

DIRECT APPEAL JURISDICTION OF FLORIDA'S DISTRICT COURTS OF APPEAL

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I. INTRODUCTION

Florida's District Courts of Appeal (DCAs) function as the courts of last resort for most litigants in the state court system.¹ Most appeals to the DCAs are filed in appeal of "final judgments" of the circuit courts.² This Article examines the difficulties that have arisen over the years as the DCAs attempt to determine what is, and what is not, a "final judgment" that is appealable on that basis. The analysis is limited to appeals from civil and administrative, rather than criminal, orders. Part Two of this Article contains a brief overview of the history of Florida's appellate court structure. Part Three provides an overview of the DCAs' jurisdiction; Part Four examines in detail the Florida courts' efforts to clarify the standard against which an order's "finality" is measured. Part Five analyzes the procedure by which final (actual or putative) orders are appealed, and Part Six concludes with a summary of how well the system is currently working.

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1. Fla. Const. art. V, § 3(b)(1), (2); Fla. R. App. P. 9.030(a)(1); Jack W. Shaw, Jr., "*Per Curiam: Affirmed*": *Some Historical Perspectives*, 1 Fla. Coastal L.J. 1, 2 (1999) (citing *Jenkins v. State*, 385 So. 2d 1356, 1357-1358 (Fla. 1980)); Fla. Sup. Ct., *The District Courts of Appeal, Organization*, <http://www.flcourts.org/pubinfo/system2.html> (accessed Mar. 30, 2003).

2. Fla. Const. art. V, § 4(b)(1), (2); Fla. R. App. P. 9.030(b)(1).

II. HISTORY

Before 1957, the state Supreme Court was Florida's only appellate court.³ However, the State's population growth, with its attendant litigation growth, caused a backlog of cases for the Supreme Court.⁴ The Court felt overworked, and litigants were deprived of timely appeals.⁵ In an effort to reduce the Supreme Court's workload, the Florida Legislature amended the 1956 Constitution to require that the Legislature create an intermediate level of appellate courts.⁶ The constitutional amendment directed the Legislature to establish appellate districts, each of which was to have its own district court of appeal.⁷

There are currently five DCAs in Florida, which hear almost all appeals from Florida's circuit courts and administrative agencies.⁸ The DCAs are intended to be the courts of last resort in Florida; appeals to either the Florida or United States Supreme Court are almost always discretionary.⁹

III. GENERAL OVERVIEW: FLORIDA RULE OF APPELLATE PROCEDURE 9.030

A. Final Judgments

Generally, every party to litigation has the right to one level of review by a higher court upon entry of a final judgment. Most final judgments entered by Florida circuit courts in criminal and civil cases are subject to direct appeal to the DCAs.¹⁰ Exceptions to this rule are circuit court cases in which the court imposes the death penalty and circuit court judgments entered in proceedings for the validation of bonds or certificates of indebtedness.¹¹ DCAs do not review these cases, but instead, these cases are appealable directly to the Florida Supreme Court.¹² Otherwise, all final

3. Shaw, *supra* n. 1, at 1-2; Fla. Sup. Ct., *supra* n. 1.

4. Shaw, *supra* n. 1, at 1; Fla. Sup. Ct., *supra* n. 1.

5. Shaw, *supra* n. 1, at 1; Fla. Sup. Ct., *supra* n. 1.

6. Fla. Const. art. V, §§ 1, 4.

7. *Id.*

8. Shaw, *supra* n. 1, at 2; Fla. Sup. Ct., *supra* n. 1.

9. Shaw, *supra* n. 1, at 2; Fla. R. App. P. 9.030(b).

10. Fla. Const. art. V, § 4(b)(1), (2); Fla. R. App. P. 9.030(b)(1).

11. Fla. R. App. P. 9.030(a)(1).

12. Fla. Const. art. V, § 3; Fla. R. App. P. 9.030(a)(1).

judgments entered by circuit courts may be appealed directly to the DCAs.

B. Nonfinal Orders

The right to review orders entered by circuit courts that are not final judgments is severely limited in Florida. The right to a direct appeal of nonfinal orders—otherwise called interlocutory orders—is limited to the following types of orders identified in Florida Rule of Appellate Procedure 9.130:

- orders entered in criminal cases identified in Rule 9.140;¹³
- orders concerning venue;¹⁴
- orders relating to injunctions;¹⁵
- orders determining personal jurisdiction;¹⁶
- orders determining “the right to immediate possession of property;”¹⁷
- orders determining “the right to immediate monetary relief or child custody in family law matters;”¹⁸
- orders determining the right to arbitration;¹⁹
- orders determining that “a party is not entitled to workers’ compensation immunity;”²⁰
- orders certifying a class action;²¹
- orders determining that “a party is not entitled to absolute or qualified immunity” in civil rights actions;²²
- orders relating to appointment, termination, or retention of a receiver;²³

13. Fla. R. App. P. 9.130(a)(2).

14. *Id.* at 9.130(a)(3)(A).

15. *Id.* at 9.130(a)(3)(B).

16. *Id.* at 9.130(a)(3)(C)(i).

17. *Id.* at 9.130(a)(3)(C)(ii).

18. *Id.* at 9.130(a)(3)(C)(iii).

19. *Id.* at 9.130(a)(3)(C)(iv).

20. *Id.* at 9.130(a)(3)(C)(v).

21. *Id.* at 9.130(a)(3)(C)(vi).

22. *Id.* at 9.130(a)(3)(C)(vii).

23. *Id.* at 9.130(a)(3)(D).

- nonfinal orders entered after final judgment other than those that automatically suspend the rendition of the judgment;²⁴ and
- orders entered on motions for relief from judgment under “Florida Rule of Civil Procedure 1.540, Small Claims Rule 7.190 and Florida Family Law Rule of Procedure 12.540.”²⁵

Other interlocutory orders may be reviewed under the DCAs’ discretionary certiorari²⁶ or extraordinary writ jurisdiction.²⁷ But only those interlocutory orders listed in Rule 9.130 are subject to direct appeal as a matter of right.²⁸

C. Final Administrative Orders

Florida Rule of Appellate Procedure 9.030(b)(1)(C) authorizes direct appeal of “administrative action if provided by general law.”²⁹ Chapter 120 of the Florida Statutes, Florida’s Administrative Procedure Act (APA), provides for direct appeal to the DCAs of an administrative agency’s final orders that are subject to the APA.³⁰ Section 120.52(1) defines agencies subject to the APA.³¹ Because most agencies fall within this definition, virtually any state agency final order is directly appealable to a DCA. Other types of administrative orders, for example decisions of local zoning authorities, that are not subject to the APA, are not directly appealable to the DCAs.³²

D. Final Orders Entered in Workers’ Compensation Cases

Section 440.25 provides for the First DCA’s review of final orders entered in proceedings governing claims for workers’ compensation.³³

24. *Id.* at 9.130(a)(4).

25. *Id.* at 9.130(a)(5).

26. *Id.* at 9.030(b)(2).

27. *Id.* at 9.030(b)(3).

28. *Id.* at 9.030(b)(1)(B).

29. *Id.* at 9.030(b)(1)(C).

30. Fla. Stat. § 120.68 (2002).

31. *Id.* at § 120.52(1).

32. *Id.*; *Orlando-Orange County Expressway Auth. v. Hubbard Constr. Co.*, 682 So. 2d 566, 567 (Fla. 5th Dist. App. 1996).

33. Fla. Stat. § 440.25; *Lamounette v. Akins*, 547 So. 2d 1001, 1003 (Fla. 1st Dist. App. 1989).

IV. WHAT'S FINAL AND WHAT'S NOT?

In spite of countless appellate court opinions on the subject and various amendments to the appellate rules, determining the finality of—and therefore the right to appeal from—certain orders is an ongoing problem for some lawyers. An order may seem to finally dispose of an issue or a portion of a given case—maybe even resolving the fundamental dispute between the parties—but that does not necessarily mean the order is appealable. The basic rule is that an order is final when all judicial labor in the case has come to an end.³⁴ If an order finally resolves a case with respect to one of multiple parties, the order is final with respect to that party only and the party must appeal, if at all, within thirty days of rendition of the order.³⁵

But an order that finally disposes of one count in a multiple count action is rarely appealable, and if it is appealable, the party may appeal immediately *or* after entry of the final judgment in the entire case.³⁶ These fine points are discussed in more detail below.

A. The Old *Mendez* / *S.L.T. Warehouse* Trap

In *Mendez v. West Flagler Family Association, Inc.*,³⁷ the Florida Supreme Court considered whether an appeal could be taken from a “summary final judgment . . . dismissing a distinct and independent” count of a multiple count complaint.³⁸ The plaintiff filed a motion for rehearing under Florida Rule of Civil Procedure 1.530,³⁹ which authorizes rehearing of final judgments.⁴⁰ A timely motion for rehearing of a final judgment tolls the time for filing a notice of appeal.⁴¹ The lower court decided the motion for rehearing more than thirty days after entry of the summary judgment.⁴² The plaintiff filed a notice of appeal within thirty days of the court’s order denying her motion for rehearing,

34. Fla. R. App. P. 9.020(h).

35. *Id.* at 9.110(k).

36. *Id.*

37. 303 So. 2d 1 (Fla. 1974).

38. *Id.* at 2.

39. *Id.*

40. Fla. R. Civ. P. 1.530.

41. *Id.* cmt. ¶ 530.5[4] (citing Fla. R. App. P. 9.020(h)).

42. *Mendez*, 303 So. 2d at 2.

but more than thirty days after entry of the order granting summary final judgment.⁴³ The defendants/appellees then moved to dismiss, arguing that the tolling provision for rehearing motions did not apply because the appealed order was not “final” in the sense that it did not dispose of the entire case, and therefore, the notice of appeal was not timely.⁴⁴

The Supreme Court determined that the dismissed count indeed was a “distinct and separate cause of action.”⁴⁵ Therefore, the Court concluded that the order was final, the tolling provision for rehearing did apply, and the appeal was timely.⁴⁶ At the same time, the Court reiterated the general policy disfavoring piecemeal appeals and affirmed the rule that appeals from nonfinal orders disposing of claims that are “legally interrelated and in substance involve the same transaction” should not be permitted.⁴⁷

Three weeks after the *Mendez* decision, the Court decided *S.L.T. Warehouse Co. v. Webb*,⁴⁸ a case involving the appeal of an order that finally dismissed a counterclaim while the main complaint remained pending.⁴⁹ The Court again reiterated the prohibition against piecemeal appeals.⁵⁰ This time however, the Court found that the dismissed claim was in fact “clearly interrelated” because it involved the same substance and the same transaction.⁵¹

Although the law announced and discussed in the two cases is consistent, the nature of the respective factual circumstances led to endless confusion and attempts to appeal virtually every nonfinal order that appeared to finally dispose of any particular issue within a case. The difficulty was the result of the facts as reported in the two cases. It is very difficult to discern why the claim giving rise to the appeal in *Mendez* was “distinct and sepa-

43. *Id.*

44. *Id.*

45. *Id.* at 4.

46. *Id.* at 3, 5.

47. *Id.* at 5.

48. 304 So. 2d 97 (Fla. 1974).

49. *Id.* at 98.

50. *Id.* at 99.

51. *Id.* at 100.

rate”⁵² whereas the claim giving rise to the appeal in *S.L.T. Warehouse* was “clearly interrelated.”⁵³

Thus, attorneys were faced with a conundrum whenever an order appeared to finally dispose of a particular claim. A decision had to be made about whether the disposed of claim was “distinct and separate”⁵⁴ or “clearly interrelated.”⁵⁵ The repercussions of an incorrect decision regarding the appealability of the order could be extreme. If a party appealed an order resolving a claim that was clearly interrelated with claims that remained pending, the appeal would be dismissed as improper. However, if the order resolved a distinct and separate claim, failure to appeal it within thirty days of rendition would bar forever the right to appellate review of the decision. This dilemma became known as the *Mendez* trap.

Obviously, the practical ramifications of wrongly concluding that a claim was not appealable were far more serious than a wrong conclusion that the claim was appealable. In the former situation, the attorney’s mistake meant a permanent loss of the right to appeal. In the latter situation, the attorney’s decision meant dismissal of the improper interlocutory appeal, but it preserved the right to appeal the order at the conclusion of the entire case. Not surprisingly, to avoid the “*Mendez* trap” of losing the right to appeal, notices of appeal were filed with respect to virtually every interlocutory order disposing of one count or claim in a multiple claim case.

B. The Trap Is Fixed

In 1984, the Supreme Court amended Florida Rule of Appellate Procedure 9.110 to add the following subsection (k):⁵⁶

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. If a partial final judg-

52. *Mendez*, 303 So. 2d at 4.

53. *S.L.T. Warehouse*, 304 So. 2d at 100.

54. *Mendez*, 303 So. 2d at 4.

55. *S.L.T. Warehouse*, 304 So. 2d at 100.

56. Fla. R. App. P. 9.110(k) comm. nn. 1984 amend.

ment totally disposes of an entire case as to any party, it must be appealed within 30 days of rendition.⁵⁷

The express purpose of the amendment was “to remedy a pitfall in the application of caselaw under *Mendez*. Appeals may now be taken immediately or delayed until the end of the entire case. . . .”⁵⁸ Thus, with the amendment, lawyers no longer faced the fear of wrongly deciding that a particular order disposed of a separate and independent claim.

However, appellants immediately attempted to invoke the new rule as a blanket authorization for piecemeal appeals. Appellants argued that the provision for appealing “either on appeal from the partial final judgment or on appeal from the final judgment”⁵⁹ opened the door to immediate appeal of any order that arguably disposed of a particular issue in the case. The fact that the apparently oxymoronic term “partial final” is not defined anywhere in the rules gave credence to the argument.

The DCAs, however, made short shrift of it. The addition of subsection (k) was intended to eliminate only the “better safe than sorry” policy adopted by practitioners to avoid the *Mendez* trap. Only partial final judgments, that is, orders that dispose of a distinct and separate claim, are immediately appealable.⁶⁰ Additionally, subsection (k) did not change the factors for determining whether an order is a partial final judgment.⁶¹ Those factors are addressed below.

C. Partial Final Judgments Defined

The truth is that, in practice, very few orders that do not either dispose of the case entirely or dispose of the case entirely as to one party will be considered partial final judgments that are immediately appealable under Rule 9.110(k). Calling the order a partial summary judgment or a partial final judgment will not do

57. Fla. R. App. P. 9.110(k).

58. *Id.* (citation omitted).

59. Fla. R. App. P. 9.110(k).

60. See e.g. *Kirkland v. State*, 489 So. 2d 800, 801 (Fla. 1st Dist. App. 1986) (restating criteria for evaluating whether partial summary judgment is a final appealable order); *Bay & Gulf Laundry Equip. Co. v. Chateau Tower, Inc.*, 484 So. 2d 615, 616 (Fla. 2d Dist. App. 1985) (discussing intent and effect of adding new subsection (k)); *Stein v. Hosp. Corp. of Am.*, 481 So. 2d 1264, 1265 (Fla. 4th Dist. App. 1986) (rejecting expansion of the class of immediately appealable orders).

61. *Kirkland*, 489 So. 2d at 801.

the trick. Rather, the DCAs look at the substance of the order, the disposed-of claim, and the issues that remain pending.⁶² The criteria applied to determine whether the appealed order disposes of a distinct and separate claim are as follows:

- (1) Could the cause of action disposed of by the partial summary judgment be maintained independently of other remaining causes of action?
- (2) Were one or more parties removed from the action when the partial final summary judgment was entered?
- (3) Are the counts separately disposed of based on the same or different facts?⁶³

Arguably, under these criteria, the claim that was found to be distinct and separate in *Mendez* was not.⁶⁴ In any event, in practice, it is very unusual to find claims in the same lawsuit that are not based on the same facts and were not required to be brought in the same lawsuit.

D. Finally Disposing of All Issues

When does an order “finally dispose of the entire case?” There are certain, highly technical requirements for appealing an order that appears to be final.⁶⁵ Also, there are certain matters that the trial court may reserve for further action without affecting the finality of the order.

1. Words of Finality

An order that grants a motion without including appropriate words of finality is not appealable under Rule 9.110.⁶⁶ This Rule results in the greatest occurrence of improper appeals. Therefore, it is very common to see an order that grants a motion to dismiss or a motion for final judgment that is deemed nonfinal, even if the motion was directed to the entire case. However, an order that merely grants a motion but fails, in fact, to enter a judgment is not final.⁶⁷

62. *Id.*

63. *Id.*

64. *Mendez*, 303 So. 2d at 1.

65. Fla. R. App. P. 9.110.

66. *Id.*; *Hoffman v. Hall*, 817 So. 2d 1057, 1058 (Fla. 1st Dist. App. 2002).

67. *E.g. Gries Inv. Co. v. Chelton*, 388 So. 2d 1281, 1282 (Fla. 3d Dist. App. 1980) (indicating that a motion for only a final judgment is not final); *Danford v. City of Rockledge*, 387 So. 2d 967, 968 (Fla. 5th Dist. App. 1980) (indicating that the order should contain

Likewise, an order granting a motion to dismiss without prejudice or with leave to amend is not a final appealable order,⁶⁸ even if the plaintiff determines that no further amendment is possible.⁶⁹ In such cases, the plaintiff must advise the lower court that the complaint cannot be viably amended, and request entry of a final judgment of dismissal.⁷⁰

Words and phrases that indicate finality include the following: “for which let execution issue”;⁷¹ plaintiff “shall ‘take nothing by this action’”;⁷² and plaintiff “shall go hence without day.”⁷³ The use of these words or phrases does not automatically make the order final for purposes of appeal.⁷⁴ The fine distinction between language indicating finality and language indicating that the entire judicial labor has not yet come to an end is illustrated in *Hoffman v. Hall*.⁷⁵ There, “the order stated, ‘Plaintiff’s Second Amended Complaint shall be dismissed with prejudice and judgment in favor of defendant shall be entered.’”⁷⁶ Because the trial court used the phrase “shall be” with respect to the dismissal and entry of judgment instead of stating that the complaint “is dismissed” and “judgment is entered,” the court held that the language suggested that some future order was to be entered.⁷⁷ Accordingly, the order did not establish that all judicial labor in the case had come to an end, and the appeal was dismissed.⁷⁸

2. Reservations of Jurisdiction

It is not uncommon for a purportedly final judgment or order to include a reservation of jurisdiction to decide certain issues. Sometimes, the reservation will destroy the finality of the order, and sometimes it will not.

traditional words of finality, or words to the same effect).

68. *Meissner v. Moore*, 770 So. 2d 708, 708 (Fla. 1st Dist. App. 2000).

69. *Klein v. Pinellas County*, 685 So. 2d 945, 946 (Fla. 2d Dist. App. 1996).

70. *Id.*

71. *Geico Fin. Servs., Inc. v. Kramer*, 575 So. 2d 1345, 1346 (Fla. 4th Dist. App. 1991).

72. *State Farm Mut. Automobile Ins. Co. v. Open MRI of Orlando, Inc.*, 780 So. 2d 339, 341 (Fla. 5th Dist. App. 2001).

73. *Id.*

74. *Hoffman*, 817 So. 2d at 1058.

75. *Id.* at 1057.

76. *Id.* at 1058.

77. *Id.*

78. *Id.* at 1059.

Reservations of jurisdiction to award costs to the prevailing party and to determine or award attorneys' fees do not definalize a final order. Costs and fees are considered collateral matters that do not affect finality.⁷⁹

Prejudgment interest, on the other hand, is considered an element of damages directly related to the cause of action and is not incidental to the main adjudication.⁸⁰ Prior to *McGurn v. Scott*,⁸¹ reservations of jurisdiction to determine and award prejudgment interest were common in "final" judgments because parties often disputed the appropriate interest calculation, and verdicts do not necessarily resolve the issue.⁸² In *McGurn*, the Florida Supreme Court considered conflicting district court decisions regarding the effect of a reservation to award prejudgment interest in an otherwise final judgment.⁸³ The issue, as the Supreme Court framed it, was "whether a trial court may issue a final appealable order while reserving jurisdiction to award prejudgment interest."⁸⁴ The answer essentially is no, but that answer alone does not address the effect of an order that appears to do just that.⁸⁵

If an order is entered that appears to have all the indicia of a final judgment and that authorizes immediate execution on the judgment, *McGurn* holds that the judgment is, in fact, final.⁸⁶ Additionally, any issue such as prejudgment interest that the judgment should have properly resolved is deemed waived when the court enters the judgment.⁸⁷ The Court noted that this potentially harsh result is ameliorated by the rule of appellate procedure that allows the DCAs to relinquish jurisdiction "if the district court decides it is equitable to do so."⁸⁸ In *Emerald Coast Communications, Inc. v. Carter*,⁸⁹ the First DCA decided that it was not equitable to relinquish jurisdiction to cure an erroneous reservation to

79. *Travelers Indem. Co. v. Hutchins*, 489 So. 2d 208, 209 (Fla. 2d Dist. App. 1986).

80. *McGurn v. Scott*, 596 So. 2d 1042, 1044 (Fla. 1992).

81. *Id.* at 1042–1045.

82. *Id.* at 1043.

83. *Id.*

84. *Id.*

85. *Id.* at 1044–1045.

86. *Id.* at 1045.

87. *Id.*

88. *Id.* (citing Fla. R. App. P. 9.600(b)).

89. 780 So. 2d 968, 970 (Fla. 1st Dist. App. 2001).

award prejudgment interest because the plaintiff failed to file a motion for rehearing seeking correction of the error.⁹⁰

The ruling in *McGurn* and its application in *Emerald Coast* stand as a loud warning to successful plaintiffs' attorneys. In practice, of course, the form of judgment that is signed in civil litigation is one prepared and submitted by the prevailing party's attorney. Including a reservation to award prejudgment interest in the proposed judgment in favor of the plaintiff would be a serious error. If such an order is entered and plaintiff's counsel fails to take timely steps to cure it, i.e., by filing a motion for rehearing within the prescribed time period, it is very possible that the right to prejudgment interest will be waived forever. With litigation often spanning years between the time the cause of action accrues and entry of the judgment, this could mean a significant financial loss⁹¹ for which the attorney may ultimately be liable.

E. Final Disposition as to One Party

If an order finally resolves a case with respect to one of multiple parties, the order is immediately appealable.⁹² Unlike partial final judgments with respect to particular causes of action, an order resolving the case as to one party *must* be appealed within thirty days of rendition, or the right to appeal is lost.⁹³ For example, if a complaint is dismissed with prejudice with respect to one of three defendants, but is dismissed with leave to amend with respect to the remaining two, the plaintiff must appeal the dismissed with prejudice order immediately or forever lose that right. The plaintiff's case against the remaining two defendants will continue while the appeal is prosecuted, unless the trial court agrees to a stay of proceedings pending the appeal.⁹⁴

V. PROCEDURE

The intricacies of appellate procedure are many, and space does not allow an in-depth treatment here. The following ad-

90. *Id.*

91. For example, the interest award on a \$250,000 judgment entered three years after the plaintiff's damages were incurred would be \$60,000, applying an eight percent interest rate.

92. Fla. R. App. P. 9.110(k).

93. *Id.*

94. See *infra* Part V for applicable procedural rules.

dresses the basics for initiating and prosecuting an appeal to the DCAs in Florida.

A. The Notice of Appeal

1. *The Thirty-Day Limit*

There are few rules of procedure that are as black and white, with such irrevocable consequences, as the requirement in Florida that a notice of appeal must be filed within thirty days of rendition of the appealed order.⁹⁵ Florida Rule of Appellate Procedure 9.110(b) provides the following:

(b) Commencement. Jurisdiction of the court under this rule shall be invoked by filing 2 copies of a notice, accompanied by filing fees prescribed by law, with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed.⁹⁶

The same language is used in Florida Rule of Appellate Procedure 9.130(b) governing commencement of appeals from specified non-final orders.⁹⁷

It is the filing of the notice that “invokes” the jurisdiction of the appellate court. If the notice is not filed within the prescribed time limit, the appellate court has no jurisdiction to consider the case.⁹⁸ There is no room for equitable considerations, and there are no exceptions to this rule.⁹⁹ Accordingly, if the notice is not timely, the right to appeal is lost forever.

The only possibility of reprieve from the effects of failing to file a timely notice of appeal is the relief from judgment rule.¹⁰⁰ If the would-be appellant can show that the judgment should be set aside under that rule, a new thirty-day period will commence with re-entry of a judgment after, or in connection with, an order setting aside the original judgment.¹⁰¹ However, the standard for setting aside a judgment is itself stringent. Even if the failure to

95. Fla. R. App. P. 9.110(b).

96. *Id.*

97. *Id.* at 9.130(b).

98. *Free Unitholders of Outdoor Resorts at Orlando, Inc. v. Outdoor Resorts of Am., Inc.*, 460 So. 2d 382, 383 (Fla. 2d Dist. App. 1984).

99. *Millinger v. Broward County Mental Health Div.*, 655 So. 2d 104, 105 (Fla. 1st Dist. App. 1994), *aff'd*, 672 So. 2d 24 (Fla. 1996).

100. Fla. R. Civ. P. 1.540.

101. *Id.* at authors' cmt. 1967.

file a timely notice might be considered excusable neglect under the Florida Rule of Civil Procedure 1.540 standard,¹⁰² it is not likely that excusable neglect also will justify setting aside the judgment. Only in rare cases in which, through no fault of its own, the party never received notice that the judgment had been entered, have the courts found excusable neglect for setting aside and re-entering the judgment to reinstate the right to appeal.¹⁰³ Additionally, this narrow avenue of relief from the consequences of an untimely appeal is generally available only when existing law—specifically, Rule 1.540—authorizes the setting aside of a final judgment.¹⁰⁴ This Rule generally is inapplicable in administrative proceedings.¹⁰⁵

2. Rendition

The thirty-day limit for invoking the appellate court jurisdiction commences with “rendition” of the order to be appealed.¹⁰⁶ Rendition is defined in Rule 9.020(h).¹⁰⁷ An order is rendered when a signed, written order is filed with the clerk of the lower tribunal.¹⁰⁸ Thus, although a court’s oral ruling may be effective and binding on the parties, it is not rendered, and a notice of appeal will not effectively invoke an appellate court’s jurisdiction.¹⁰⁹

However, along with other motions, the date of rendition is tolled by the timely filing of an authorized motion for new trial, rehearing, clarification, to alter or amend, or for judgment in accordance with a prior motion for directed verdict.¹¹⁰ An untimely motion for rehearing will not toll the rendition date;¹¹¹ nor will an unauthorized motion.¹¹²

A common and fatal practical error results from filing a motion for rehearing concerning one of the specified orders from which Rule 9.130 permits an interlocutory appeal.¹¹³ Although

102. Fla. R. Civ. P. 1.540.

103. *Gibson v. Buice*, 381 So. 2d 349, 350–351 (Fla. 5th Dist. App. 1980).

104. Fla. R. Civ. P. 1.540.

105. *Farrell v. Amica Mut. Ins. Co.*, 361 So. 2d 408, 411 (Fla. 1978).

106. Fla. R. App. P. 9.110(b), 9.130(b).

107. *Id.* at 9.020(h).

108. *Id.*

109. *Rivera v. Dade County*, 485 So. 2d 17, 17 (Fla. 3d Dist. App. 1986).

110. Fla. R. App. P. 9.020(h).

111. *Harris v. Harris*, 670 So. 2d 1187, 1188 (Fla. 5th Dist. App. 1996).

112. *Feinberg v. Feinberg*, 384 So. 2d 1304, 1305 (Fla. 4th Dist. App. 1980).

113. Fla. R. App. P. 9.130.

there is no prohibition against filing such a motion, there also is no specific authority for it.¹¹⁴ Therefore, although there is no error in moving for rehearing of a nonfinal order, the practitioner needs to be aware that filing the motion does not suspend the thirty-day time limit for filing a notice of appeal.¹¹⁵

3. *Filed, Not Served*

In many instances of civil practice, and in many jurisdictions outside of Florida, the terms “service” and “filing” are, for practical purposes, interchangeable. This is not so with respect to filing a notice of appeal within thirty days of rendition of the appealed order. Rule 9.110(b) and Rule 9.130(b) provide that an appellate court’s jurisdiction is invoked when the notice of appeal is *filed* with the clerk of the lower tribunal.¹¹⁶ Putting the notice in the mail will not do the trick.¹¹⁷ The piece of paper must be physically lodged in the clerk’s office to be effective.¹¹⁸ Regardless of how early the notice may have been served by placing it in the mail, it is not effective until and unless it is in the clerk’s office within the thirty-day period.¹¹⁹ In other words, the mailbox rule does not apply.¹²⁰

For appeals from circuit court orders, two copies of the notice must be filed with the clerk of the court that entered the order.¹²¹ Notices of administrative appeal are to be filed with the agency that entered the order and with the appellate court.¹²² However, accomplishing either filing is sufficient to invoke an appellate court’s jurisdiction.¹²³

114. *Freeman v. Perdue*, 588 So. 2d 671, 671 (Fla. 5th Dist. App. 1991).

115. *Id.* at 671–672.

116. Fla. R. App. P. 9.110(b), 9.130(b).

117. *Millinger v. Broward County Mental Health Div.*, 672 So. 2d 24, 26 (Fla. 1996) (citing *Coca Cola Foods v. Cordero*, 589 So. 2d 961, 962 (Fla. 1st Dist. App. 1991)).

118. *Coca Cola Foods*, 589 So. 2d at 962.

119. *Id.*

120. *Millinger*, 672 So. 2d at 26.

121. Fla. R. App. P. 9.110(b).

122. *Id.* at 9.110(c).

123. *Davis v. Dept. of Hwy. Safety & Motor Vehs.*, 660 So. 2d 775, 777–778 (Fla. 1st Dist. App. 1995).

4. Form of the Notice

The stringency applied to perfecting an appeal completely disappears with respect to the form of the notice. Although Florida Rule of Appellate Procedure 9.110(d) specifies the content of the notice of appeal, and Rule 9.900 includes forms for noticing the various types of appeals, deviation from these requirements generally does not affect the court's jurisdiction and therefore is not fatal.¹²⁴ Still, the requirements are there to be followed, and failure to do so may result in an order to correct the notice or possibly lead to sanctions.

There is no provision in the requirements for identifying the issues to be appealed or any other substantive information about the case. All that is required is that the notice identify the tribunal from which the appeal is taken, the date of rendition, the nature of the order appealed, and a "conformed" copy of the appealed order and any order disposing of any postjudgment motions.¹²⁵ This way, the appellate court can determine whether it has jurisdiction over the appeal. The word "conformed" seems to be surplusage, as all that is required is that an accurate copy be attached.¹²⁶

Although the Rule states that the required filing fee must accompany the notice,¹²⁷ that also is not a jurisdictional requirement; the appeal may not be summarily dismissed, and the clerk of court may not refuse the notice, because the filing fee is not attached.¹²⁸ However, the appeal may be dismissed for failure to submit the filing fee after the party has been given notice and an opportunity to cure.¹²⁹

B. Briefs

Rule 9.110 provides that the "initial brief shall be served within 70 days of filing the notice" of appeal of a final order.¹³⁰ Rule 9.130 provides that the initial brief shall be filed within fif-

124. *Ratner v. Miami Beach First Natl. Bank*, 362 So. 2d 273, 274 (Fla. 1978).

125. Fla. R. App. P. 9.110(d).

126. *Id.*

127. *Id.*

128. *Williams v. State*, 324 So. 2d 74, 77 (Fla. 1975).

129. *Id.*

130. Fla. R. App. P. 9.110(f).

teen days of the notice in interlocutory appeals.¹³¹ Reasonable extensions of time are liberally granted upon motion pursuant to Rule 9.300.¹³²

Rule 9.210 governs the form, number, and content of briefs.¹³³ There is considerable variation among the five districts with respect to compliance with the Rule requirements. The First DCA is known for what many consider overzealous enforcement. Any deviation—for example, failure to include an index to a one-page appendix—will result in an order directing that the entire brief be corrected and re-filed or it will be stricken.¹³⁴ Other courts seem to virtually ignore the Rule 9.210 requirements, including such substantive matters as listing the issues in the table of contents.¹³⁵ In any event, the Rule itself can and should be used as a check-list to ensure that all requirements are met. Some of the notable and often overlooked matters include the following:

- Font size and certification of compliance therewith.
- Binding so that brief will lie flat—fancy plastic ACCO-type binding is not permitted. In essence, the brief must either be bound by a single staple in the upper left hand corner or spiral bound.
- Identification of standard of review.
- Precise statement of relief requested in conclusion section, not to exceed one page.¹³⁶

C. The Record

There is a significant distinction between Rule 9.110 appeals of final judgments and Rule 9.130 interlocutory appeals, when it

131. *Id.* at 9.130(e).

132. *Id.* at 9.300.

133. *Id.* at 9.210.

134. *E.g. Robinson v. Albert*, 634 So. 2d 227, 227 (Fla. 1st Dist. App. 1994) (striking appellants' brief for failure to list the issues for review); *White v. White*, 627 So. 2d 1237, 1238–1239 (Fla. 1st Dist. App. 1993) (finding the brief to be of no assistance); *Williams v. Winn-Dixie Stores, Inc.*, 548 So. 2d 829, 830 (Fla. 1st Dist. App. 1989) (finding that the brief's citations to the record were inadequate).

135. *E.g. Sarasota County v. Ex*, 645 So. 2d 7, 8 (Fla. 2d Dist. App. 1994) (finding the notices were in good faith and did not abuse the Rule); *Town of Pembroke Park v. Fla. St. Lodge, Fraternal Or. of Police*, 501 So. 2d 1294, 1296 (Fla. 4th Dist. App. 1986) (reminding counsel that the summary is an important part of the brief, but overlooking some substantive requirements).

136. Fla. R. App. P. 9.210.

comes to the record. Because the lower tribunal retains jurisdiction during an interlocutory appeal, the clerk of the court does not prepare and transmit the record. Thus, no directions to the clerk are required. Instead, the appellant must include an appendix, conforming to Rule 9.220, containing pertinent record excerpts.¹³⁷ This does not authorize reliance on nonrecord information.

In appeals of final orders, the appellant must file directions to the clerk of the lower tribunal, who then is responsible for preparing the record in accordance with Rule 9.200.¹³⁸ However, the burden is on the appellant to ensure that the clerk performs as required.¹³⁹

VI. CONCLUSION

Florida's DCAs, as the courts of last resort for most Florida litigants, have jurisdiction to hear appeals from "final" orders of the circuit courts and administrative agencies. After some initial confusion, the courts have clearly defined those orders that are, in fact, appealable. Practitioners who abide by the courts' rules and precedent should have little difficulty successfully filing appeals of final orders.

137. *Id.* at 9.220.

138. *Id.* at 9.200.

139. *Id.* at 9.200(e).