams., 820 So. 2d 441 (Fla. 5th DCA 2002). Another circumstance might be to compel a judge to render a written order after an unreasonably long delay.

Perhaps least likely to be used in the context of dependency is the writ of quo warranto. A petition for the writ of quo warranto is used to challenge the authority of a party to exercise a right or privilege derived from the state. Padovano, Florida Appellate Practice at §§ 4.9, 28.4.

APPEALS FROM FINAL ORDERS

A final order is an order that disposes of a matter on its merits, leaving nothing for the court other than enforcement of the order. The test for finality is "whether the order in question constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court to

effectuate a termination of the cause as between the parties directly affected.” S.L.T. Warehouse Co. v. Webb, 304 So. 2d 97 (Fla. 1974).

Because of the uniqueness of dependency and termination cases generally, the contours of what order marks the end of judicial labor are ill-defined. See G.L.S. v. Department of Children & Fams., 724 So. 2d 1181 (Fla. 1998) (recognizing that “orders authorized by chapter 39 of the Florida Statutes do not always fit neatly into the traditional categories of final and non-final orders.”) For example, in a termination of parental rights case, judicial labor continues following adjudication and disposition until the child is adopted, placed in a permanent guardianship, or turns 18. Nevertheless, the district courts consistently treat adjudication and disposition orders of dependency, as well as termination of parental rights, as appealable, final orders, see *Id.*, and two district courts have treated permanency placement orders as final orders. In re K.M., 946 So. 2d 1214 (Fla. 2d DCA 2006); Bembry v. Dep’t of Children & Fam. Servs., 716 So. 2d 806 (Fla. 3d DCA 1998).

An appeal from a final order is commenced by filing two (2) copies of the notice of appeal, along with a conformed copy of the order appealed, with the clerk of the lower court within 30 days of rendition of the order appealed. Fla. R. App. P. 9.110(b) and (d). Motions for rehearing in the lower court do not toll the period for filing the notice of appeal in dependency and termination of parental rights cases. Fla. R. Juv. P. 8.265(b)(3). Parties who wish to join as an appellant and who have not filed their own timely notice of appeal must file a notice of joinder within 10 days of service of the notice of appeal. Fla. R. App. P. 9.360(a). Following the filing and service of the notice of appeal, the appellant and appellee have 10 and 20 days, respectively, to provide instructions to the clerk regarding the inclusion or exclusion of documents from the record on appeal and to designate proceedings for transcription to the court reporter. Fla. R. App. P. 9.200. The clerk and court reporter likewise have duties based on time frames tied to the filing of the notice of appeal. *Id.*

Trial counsel for the appellant has the duty to file all appellate documents relating to preparation of the appellate record. S.H. v. Dep’t of Children & Fam. Servs., 955 So. 2d 610 (Fla. 5th DCA 2007).

APPEALS FROM NONFINAL ORDERS

Appellate review of nonfinal orders is one of the most, if not the most, misunderstood aspects of appellate practice. Review of nonfinal orders falling outside the narrow scope of permitted direct appeals must be sought through the district courts’ certiorari or original jurisdiction or the supreme court’s original jurisdiction. Unfortunately, the district courts are not yet in agreement as to what the scope of permitted direct appeals is.

Notwithstanding the second district’s opinion holding that review of nonfinal dependency orders must be sought through certiorari proceedings, In re J.T. (Dep’t of Children & Fam. Servs. v. Heart of Adoptions, Inc.), 947 So. 2d 1212 (Fla. 2d DCA 2007), other district courts permit direct appeals of nonfinal dependency orders pursuant to Florida Rule of Appellate Procedure 9.130(a)(4), which permits direct appeal of “[o]ther non-final orders entered after final order on authorized motions....” Dep’t of Children & Fams. v. T.L., 854 So. 2d 819 (Fla. 4th DCA 2003) (appeal of placement order); Ayo v. Dep’t of Children & Fam. Servs., 788 So. 2d 397 (Fla. 1st DCA 2001) (appeal of order resulting from periodic review); Coy v. Dep’t of Health & Rehab. Servs., 623 So. 2d 792 (Fla. 5th DCA 1993) (appeal of judicial review order).

The few opinions grounding jurisdiction under rule 9.130(a)(4) have not explained precisely why the rule applies. Presumably the “final order” is the dependency disposition order, while the “authorized motion” giving rise to the later nonfinal order are motions relating to matters contemplated by chapter 39, such as motions associated with judicial review hearings, motions to modify case plans, motions relating to visitation, and motions relating to placements.

To the extent direct appeals of nonfinal orders are permitted under rule 9.130, they are commenced by filing two (2) copies of the notice of appeal and conformed copies of the order appealed with the clerk of the lower court within 30 days of rendition of the order appealed. Fla. R. App. P. 9.130 (b). Appeals of nonfinal orders follow a faster briefing schedule than appeals of final orders and, unless the district court orders otherwise, do not involve preparation and transmission of the complete record. Fla. R. App. P. 9.130(d), (e).

ORIGINAL APPELLATE PROCEEDINGS

Original appellate proceedings include petitions for certiorari, prohibition, habeas corpus, mandamus, or quo warranto, and petitions to invoke all writs jurisdiction. Original appellate proceedings are initiated by the filing a petition directly with the appropriate district court of appeal or the Florida Supreme Court, if the Supreme Court has jurisdiction. Fla. R. App. P. 9.100(b). Unlike petitions for writs of certiorari, which must be filed within 30 days of rendition of a nonfinal order, Fla. R. App. P. 9.110(c)(1), petitions for writs of prohibition, mandamus, habeas corpus, and quo warranto and petitions to invoke an appellate court’s all writs jurisdiction are not subject to a specific filing deadline. Padovano, Florida Appellate Practice at §28.9. Still, relief in these proceedings may be denied on equitable grounds or lost as a practical matter if one delays an appropriate request for extraordinary relief. *Id.*

Parties defending original proceedings do not automatically respond to the petition unless specifically ordered to do so in an order to show cause; the time for filing a response is specified in the order to show cause. Fla. R. App. P. 9.110(h), (j). Following service of a response, the petitioner may file a reply within 20 days or such shorter time specified by the district court. Fla. R. App. P. 9.110(k).

INVOKING APPELLATE JURISDICTION CORRECTLY

Attorneys uncertain as to whether they are required to file a notice of appeal or an original petition must first determine whether the challenged order is final or nonfinal. When in doubt, case law should be reviewed to determine what label, if any, courts have attached to the type of order at issue. If still in doubt after thoroughly researching the question, the safest course is to file according to the most stringent time requirements.

If the order is truly final, notices of appeal are filed, and the appeal proceeds under Rules 9.110, 9.130, 9.146, 9.200, 9.210, and 9.220. If the order is nonfinal, one must determine whether the order falls within the scope of permitted appeals of nonfinal orders under Rule 9.130, keeping in mind that all district courts have not spoken on the applicability of rule 9.130(a)(4). If a nonfinal order is appealable under a provision of rule 9.130, notices of appeal and conformed copies of the order appealed are filed, and the appeal proceeds under rules 9.130, 9.210, and 9.220. If the order does not fall within one of the categories delineated in rule 9.130, an original petition and appendix

must be filed pursuant to rule 9.100. The chart contained at the end of this chapter illustrates these requirements.

CONTENTS OF BRIEFS, PETITIONS, RESPONSES, AND REPLIES

While time and record requirements vary widely according to the type of appellate jurisdiction used to review a lower court's order, the actual content of the documents filed by the parties are substantially similar. There are differences, however, which require reference to the applicable rules of appellate procedure.

In all appellate documents, references to the child and parents shall be by initials. Fla. R. App. P. 9.146(e); §§ 39.510(4), 39.815(4), Fla. Stat. (2006). Specific rules govern the captions of documents filed in original proceedings, and specific reference to Florida Rule of Appellate Procedure 9.100 should be made in those cases. Similarly, rule 9.210(a)(4) specifies the content of coversheets for briefs filed in appeals.

Initial and answer briefs in appeals and petitions and responses in original proceedings are limited to 50 pages. Fla. R. App. P. 9.210(a)(5), 9.100(g), (j). Longer is not better; the most effective briefs are those that convey the operative facts and legal arguments in a compelling, clear and concise manner. Reply briefs in appeals and replies in original proceedings are limited to 15 pages. Fla. R. App. P. 9.210(a)(5), 9.100(k). All must be in either Times New Roman 14-point font or Courier New 12-point font; white, unglossed 8½-by-11 inch paper must be used; and the documents must contain a certificate of compliance, immediately following the certificate of service, signed by counsel and certifying that the brief complies with the specified font requirements. Fla. R. App. P. 9.210(a), 9.100(l). Other mandatory requirements are also set forth in the applicable rules, and they should be consulted before filing and serving every document.

Initial briefs are required to contain six (6) essential elements in the following order:

- (1) A table of contents listing the issues presented for review, with references to pages;
- (2) A table of citations with cases listed alphabetically, statutes and other authorities, and the pages of the brief on which each citation appears;
- (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 including the applicable appellate standard of review; and
- (6) A conclusion, of not more than 1 page, setting forth the precise relief sought.

Fla. R. App. P. 9.100(k).

Answer briefs must contain the same elements as initial briefs, with the exception of the statements of the case and of the facts, which may be omitted. Fla. R. App. P. 9.210(c). Reply briefs may contain only response and rebuttal to arguments raised in the opponent's answer brief. Fla. R. App. P. 9.210(d).

Original petitions are not required to have tables of contents and authorities, although the inclusion of such tables may assist the appellate court. The required elements of original petitions are:

- (1) A statement of the basis for invoking the jurisdiction of the court;
- (2) A statement of the facts on which the petitioner relies;
- (3) A statement of the nature of the relief sought;
- (4) A statement of argument in support of the petition and appropriate citations of authority; and
- (5) An appendix containing, at a minimum, a copy of the lower court's order for which review is sought.

Fla. R. App. P. 9.110(g).

Petitions are not required to state the standard of review because they constitute original proceedings and are not a direct appeal. Nevertheless, because relief depends upon satisfaction of prima facie elements, arguments should state those elements and be driven toward establishing them by references to appropriate documents in the appendix. For example, before a court will grant a writ of certiorari, the petitioner must demonstrate both that the lower court departed from the essential requirements of law and that if the writ is not issued the petitioner will suffer material injury for which there is no adequate remedy by appeal later from a final order. Fla. R. App. P. 9.110(h).

Responses in original proceedings contain simply "argument in support of the response, appropriate citations of authority, and references to the appropriate pages of the supporting appendices," Fla. R. App. P. 9.100(j), while the content of replies is not specified but is presumably limited, like reply briefs, to response and rebuttal to arguments raised in the opponent's response. Fla. R. App. P. 9.100(k).

RECORDS ON APPEAL AND APPENDICES

Appellate courts decide issues on the basis of events occurring and facts established in the lower court. These events and facts are documented in "the record." The record consists of "the original documents, exhibits, and transcript(s) of proceedings, if any, filed in the lower tribunal, except summonses, praecipes, subpoenas, returns, notices of hearing or of taking deposition, depositions, other discovery, and physical evidence." Fla. R. App. P. 9.200(a). The record also includes the progress docket in the lower court.

With the very narrow exception of matters judicially noticed on appeal, an appellate court is limited to the record before it. For this reason, it is imperative that all documents and tangible items relied on be introduced into evidence, including documents that may have been judicially noticed but that are not included within the strict definition of "the record."

The manner in and extent to which the record is transmitted to the appellate court depends on the type of order at issue and the type of jurisdiction under which the appellate court reviews the lower court's order. In appeals from final orders, the clerk of the lower court transmits the record to the appellate court, while the clerk transmits no record in appeals from nonfinal orders and in original proceedings. Instead, in the latter groups of cases, the appellant/petitioner submits relevant items from the record in an appendix accompanying the initial brief or petition. Compare Fla. R. App. P. 9.200(d) with Fla. R. App. P. 9.100(g), (i) and 9.130(d), (e). Because of the expedited schedule for appeals from nonfinal orders and original proceedings, matters involving the transcription of lower court proceedings require immediate coordination with the court reporting service responsible for transcribing the proceedings.

In appeals from final orders, the appellant may direct the clerk to include or exclude documents or exhibits filed in the lower tribunal within 10 days of filing the notice of appeal. Otherwise, the record will contain only the documents included in the standard definition of the record. Fla. R. App. P. 9.200(a)(1), (3). If the clerk is directed to transmit less than the entire record or a transcript of trial with less than all of the testimony, the appellant must serve, along with the direction, a statement of the judicial acts to be reviewed. Appellees have 20 days from the appellant's directions to the clerk in which to direct the clerk to include additional documents and exhibits. Fla. R. App. P. 9.200(a)(3). An alternative procedure also exists through which the parties may prepare a stipulated statement in lieu of the record. Fla. R. App. P. 9.200(a)(4).

Similarly, the appellant in an appeal from a final order has 10 days from the filing of the notice of appeal in which to designate proceedings necessary for transcription and inclusion in the record. Fla. R. App. P. 9.200(b)(1). The appellee may designate additional portions for transcription within 20 days of the filing of the notice of appeal. *Id.* If the designating party directs the court reporter to furnish transcripts to fewer than all parties, the designating party must serve a copy of the transcript(s) on the parties within five (5) days of receipt from the court reporter. Fla. R. App. P. 9.200(b)(2). The court reporter has 30 days in which to complete the transcripts unless additional time is requested and granted. Fla. R. App. P. 9.200(b)(2), (3). Finally, if transcripts are not available, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The appellee then has an opportunity to serve objections or proposed amendments within 10 days, followed by submission of the statement and any objections or proposed amendments to the lower court for settlement and approval. As settled and approved, the statement becomes part of the record. Fla. R. App. P. 9.200(b)(4).

When necessary to assure that the appellate court has an accurate understanding of the record, a motion to correct or supplement the record may be filed. Fla. R. App. P. 9.200(f). Ultimately, the duty to ensure that the record is correctly prepared and transmitted rests on the appellant. Fla. R. App. P. 9.200(e).

FILING REQUIREMENTS

Current rules require that the original and three (3) copies of all briefs be filed in the district courts of appeal and that the original and seven (7) copies of all briefs be filed with the Supreme Court. Fla. R. App. P. 9.210(g). Multiple copies of petitions, responses, and replies in original proceedings are not required. See generally Fla. R. App. P. 9.100.

Each appellate court presently has its own rule pertaining to electronic filing or the submission of appellate documents on disc in addition to the filing requirements pertaining to hard copies. Over the course of the coming months, electronic filing will become more widely available and eventually mandatory. Attorneys participating in appeals should consult the websites and administrative orders of each court to determine the specific filing requirements that apply.

ORAL ARGUMENT

Cases in the district courts are generally not set for oral argument unless a request for oral argument is made. Requests for oral argument must be filed in a separate document and served no later than the time the last brief of the requesting party is due, Fla. R. App. P. 9.320, unless the court specifies a different procedure or deadline through its own rule or order. Attorneys should consult the local rules of each court to determine the controlling procedures and deadlines.

Policies regarding oral argument vary from district court to district court. Some routinely grant argument upon request, while others make the determination on a case by case basis. Each “side” (not party) is allowed 20 minutes for oral argument, although the court may limit, expand, or dispense with argument on its own motion or that of a party. *Id.* Because the rule speaks in terms of “sides,” parties advocating for the same or substantially similar outcomes must share time. An effort to agree on a division of the time allotted should be made well in advance of the argument. If agreement cannot be reached, counsel should file a motion asking the court to divide the allotted time, asking for a separate allocation of time for argument, or both.

COMPARISON BY TYPE OF ORDER APPEALED AND BY APPELLATE JURISDICTION

Requirements	Appeal of Final Order	Appeal of Nonfinal Order	Original Proceeding
Initiating Appellate Jurisdiction	Notice of Appeal and conformed copies of the order appealed filed within 30 days of rendition of lower court’s order	Notice of Appeal and conformed copies of the order appealed filed within 30 days of rendition of lower court’s order	Petition & Appendix containing at least a conformed copy of the challenged order filed (certiorari must be filed within 30 days of rendition of lower court’s order; others have no definitive deadline)
Designation to Court Reporter	Within 10 days of filing Notice of Appeal	None	None

Instructions to Clerk of the Lower Court	Within 10 days of filing the Notice of Appeal	None	None
Index to Record on Appeal Provided	Within 50 days of the filing of the notice of appeal, clerk prepares record and serves copy of index on all parties	None	None
Initial Brief/Petition	Within 70 days of filing Notice of Appeal	Within 15 days of filing Notice of Appeal <u>and</u> must be accompanied by an appendix containing, at a minimum, a copy of the order appealed and the transcript(s), if any.	Petition and Appendix filed within 30 days of rendition of lower court's order
Answer Brief/Response	Within 20 days of service of Initial Brief (unless shortened by court order)	Within 20 days of service of Initial Brief (unless shortened by court order)	None unless ordered by the appellate court and served within the time prescribed in the court's order