Florida Law Review

Volume 11 | Issue 1 Article 1

March 1958

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University of Florida Law Review

VOL. XI SPRING 1958 No. 1

THE FLORIDA APPELLATE RULES*

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Acting pursuant to authority vested in it by revised article V of the Florida Constitution, which was adopted on November 6, 1956, the Supreme Court of Florida on June 18, 1957, adopted the new Florida Appellate Rules, to become effective July 1, 1957.

The rules as finally adopted involve many changes from the tentative draft of the proposed Florida Appellate Rules as published in the May 1957 issue of the *Florida Bar Journal.* Most of these changes resulted from the public hearing held on May 28, 1957, and comments previously received from the bench and bar.

There have been several additions and amendments since adoption of the rules. On July 30, 1957, the new district courts of appeal promulgated Rule 2.2, covering internal government of these courts. On August 13, 1957, the Supreme Court amended Rule 2.1a (4) (h). Other amendments were added by an opinion filed March 19, 1958, to become effective July 1, 1958. These affect Rules 1.3, 2.1a (4) (a)- (i), 2.1e (1), 4.5a, 4.5c (6), and 6.1.

The basic contents of the new rules are drawn from the former Florida Supreme Court Rules of Practice of 1949 and 1955,[1] certain

*A table of headings and subheadings is appended at the end of this article.

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[1]See Truett, *The New Florida Appellate Rules of Practice,* 8 U. FLA. L. REV. 93 (1955); Warren, *Appellate Procedure — in Florida — Adjusted to the New 1955 Supreme Court Rules,* 9 MIAMI L.Q. 375 (1955) reproduced at 31 FLA. STAT. ANN.

of the procedural statutes, and the provisions of article V of the revised Constitution.

Rule 2.1g contemplates a continuous study of the rules by a standing advisory committee consisting of a judge from each level of the appellate courts and three members of The Florida Bar.[2] This committee has been active since the initial adoption of the rules, and it welcomes any suggestions that will lead to improvement of the rules.

Constitutional Background

To understand the Florida Appellate Rules it is desirable to examine amended article V, the judiciary article of the Florida Constitution. The most publicized change of the 1957 amendment to article V was the creation of a new appellate court system. This system, which has had a profound influence on the Florida Appellate Rules, will be discussed at appropriate places in this article. In addition to the new appellate system, there are five new provisions in amended article V that specifically affect the Supreme Court's power to establish rules concerning particular matters.

Administration, Section 2

> *"The chief justice of the supreme court is vested with and shall exercise in accordance with rules of that court, authority temporarily to assign justices of the supreme court to district courts of appeal and circuit courts, judges of district courts of appeal and circuit judges to the supreme court, district courts of appeal and circuit courts, and judges of other courts, except municipal courts, to judicial service in any court of the same or lesser jurisdiction. Any retired justice or judge may, with his consent, be likewise assigned to judicial service."*

Apparently this provision was designed in the interest of administrative efficiency; it supplanted the following provisions in former article V:

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435 (1956). Many of the old rules are still significant because of their similarity to or identity with the new rules.

[2]The committee members are E. Harris Drew, Justice, Supreme Court, Tallahassee; A. O. Kanner, Judge, District Court of Appeal, Stuart; L. L. Parks, Circuit Judge, Tampa; W. O. Mehrtens, Miami; Mark Hawes, Tampa; J. Lewis Hall, Tallahassee.

(1) Section 4(b), which provided authority for the Supreme Court or the chief justice to call circuit judges for use on the Supreme Court when justices were absent, disqualified, or disabled;
(2) Section 6, which provided authority for the legislature to prescribe regulations governing the use of circuit judges on the Supreme Court when justices were disqualified or disabled;
(3) Section 8, which provided for the temporary exchange of circuits by circuit judges on order of the governor;[3]
(4) Section 49(46), which provided authority for the chief justice to recall retired Supreme Court justices. This section also contained authority for the senior circuit judges to recall retired circuit judges and for the governor to assign them to other circuits.

Appellate Rules 2.1a (3), (4) are designed to implement article V, section 2.

Practice and Procedure, Section 3

"The practice and procedure in all courts shall be governed by rules adopted by the Supreme Court."

This specific language dispenses with the need for interpretation to assert the Supreme Court's power to promulgate rules of practice and procedure in the courts,[4] and impliedly denies any authority, even subordinate, for the legislature to act in this field.[5]

The 1954 Florida Rules of Civil Procedure and the appropriate sections of title XLV of Florida Statutes 1957 still govern, respectively, civil and criminal trial practice and procedure, although there has been no applicable Supreme Court recognition or continuation order,[6] since article V, section 26(4) provides:

[3]Sec. 39 gave the governor power to order a circuit judge to temporary duty on the Court of Record for Escambia County.

[4]See, *e.g.*, Petition of the Florida State Bar Ass'n for Promulgation of New Florida Rules of Civil Procedure, 145 Fla. 223, 199 So. 57 (1940).

[5]*But see* FLA. STAT. §§25.371, 59.01(1) (1957); *cf. id.* §25.47; Petition of the Florida State Bar Ass'n for Adoption of Rules of Practice and Procedure, 155 Fla. 710, 21 So.2d 605 (1945); Petition of the Florida State Bar Ass'n for Promulgation of New Florida Rules of Civil Procedure, *supra* note 4.

[6]*Cf.* FLA. R. CIV. P. 1.1, confirming local internal rules of trial courts not in-

> "Except to the extent inconsistent with the provisions of this Article, all provisions of law and rules of court in force on the effective date of this Article shall continue in effect until superseded in a manner authorized by the constitution."

This safety-net provision is calculated to prevent any hiatus in the process of changing from one complicated system to another. In Rule 1.4 of the Florida Appellate Rules the Supreme Court has applied a similar technique to retain all applicable statutes that are not specifically superseded by or in conflict with the appellate rules. This rule makes it clear that the Supreme Court did not intend to occupy the whole field and thereby supersede any existing statutes that would otherwise have been continued under article V, section 26 (4); this might have been the implication if the Court had entered the appellate rules field without the provisions of Rule 1.4.

The Florida Appellate Rules govern civil and criminal appellate practice and procedure, as indicated by Rules 1.1, 4.7 and Part VI.

Retirement, Suspension, and Removal of Judges, Section 17(b)

> *"Subject to rules of procedure to be established by the supreme court, and after notice and hearing, any justice or judge may be retired for disability at retirement pay to be fixed by law, which shall not be less than two-thirds of his then compensation if he has served for ten years or more, by a commission composed of one justice of the supreme court to be selected by that court, two judges of the district courts of appeal to be selected by the judges of said district courts of appeal, and two circuit judges and two county judges to be selected by the supreme court."*

The proposed draft of the appellate rules that appeared in the May, 1957, *Florida Bar Journal* contained a section providing for a commission to administer the retirement of justices and judges for disability.[7] However, there was no general agreement on a plan to govern such proceedings at the time the final draft of the rules was before the Supreme Court for approval; and, since the inclusion of such rules would not affect appellate practice and procedure, the

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consistent with Supreme Court Rules.

[7]R. 2.1a (6).

Supreme Court left the matter out of the Florida Appellate Rules — to be disposed of at another time.

Admission and Discipline of Attorneys, Section 23

> *"The supreme court shall have exclusive jurisdiction over the admission to the practice of law and the discipline of persons admitted. It may provide for an agency to handle admissions subject to its supervision. It may also provide for the handling of disciplinary matters in the circuit courts and the district courts of appeal, or by commissions consisting of members of the bar to be designated by it, the supreme court, subject to its supervision and review."*

The appellate rules do not deal with this problem. It is handled by the Integration Rule of The Florida Bar; new Rule of Civil Procedure 3.1, which continues the circuit court's power to disbar under chapter 454 of Florida Statutes 1957; and the rules governing the Board of Bar Examiners.

Implementation, Section 26(14)

> *"Upon the adoption of this Article . . . the supreme court shall make such rules as may be necessary or proper to give effect to its provisions."*

Acting pursuant to this specific mandate, the several applicable provisions of amended article V, and its "inherent powers,"[8] the Supreme Court promulgated the Florida Appellate Rules.

PART I. APPLICATION, DEFINITIONS, AND CITATION

Application, Rule 1.1

Throughout the early drafts, the general provisions of the appellate rules were formulated to govern only proceedings in the Supreme Court and the district courts of appeal. Proposed Rule 2.1a (4) (k), which appeared for the first time in the draft printed in the May, 1957, *Florida Bar Journal,* provided rules governing appellate procedure for the circuit courts.

[8]See R. 1.1.

At the time the final draft was prepared, the Court decided to make the general appellate rules apply to the circuit courts in the exercise of their appellate jurisdiction, with only the exceptions contained in Rule 4.7. This change was accomplished principally through an appropriate modification of Rule 1.1, the elimination of Rule 2.1a (4) (k), and the addition of new Rule 4.7. There were relatively unimportant changes to conform the definitions of "court" and "rendition" to the above modifications.

Since the appellate rules apply to the Supreme Court, the district courts of appeal, and the circuit courts in the exercise of their appellate jurisdiction, they appear to cover all appellate practice and procedure in the courts except appeals from courts of justices of the peace in criminal cases, which "may be tried de novo under such regulations as the legislature may prescribe."[9] This conclusion is apparent from the fact that the Constitution assigns appellate jurisdiction or extraordinary writ power only to the Supreme Court,[10] the district courts of appeal,[11] the circuit courts,[12] and the Court of Record of Escambia County, which is governed by the same rules of practice and procedure as the circuit courts.[13] The power of county courts to "exercise final appellate jurisdiction in civil cases arising in Courts of Justices of the Peace"[14] has been omitted from amended article V, and this jurisdiction has been transferred to the circuit courts.[15]

Citation, Rule 1.2

The March 9, 1957, draft cited the rules as "1957 Florida Appellate Rules," but the date was subsequently dropped to accord with the idea of an evolutionary set of rules.

Definitions, Rule 1.3

Of the seven terms defined in this rule, *rendition* is the only one that requires any discussion.

In the March 1957 draft this single sentence, which appears as

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[9]FLA. CONST. art. V, §11 (2); see FLA. STAT. §932.56 (1957).
[10]FLA. CONST. art. V, §4 (2).
[11]*Id.* §5 (3).
[12]*Id.* §6 (3).
[13]*Id.* §10.
[14]*Id.* §18, prior to July 1, 1957.
[15]FLA. CONST. art. V, §6 (3).

the first sentence in the final draft, defined rendition: " 'Rendition' of a judgment, decision, order or decree means that it has been reduced to writing, signed and made a matter of record or if recording is not required then filed."[16] This definition was designed to provide a definite act from which to compute the time allowed for commencing appeals and filing petitions for certiorari. The second sentence of the present rule, "A paper is deemed to be recorded when filed with the clerk and assigned a book and page number," was added to make the act of "recording" more definite for the purpose at hand. The third sentence of the present rule, "A judgment or decision of an appellate court shall not be deemed rendered until the mandate is issued," was intended to tie in with Rule 3.15, which provides for withholding the mandate "until the cause has been fully determined" by the appellate court and thus to provide a definite act of the lower appellate court after it has finished its work, from which to compute the time within which an action can be commenced in a higher court. This sentence is particularly significant, since the time for taking an appeal[17] and the time for petitioning for a writ of certiorari[18] starts to run from the date of "rendition of the decision, order, judgment, or decree" from which the appeal or petition is taken. Thus a stay of the "issuance" of the mandate would prevent the running of the time. There does not seem to be any clear idea as to what act of the appellate court amounts to "issuance" of the mandate in Florida,[19] possibly because it has not been of practical importance before. The appellate rules do not explicitly define this term.

The possible consequence of this definition of *rendition* of appellate court decisions is illustrated in *State ex rel. Hawley v. Coogan*,[20] in which the District Court of Appeal for the Third District held that it could not stay the issuance of the mandate in order to allow a petition for writ of certiorari to the Supreme Court, since such a petition could not be taken until the mandate had issued. In order to eliminate this problem, the Supreme Court has stricken the offending sentence from the rules, by its order of March 19, 1958, to become effective July 1, 1958.

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[16] *Cf.* Brenner v. Gelernter, 90 So.2d 306 (Fla. 1956).

[17] R. 3.2b.

[18] R. 4.5c(1).

[19] *Cf.* "The time of issuance is held to be the time the clerk of the appellate court files the remittitur and not the time it is ordered by the court." 5A C.J.S., *Appeal and Error* §1960 (1958).

[20] 99 So.2d 243 (3d D.C.A. Fla. 1957).

For the present there is a reasonable interpretation of "issuance of the mandate," so that the sentence may perform its designed function. When the appellate court has finally disposed of a case the clerk prepares a document called the "mandate,"[21] indicating to the lower court the disposition of the case.[22] Then, after proper notations have been made in the clerk's records, this document is sent to the lower court.[23] A reasonable interpretation is that the clerk's completion of the document marks the "issuance" of the mandate and that transmission is not a part of issuance. Thus, a stay or supersedeas in the lower appellate court could take effect after issuance of the mandate but before its transmission to the lower court.[24] There is ample authority for the appellate court to withhold or "stay" its mandate when the circumstances justify such action.[25]

The final sentence in the definition of *rendition* withholds the start of the period of time within which appellate review must be sought until any "proper and timely" processes for reconsideration instituted in the lower court have been disposed of. This is an attempt to solve a problem that has caused a fair amount of litigation in the past.[26] The words *proper and timely* indicate that only proceedings that are allowed by established rules of lower court procedure and that comply with them affect the time.[27]

Effective July 1, 1958, an eighth definition, adopted by the order of March 19, 1958, becomes part of Rule 1.3: " 'Commission' or 'board' shall mean a commissioner or other administrative agent or officer where the context of these rules requires." This definition merely recognizes the fact that some Florida agencies act through single agents, who are variously described.

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[21]Preparation of a document is limited in actual practice in the Supreme Court to appeals, but the framers of the new rules intended the word *mandate* to apply to all official notifications of appellate court decisions sent by the appellate court to the official or the lower court whose act was reviewed.

[22]"The mandate of an appellate court remitting the cause to the lower court is the official mode of communicating its judgment to the inferior tribunal." Livingston v. State, 113 Fla. 391, 393, 152 So. 205, 206 (1933); see 3 AM. JUR., *Appeal and Error* §1229 (1936).

[23]See R. 2.1b (7), 2.2.

[24]*Cf.* State v. Clearwater, 108 Fla. 635, 146 So. 836 (1933).

[25]*E.g.*, Jacksonville, T. & K.W. Ry. v. Adams, 28 Fla. 631, 10 So. 465 (1891); see Severns Drilling Co. v. Superior Court, 16 Cal. App. 2d 529, 60 P.2d 530 (1936); Reynolds v. E. Clemens Horst Co., 36 Cal. App. 529, 172 Pac. 623 (1918).

[26]See, *e.g.*, Ganzer v. Ganzer, 84 So.2d 591 (Fla. 1956).

[27]See Brenner v. Gelernter, 90 So.2d 306 (Fla. 1956); Counne v. Saffan, 87 So.2d

Effective Date, Rule 1.4

Only one comment need be made about this rule. It should be read in conjunction with Rule 1.1; "Proceedings Commenced" refers to those begun, according to the applicable rules governing such proceedings, in the Supreme Court, the district courts of appeal, or the circuit courts in the exercise of their appellate jurisdiction.

PART II. THE COURTS

a. The Supreme Court, Rule 2.1

Internal Government

The scope of the rules of "internal government"[28] of the Supreme Court is somewhat broader than the title would indicate. For example, they include the new restricted jurisdiction of the Supreme Court[29] prescribed by amended article V, section 4, which constitutes one of the most radical changes made in that article.

Exercise of Powers and Jurisdiction

The Supreme Court now exercises its powers en banc in all cases;[30] this, of course, is a departure from the former practice.[31] Moreover, five members of the Court now sit en banc instead of seven as formerly,[32] it being specifically provided that "five justices shall constitute a quorum,"[33] though the concurrence of four justices is still necessary to a decision.[34] The final sentence of Rule 2.1a (1) provides that "if four justices who hear the argument do not concur, the cause shall be submitted to the other two justices." Thus an opinion, after it has circulated among the justices who heard the argument, may now be filed immediately in spite of a dissent. Formerly, when the Court sat in divisions, one dissent by a division member

586 (Fla. 1956); Ganzer v. Ganzer, *supra* note 26.

[28]R. 2.1a (1)-(6).

[29]R. 2.1a (5).

[30]R. 2.1a (1).

[31]Sup. Ct. R. 1.3 (1955).

[32]*Ibid.*

[33]FLA. CONST. art. V, §4 (1); R. 2.1a (1).

[34]R. 2.1a (1).

would throw the case to the full Court.[35] If two of the five justices who hear the argument dissent, under the present rule the case goes to "the other two justices," even though the conflict may be resolved four-to-two by the first of the two nonhearing justices to consider the case.

Chief Justice

The chief justice is chosen by the justices for a two-year term,[36] as heretofore. He continues to be the administrative officer of the Court,[37] in addition to his judicial duties. If for any reason an acting chief justice must serve, he will be the justice longest in continuous service.[38]

The duties of the chief justice were formerly prescribed in considerable detail by 1955 Supreme Court Rule 4 (a)-(i). Much of this detail has been eliminated under the present rules. One change worth noting is that the responsibility of the chief justice for "procuring consistent decisions"[39] is omitted. Of course, with the Court sitting en banc in all cases rather than in divisions, the risk of inconsistent decisions is greatly reduced if not eliminated; but, in so far as this risk may still exist, it must be the ultimate responsibility of the chief justice to resolve the inconsistency, because his is the only office through which all cases are necessarily channeled.

Administration; Assignment of Judges

As for administrative power over the entire Florida court system, the rules provide only that the chief justice shall have authority to make temporary assignment of judges,[40] obviously for the purpose of expediting the dispatch of judicial business throughout the state.

The Judicial Council originally proposed that the chief justice should have "general administrative authority over all courts in this

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[35]Sup. Ct. R. 1.3 (1955).

[36]R. 2.1a (2) (a). The Judicial Council originally recommended that the chief justice remain in that position for a 6-year term, but this was reduced to two years by the legislature. SECOND ANN. REP. OF JUDICIAL COUNCIL, app. 1, p. 4 (June 30, 1955); FLA. CONST. art. V, §4 (3); H. JOINT RES. No. 810, H.R. JOUR. 388-89 (Reg. Sess. 1955).

[37]R. 2.1a (2) (a).

[38]R. 2.1a (2) (c).

[39]Sup. Ct. R. 1.4 (a) (1955).

[40]R. 2.1a (3), (4).

state, including the" authority to make temporary assignment of judges among the courts, but the quoted language was eliminated by the legislature.[41]

Jurisdiction

The acid test of the revised judiciary article of the Constitution will lie in the Supreme Court's interpretation of the provisions regarding its jurisdiction, which are reproduced almost verbatim in Rule 2.1a (5).[42] The jurisdiction of the Court has been severely and intentionally restricted. The purpose of this restriction is[43]

> "to reserve the time and energies of the members of that court for the more important cases (i.e., those involving the death penalty, those involving constitutional questions, those involving questions of great public importance, and those in which the decision is in conflict with the decisions of other district courts or of the supreme court itself). Furthermore, the members of the supreme court will be able to give more deliberate consideration to these cases than heretofore."

In order to understand the changes in the Court's jurisdiction wrought by amended article V and reflected in Rule 2.1a (5), it will be helpful first to consider those respects in which jurisdiction remains the same as under former article V. A consideration to be borne in mind in this analysis is that the appellate jurisdiction of the Supreme Court under former article V was geared to the character of the case appealed, or to the court rendering judgment – in most cases the circuit court[44] – while under present article V final judgments or decrees in specified categories, which may or may not de-

[41]SECOND ANN. REP. OF JUDICIAL COUNCIL, app. 1, p. 1 (June 30, 1955); FLA. CONST. art. V, §2; H. JOINT RES. No. 810, H.R. JOUR. 388 (Reg. Sess. 1955); see Porter, *The Status of Judicial Reform in the State of Florida,* 12 MIAMI L. REV. 104, 106 (1957).

[42]See note 76 *infra* and text pertaining thereto.

[43]*Improving Florida's Court System,* Florida Judicial Council 32 (July 1, 1956).

[44]Former art. V, §5, read in part: "The Supreme Court shall have appellate jurisdiction in all cases at law and in equity originating in Circuit Courts, and of appeals from the Circuit Courts in cases arising before Judges of the County Courts in matters pertaining to their probate jurisdiction and in the management of the estates of infants, and in cases of conviction of felony in the criminal courts, and in all criminal cases originating in the Circuit Courts."

pend upon the character of the case, may be appealed to the Supreme Court directly from "trial courts."[45]

Direct Appeals from Trial Courts

As before, under the present rules appeals from judgments imposing the death penalty[46] and appeals from final judgments or decrees in bond validation suits[47] may be taken directly to the Supreme Court as a matter of right. And, as before, such appeals are taken from the circuit court,[48] not from a court of lesser jurisdiction.

Nonstop appeals from trial courts to the Supreme Court may be taken in two additional categories: from final judgments or decrees (1) "passing directly upon the validity of a state statute or a federal statute or treaty" or (2) "construing a controlling provision of the Florida or Federal Constitution."[49] This general area of review is reminiscent of that prescribed by the statute governing the jurisdiction of the Supreme Court of the United States to review decisions of state courts.[50] Accordingly, the interpretation by the Supreme Court of the United States of its own jurisdiction under this grant should be helpful when the Supreme Court of Florida is asked to resolve jurisdictional problems that arise under the language quoted above.[51]

A judgment "passing directly upon the validity of" a statute[52] is evidently one that squarely holds the challenged statute valid or invalid. It was clearly the intent of the Judicial Council that a judgment upholding the validity of a statute questioned upon constitutional grounds should be directly appealable to the Supreme

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[45]See FLA. CONST. art. V, §4 (2); R. 2.1a (5).

[46]R. 2.1a (5) (a). Note that this does not permit direct appeals in all cases in which death is a possible penalty, but only when the death penalty has actually been imposed.

[47]R. 2.1a (5) (b).

[48]This is easily discovered from the nature of the matter appealed. Jurisdiction to determine proceedings for validation of bonds and certificates of indebtedness reposes in the circuit courts. FLA. STAT. §75.01 (1957). The circuit courts must also determine capital cases; see FLA. CONST. art. V, §§6, 7, 8, 9 (2).

[49]R. 2.1a (5) (a); FLA. CONST. art. V, §4 (2).

[50]28 U.S.C. §1257 (1952).

[51]Some possible problems are pointed out in Barns, *Courts, Lawyers and Taxpayers*, 30 FLA. B.J. 162, 163-64 (1956). An excellent analytical discussion of the jurisdiction of the Supreme Court of the United States under 28 U.S.C. §1257 will be found in STERN and GRESSMAN, SUPREME COURT PRACTICE 52-102 (2d ed. 1954).

[52]See FLA. CONST. art. V, §4 (2).

Court because "the litigant's constitutional right has been involved in the trial court."[53]

The decisions of the Supreme Court of Missouri interpreting somewhat similar provisions of the Missouri Constitution may be helpful in forecasting the Florida Supreme Court's interpretation of its jurisdiction. The jurisdictional grant to the Missouri court reads in part as follows:[54]

> "The supreme court shall have exclusive appellate jurisdiction in all cases involving the construction of the Constitution of the United States or of this state, the validity of a treaty or statute of the United States . . . , the construction of the revenue laws of this state . . . ."

As examples of decisions under this language, it has been held that to give the Supreme Court jurisdiction on the ground that a constitutional question is involved, the question must be raised at the first opportunity and the particular provision of the constitution alleged to have been violated must be pointed out.[55] The Missouri court has also held that regardless of which side may invoke the protection of the constitution, the supreme court has jurisdiction of an appeal if a construction of the constitution is necessarily involved in the case.[56]

Considering article V, section 4 (b), of the Florida Constitution — Rule 2.1a (5) — alone, it appears that the Supreme Court is intended to be the exclusive final appellate arbiter of constitutional questions,[57] responsible for their expeditious determination wherever they may originate; and that such questions may be brought to the Supreme Court without pause from "trial courts" of any size.[58] On the other

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[53]*Improving Florida's Court System,* Florida Judicial Council 33 (July 1, 1956).

[54]Mo. CONST. art. V, §3.

[55]St. Louis v. Friedman, 358 Mo. 681, 216 S.W.2d 475 (1948).

[56]Wooster v. Trimont Mfg. Co., 197 S.W.2d 710, *rehearing,* 356 Mo. 682, 203 S.W.2d 411 (1947).

[57]One purpose of the revised judiciary article was to increase the importance of the Supreme Court's function as "watchdog of the constitution" because the Court "will have time to give more deliberate consideration to cases involving important constitutional questions." *Improving Florida's Court System, supra* note 53, at 32.

[58]A chart prepared by the Judicial Council to depict the jurisdiction of the Supreme Court under the revised judiciary article shows, for "constitutional questions," a direct appeal to the Supreme Court from "all trial courts other than circuit courts." This, of course, is in addition to matters shown to be directly ap-

hand, a subsequent section of amended article V seems to provide a brake for this procedure by giving the circuit courts final appellate jurisdiction of most matters arising in the inferior trial courts.[59]

An additional problem is to be found in the interpretation to be given the words *state statute* as used in amended article V and the appellate rules.[60] If a "state statute" stands or falls under constitutional attack in the trial court, the matter may be directly reviewed by the Supreme Court;[61] but what of that notorious hotbed of unconstitutionality, the municipal ordinance? If a narrow or literal interpretation of the words *state statute* is adopted, a trial court's ruling on the constitutionality of a municipal ordinance cannot be directly reviewed by the Supreme Court unless the trial court has also "construed" a constitutional provision.[62] Confronted with a similar problem of definition, the Supreme Court of the United States has interpreted the words *statute of any state*[63] to include every legislative action to which a state gives the force of law;[64] this, in turn, includes

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pealable from the circuit courts. *Improving Florida's Court System, supra* note 53, at 45. This is also the interpretation placed upon revised art. V in Barns, *supra* note 51, at 164.

The words *trial court* are nowhere defined in the Constitution, nor have they been explained by the Supreme Court of Florida, so far as appears. A "trial" was defined by that court in 1849 as "the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in the cause, for the purpose of determining such issue." Darden v. Lines, 2 Fla. 569, 573. Proceedings in a municipal court would qualify under this definition.

[59]FLA. CONST. art. V, §6 (3), provides that the circuit courts "shall have final appellate jurisdiction in all civil and criminal cases arising in the county court, or before county judges' courts, of all misdemeanors tried in criminal courts of record, and of all cases arising in municipal courts, small claims courts, and courts of justices of the peace."

Note that felony cases originating in the criminal courts of record are not included. These would be appealed to the district court of appeal. FLA. CONST. art. V, §5 (3).

Of course art. V, §6 (3), *supra* may and probably should be interpreted to apply only to cases not directly appealable to the Supreme Court under art. V, §4 (2). See Dreisbach, *How to Determine Where to Appeal in Florida*, 32 FLA. B.J. 109, 111 (1958).

[60]FLA. CONST. art. V, §4 (2); R. 2.1a (5) (a).

[61]*Ibid.* The final judgment, to be directly appealable to the Supreme Court, must be one "directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal Constitution . . . ."

[62]*Ibid.*

[63]28 U.S.C. §1257 (1952).

[64]Williams v. Bruffy, 96 U.S. 176, 183 (1877).

municipal ordinances[65] and even orders of state commissions issued in the exercise of their delegated legislative authority.[66] The acceptance or rejection of this construction by the Florida Supreme Court will have a substantial effect upon its jurisdiction to decide constitutional questions.

Direct Review of Interlocutory Orders

A remaining type of direct review is that provided for "interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court."[67] Under this provision the "trial court" problem[68] is obviated because, for practical purposes, exclusive original jurisdiction in chancery is lodged in the circuit courts.[69] The matters directly reviewable upon final decree must be referred to in order to determine what interlocutory chancery matters may be directly reviewed. By elimination[70] it is found that the catalog is restricted to the two related types of constitutional matter discussed *supra*: statutory validity and constitutional construction. Thus it appears that there must be a chancery matter wherein a question is raised below in such a way that the final decree must necessarily pass upon the validity of a statute, or construe the state or federal constitution, before an interlocutory order may be brought directly to the Supreme Court.[71] Only a small amount of appellate business should develop from this narrow field of review.

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[65]Poulos v. New Hampshire, 345 U.S. 395 (1953); Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1946); Jamison v. Texas, 318 U.S. 413 (1943); King Mfg. Co. v. City Council, 277 U.S. 100 (1928).

[66]Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953); Hamilton v. Regents, 293 U.S. 245 (1934); Sultan Ry. & Timber Co. v. Department of Labor and Industries, 277 U.S. 135 (1928); Live Oak Water Users' Ass'n v. Railroad Comm'n, 269 U.S. 354 (1926); Lake Erie & W. R.R. v. State Pub. Util. Comm'n, 249 U.S. 422 (1919).

[67]FLA. CONST. art. V, §4 (2); R. 2.1a (5) (a).

[68]See note 58 *supra*.

[69]FLA. CONST. art. V, §6 (3). On jurisdiction of juvenile courts see FLA. STAT. §39.02 (1957).

[70]Capital cases can be eliminated at once and bond validation suits almost as readily. Rule 4.3, specifically governing bond validation appeals, provides in part: "Appeals may be taken in bond validation proceedings *only* from the final decree . . . ." (Emphasis added.)

[71]An example might be an interlocutory order in a suit to enjoin a public official from enforcing a statute alleged to be unconstitutional.

The subject of direct review of interlocutory orders should not be concluded without observing that the old certiorari-appeal ghost[72] has reappeared in a somewhat modified form. Amended article V provides that the Supreme Court may review interlocutory orders "by certiorari"[73] and that in such "interlocutory reviews by certiorari"[74] the Court shall have the necessary jurisdiction to complete determination of the cause on review. In the corresponding section of the appellate rules,[75] however, the words *by certiorari* have been eliminated, and in place of "interlocutory review by certiorari" the rules say "interlocutory appeals."[76] Since the scope of review of interlocutory orders is the same whether the method of review be by appeal or by certiorari,[77] the difference in language between the Constitution and the rules is of no substantive consequence; and the litigant will be well advised to follow the rules — which, after all, were promulgated by the very court to which he seeks admission — and appeal.[78]

Finally, in both direct and interlocutory appeals, the Supreme

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[72]As a result of various statutory and rule changes, it was first held that interlocutory orders could be reviewed by appeal if the appellant preferred not to bring certiorari. Burkhart v. Burkhart, 141 Fla. 450, 193 So. 434 (1940). Later it was held that such orders could not be reviewed by appeal before final decree, the proper method being by certiorari. Moore v. Johnson, 154 Fla. 756, 18 So.2d 786 (1944). See the excellent discussion of this subject in Rogers and Baxter, *Certiorari in Florida*, 4 U. FLA. L. REV. 477, 520-34 (1951), wherein the authors argue quite plausibly that "certiorari" is a bad word when used to describe this type of review. For a capsule history of the certiorari-appeal struggle, see 2 FLA. JUR., Appeals §3, n.17 (1955).

[73]FLA. CONST. art. V, §4 (2).

[74]*Ibid.* FLA. STAT. §59.02 (1957) provides that review of interlocutory orders in equity "may be by proceedings in the nature of certiorari in the supreme court."

[75]R. 2.1a (5) (a).

[76]*Ibid.* This is the only difference worth noting between the language of amended art. V pertaining to the jurisdiction of the Supreme Court and the language of the appellate rules on this subject.

[77]Certiorari from an interlocutory order in chancery has "all the qualities of an appeal." Wilson v. McCoy Mfg. Co., 69 So.2d 659, 662 (Fla. 1954). It is not believed to have been intended, as one commentator has suggested, that the "discretionary common law writ of certiorari" should henceforth be used to review interlocutory chancery orders, Barns, *supra* note 51, at 165, because (if for no other reason) the *Wilson* case was on the books when the constitutional amendment was adopted.

[78]If interlocutory matters are henceforth always brought up by appeal under the rules, and the word *certiorari* is never mentioned in this connection, even though it is used in the Constitution, the certiorari-appeal ghost may be laid to rest for all time.

Court is given the jurisdiction it needs completely to determine the case reviewed.[79] Thus a single key should open all doors of the Supreme Court, and the problem of "split appeals" is greatly alleviated although not completely avoided.[80] It is felt, however, that considerations of practical judicial administration, coupled with a sincere desire on the part of all courts of the state to expedite appeals, will go far toward eliminating questions that may now seem serious.

Review of District Courts of Appeal Decisions

Constitutional matters that if decided by trial courts are directly appealable to the Supreme Court may arise initially in the district courts of appeal. If they do they may be appealed, as a matter of right, to the Supreme Court; this is the only true appeal permitted between these courts.[81]

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[79]FLA. CONST. art. V, §4 (2); R. 2.1a (5) (a).

[80]"*Appeals 'from final judgments or decrees directly passing on the validity' of a Statute.*

"If one party is aggrieved on non-constitutional grounds and another party is aggrieved on constitutional grounds as to the validity of the statute passed upon, then are both appeals to the Supreme Court or does one go to the Supreme Court and another to the Court of Appeals, both appealing from the same decree?

"The pleading may raise an issue as to the validity of a statute but the final judgment or decree may appropriately be rendered adjudicating the merits of the controversy without even making mention of the statute. The court may have impliedly passed on the validity of the statute, if to do so was necessary to the decision; or else the trial judge may have considered the validity of the statute not material and given it no further consideration and not mentioned it. Does the Court of Appeals or the Supreme Court have appellate jurisdiction? Again the pleadings may make no reference to a statute but the final judgment may pass on its validity; then to which court does the appeal lie?

"'*Appeals from judgments or decrees construing a controlling provision of the Florida or Federal Constitution.*'

"Again, as in 'passing on the validity of a statute,' the final decree may impliedly or expressly construe a controlling provision of a constitution. If done impliedly it may or may not have been raised by the pleadings. If raised by the pleadings, the trial judge may have considered it immaterial and given it no further consideration. One party to the decree may be aggrieved because of the implied construction and another party aggrieved because of non-constitutional questions. Does the Supreme Court have jurisdiction or the Court of Appeals? Will split appeals be required from the same final degree: one to the Supreme Court and another to the Court of Appeals?" Barns, *supra* note 51, at 163.

[81]"Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling pro-

In addition to its function as chief constitutional arbiter, the Supreme Court is given certiorari jurisdiction, by amended article V, that is similar in some respects to that exercised by the Supreme Court of the United States.[82] This jurisdiction empowers the Florida Supreme Court to decide questions of "great public interest"[83] — so certified by the district court of appeal — and to resolve direct[84] conflicts on the same point of law: (1) between decisions of the district courts of appeal, and (2) between decisions of the district courts of appeal and the Supreme Court.[85]

The maintenance of fundamental consistency in the law is obviously one of the most important functions reserved to the Supreme Court by the amended judiciary article. It is predictable that at least in the near future the conflict between district and Supreme Court decisions will provide the major part of the Supreme Court's appellate business from the district courts, if only because there are so many reported Florida decisions that may be examined for possible conflict. This appears to be the most attractive aperture for entering the Supreme Court. It involves every field of law, except for the comparative trickle of constitutional cases and related matters, and offers an extra source of hope to the unsuccessful litigant. On the other hand, the Supreme Court is here given the greatest opportunity to show its mettle as a supervisory court, rendering its decisions at more leisure than formerly, and requiring adherence to them by

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vision of the Florida or Federal Constitution." R. 2.1a (5) (b); FLA. CONST. art. V, §4.

[82]Pursuant to 28 U.S.C. §1254 (1) (1952), the Supreme Court of the United States may review cases in the courts of appeals by a "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." Thus the Supreme Court's jurisdiction over the courts of appeal is plenary. The Court's own view of the areas wherein it will *exercise* this jurisdiction is reflected in Sup. Ct. R. 19 (effective July 1, 1954). The similarity between the criteria stated in R. 19 (b) and the grant of certiorari jurisdiction to the Supreme Court of Florida over the district courts of appeal will readily be noted.

[83]FLA. CONST. art. V, §6 (2); R. 2.1a (5) (b). This may be compared with the Supreme Court of the United States exercising its jurisdiction to decide "an important question of federal law which has not been, but should be, settled by this court." Sup. Ct. R. 19.

[84]Generally, a conflict must be direct for the Supreme Court of the United States to grant certiorari and resolve it; see STERN and GRESSMAN, SUPREME COURT PRACTICE 110-21 (2d ed. 1954).

[85]FLA. CONST. art. V, §6 (2); R. 2.1a (5) (a).

subordinate courts throughout the state, within the true intent and spirit of revised article V.[86]

But finding old decisions of the Supreme Court that, although never overruled, are inconsistent with the more recent decisions or philosophy of that Court, and contending that the district court erred in failing to follow them, very likely will not do. As in the Supreme Court of the United States, it is probable that it will be thought necessary to resolve only live conflicts.[87]

It should be noted further that as a matter of judicial policy the only way the district courts of appeal can remain progressive and avoid stagnation in the law is by refusing to follow outmoded Supreme Court decisions; only by this means can the Supreme Court be given an opportunity to re-evaluate such decisions and qualify or overrule them, except for constitutional questions and "public interest" cases. If an outmoded Supreme Court decision is followed by the district court, in the great majority of cases the unsuccessful litigant will have no way of bringing the matter before the Supreme Court for re-examination.

To complete the certiorari jurisdiction of the Supreme Court specified in article V and the rules, that Court may review by certiorari "any decision of a district court of appeal that affects a class of constitutional or state officers"[88] and may issue the writ to "commissions established by law."[89]

The power thus granted the Supreme Court to make direct review of administrative decisions by certiorari appears to be plenary but discretionary. Statutes may provide for such review, and they will be regarded as effective to implement the Supreme Court's power under the new grant, in so far as they are not inconsistent with the Florida Appellate Rules, even though they antedate amended article

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[86]See note 43 *supra* and text thereat.

[87]"A conflict with a decision which has been discredited or which has lost all weight as authority by reason of intervening decisions of the Supreme Court or other courts of appeals, as well as of the same court, will not be ground for certiorari to issue. And it is to be doubted that a contrary opinion rendered thirty or forty years ago, without any indication that it has current vitality, will be enough to convince the Court that there is a live conflict which should be resolved." STERN and GRESSMAN, *op. cit. supra* note 84, at 112.

[88]FLA. CONST. art. V, §4; R. 2.1a (5) (b). This may raise questions of definition. See, *e.g.*, State *ex rel.* Woodworth v. Amos, 98 Fla. 212, 123 So. 749 (1929), holding that agricultural inspectors are state "officers" within the meaning of FLA. CONST. art. 16, §3.

[89]FLA. CONST. art. V, §4; R. 2.1a (5) (b).

V. Examples are the statutes[90] providing for direct certiorari review by the Supreme Court of orders of the Florida Railroad and Public Utilities Commission. Orders of that body are still being reviewed directly by the Supreme Court. It seems, however, that the matter remains discretionary, if only because the Court under its rule-making power can make other provisions for review that will be inconsistent with the statutes, in effect repealing them.

When jurisdiction to review administrative decisions by certiorari resides both in the Supreme Court and in the circuit courts and the only legislative word on the subject has been superseded by the new appellate rules, it is probable that the Supreme Court, as a matter of discretion and judicial administration, will decline jurisdiction and permit the case to be handled by the circuit court.[91]

Extraordinary Writs

The Supreme Court is empowered both specifically and generally[92] to protect its jurisdiction by extraordinary writs. The general grant of authority to "issue all writs necessary or proper to the complete exercise of its jurisdiction"[93] does not, however, confer additional jurisdiction upon the Court.[94]

Writs of habeas corpus may be issued by the Supreme Court or any of its justices, returnable before that Court, the district court or the circuit court, or before an individual member of any of these courts.[95]

Transfer of Appeals Improvidently Filed

Of particular interest is the rule[96] intended to come to the rescue of litigants who are baffled by changes in the appellate structure made by amended article V, and appeal to or petition the wrong court. Although it is included in the section of the rules entitled

[90]FLA. STAT. §§350.641, 366.10 (1957).

[91]National Dairy Prod. Corp. v. Odham, 100 So.2d 394 (Fla. 1958); Codomo v. Shaw, 99 So.2d 849 (Fla. 1958).

[92]FLA. CONST. art. V, §4; R. 2.1a (5) (b), (c).

[93]*Ibid.*

[94]State *ex rel.* Watson v. Lee, 150 Fla. 496, 8 So.2d 19 (1942); see Kilgore v. Bird, 149 Fla. 570, 6 So.2d 541 (1942); Adams and Miller, *Origins and Current Florida Status of the Extraordinary Writs,* 4 U. FLA. L. REV. 421, 461-62 (1951).

[95]FLA. CONST. art. V, §4; R. 2.1a (5) (c).

[96]R. 2.1a (5).

"Jurisdiction of the Supreme Court," it is plainly intended to apply to all appellate courts.[97] This rule permits the court whose jurisdiction has been "improvidently invoked" to transfer the case to the proper court, on five days' notice to the parties, whereupon the case will be treated as if it had originally been filed in the latter court.[98]

The inclusion of this provision was an act of great wisdom, and the rule enacted thereunder should be of inestimable benefit to litigants, particularly during the period of uncertainty in the interpretation of new article V. And, because uncertainty is inevitable, a liberal or even charitable view of the transfer rule by all appellate courts is devoutly to be hoped for.

Miscellaneous

Staff. The duties of the clerk, librarian, and marshal of the Supreme Court are provided for in the rules, as usual.[99] They are substantially the same as under the former rules, with few changes of general interest to the bar.[100]

Terms of Court. Pursuant to a recent amendment, the two terms held annually by the Supreme Court commence on the second Tuesday in January and July.[101] All matters not disposed of are carried over from term to term.

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[97]See, however, State v. Weissing, 100 So.2d 373 (Fla. 1958), in which the Supreme Court held the rule inapplicable when the original, as distinguished from appellate, jurisdiction of an appellate court has been improvidently invoked. For an application of the rule, see Codomo v. Shaw, 99 So.2d 849 (Fla. 1958).

[98]R. 2.1a(5)(d). This rule is derived from FLA. CONST. art. V, §4(2), which states in part: "The supreme court shall provide for the transfer to the court having jurisdiction of any matter subject to review when the jurisdiction of another appellate court has been improvidently invoked."

[99]R. 2.1b-d.

[100]The filing fee, formerly fixed at $12.00 (R. 2.5, 1955 Rules), has been raised to $25.00 (R. 2.1b(6)). The clerk, who performed the additional duty of librarian (R. 5.1, 1955 Rules), has been relieved of this duty, and the separate post of librarian has been established (R. 2.1c(1)). The marshal now has the power to execute process of the Court throughout the state (R. 2.1d(1)), whereas formerly he had no such power (R. 4, 1955 Rules). Formerly the authority to serve process was reposed in the Sheriff of Leon County, who was designated "Sheriff of the Supreme Court," a position now eliminated.

[101]R. 2.1e(1), as amended, effective July 1, 1958. This amendment brings the terms of the Supreme Court into harmony with those of the district courts of appeal. It has the effect of revoking FLA. STAT. §25.051 (1957), which provides that

Sessions and Hearings. All hearings are open to the public except court conferences.[102] As usual, Monday is motion day; and the Court, beginning at 10:00 a.m. on that day, hears preliminary matters and interlocutory appeals.[103] When appropriate, the Court directs the clerk or the marshal to announce recesses and adjournments.[104]

b. District Courts of Appeal, Rule 2.2

Rule 2.2 was promulgated jointly by the district courts of appeal on July 30, 1957, and has been approved by the Supreme Court. This rule provides for internal government and other matters pertaining specifically to the district courts of appeal that are not covered elsewhere by the general provisions of the appellate rules.[105] The section of the Florida Constitution governing the jurisdiction of the district courts of appeal is incorporated into the rules by reference.[106]

The rules follow those of the Supreme Court as closely as possible. Each district court exercises its powers en banc.[107] Two judges may hear any matter and the concurrence of two is necessary to a decision, but not less than three shall consider each case.[108]

A chief judge is chosen for a two-year term.[109] He is the administrative officer of the court, responsible for the dispatch of business.[110] Each district court has a clerk and a marshal; the rules pertaining to their duties substantially correspond with those of the Supreme Court.[111] The marshal has power to execute process throughout the

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the terms of the Supreme Court shall commence "on the first day of January and July, providing that if such day be a Sunday or legal holiday, then on the first subsequent day which is not a Sunday or legal holiday."

[102]R. 2.1f (1).

[103]R. 2.1f (2). Formerly, motion day hearings commenced at 9:00 a.m., and hearings were held on "*all* matters pertaining to causes in this court, except arguments on the merits in appeals from final judgments or decrees . . . ." Sup. Ct. R. 7.2 (1955). (Emphasis added.)

[104]R. 2.1f (4).

[105]Other special provisions covering the district courts of appeal will be found in FLA. STAT. c. 35 (1957).

[106]R. 2.2a (4); see FLA. CONST. art. V, §5 (5).

[107]R. 2.2a (1).

[108]*Ibid.*

[109]R. 2.2a (2).

[110]*Ibid.*

[111]R. 2.2b,c.

state.[112] Terms of court are the same as those of the Supreme Court, as previously noted.[113]

Motion Days and Oral Argument Days. The first and third Tuesday of each month is motion day in the first and second districts;[114] in the third district, motion day is held every Monday.[115] Oral arguments on the merits, in appeals from final orders, judgments, or decrees, are heard Wednesday through Friday in the first and second districts and Tuesday through Friday in the third district.[116] All other matters are heard on motion day.[117]

Jurisdiction

Amended article V, section 5 (c), contains one clear and specific grant of jurisdiction to the district courts: to review by appeal "final orders or decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents . . . ."[118] In addition, the district courts are vested generally with all appellate jurisdiction not reserved to the Supreme Court or to the circuit courts.[119] Thus the major part of the jurisdiction of the district courts of appeal might be described as residuary, definable only by reference to specific grants to other courts.

The jurisdiction of the Supreme Court has been discussed previously,[120] and brief reference has been made to the appellate jurisdiction of the circuit courts.[121] It was noted that direct access to the Supreme Court is concerned primarily with the kind of substantive *matter* reviewable,[122] while interest in appeals to the circuit courts

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[112]R. 2.2c.

[113]See note 101 *supra.*

[114]R. 2.2e (2).

[115]*Ibid.*

[116]R. 2.2e (3).

[117]R.2.2e (2).

[118]This grant may be and probably is subject to exception in the event that constitutional or other matters directly appealable to the Supreme Court under art. V, §4 (2), are raised.

[119]"Appeals from trial courts in each appellate district . . . may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court." FLA. CONST. art. V, §5 (3).

[120]See THE SUPREME COURT, *Jurisdiction, supra.*

[121]See note 59 *supra.*

[122]Roughly, direct appeals lie to the Supreme Court in capital cases, bond

lies mainly in the type of *court* from which appeal is to be taken.[123] Always excepting matters directly appealable to the Supreme Court,[124] the residuary jurisdiction of the district courts authorizes them to review, by appeal, all final judgments or decrees of circuit courts, civil courts of record, and juvenile courts,[125] as well as felony cases from criminal courts of record.[126] It will readily be observed that the "residuary" jurisdiction of the district courts of appeal will ultimately make those courts responsible for processing the vast bulk of significant appellate business throughout the state. The size of their case load will be governed only to a small extent by the interpretation that the Supreme Court places upon its jurisdiction to entertain direct appeals; this, by and large, will affect only constitutional matters,[127] which are a comparative rarity.

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validation suits, and constitutional matters, plus interlocutory orders in constitutional chancery cases.

[123]The circuit courts have final appellate jurisdiction in all cases arising in county courts or before county judges' courts (except probate and guardianship matters), in municipal courts, small claims courts, and courts of justices of the peace. In addition, they have final appellate jurisdiction of misdemeanors tried in criminal courts of record. See note 59 *supra.*

[124]See note 122 *supra.*

[125]This is based on the assumption that a juvenile court is a "trial court" within the meaning of FLA. CONST. art. V, §5 (3). See note 119 *supra* and the discussion of the term *trial court* in note 58 *supra.* If a juvenile court is a "trial court" and capable of entering a final judgment or decree, it would appear that appeal could be taken directly to the district court, because the juvenile court is not specified as one whose judgments are appealable to the circuit court. See note 123 *supra.*

[126]The sum of this jurisdiction is arrived at by subtracting notes 122 and 123 *supra* from all appealable matters and all courts from which they may be appealed. A complete list of the state and county courts of Florida will be found in the Attorney General's Edition of Florida Statutes 1957, and in that list some courts that might be described as "special" or "miscellaneous" will be found. It is beyond the scope of this article to take up each one of them and attempt to determine where its judgment should be appealed. It is sufficient to observe that if the court does not fit any class specified in note 123 *supra,* it is inferable that its judgment is appealable to the district court of appeal. The effect of legislative provisions seeking to enlarge the appellate jurisdiction of the circuit courts is presently in doubt, for, while former FLA. CONST. art. V, §11, gave the circuit courts final appellate jurisdiction of specified matters "and of such other matters as the Legislature may provide," the quoted language has been omitted from present art. V, §6 (3).

[127]See THE SUPREME COURT, *Direct Appeals from Trial Courts, supra.* Direct appeals to the Supreme Court in matters other than constitutional, *i.e.,* from death sentences and bond validations, are so clearly authorized that they cannot

Interlocutory Appeals. Amended article V leaves to the Supreme Court the matter of providing for review of interlocutory orders by the district courts.[128] The Supreme Court has stated, in Rule 4.2a, that "appeals from interlocutory orders or decrees in equity, orders or decrees entered after final decree, and orders at common law relating to venue or jurisdiction over the person, may be prosecuted in accordance with this rule . . . ."[129] The orders so specified may therefore be brought before the district courts of appeal.[130]

Review of Administrative Action. Revised article V states that the "district courts of appeal shall have such powers of direct review of administrative action as may be provided by law."[131] Thus far only very limited provision has been made under this authority, pertaining mainly to the Florida Industrial Commission.[132]

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be considered as subject to interpretation.

[128]FLA. CONST. art. V, §5 (3), states in part that "the supreme court . . . may provide for review by such [district] courts of interlocutory orders or decrees in matters reviewable by the district courts of appeal."

[129]Note that jurisdiction in the Supreme Court to review interlocutory orders is limited by the Constitution to "Chancery matters," while the district courts of appeal are subject to no such constitutional limitation. It would appear, then, that the "orders at common law" specified in the text, if considered interlocutory, would not be appealable to the Supreme Court before final judgment even if the case involved a matter that would make it directly appealable to that court.

[130]There is no doubt but that the stated interlocutory orders are brought to the district courts by appeal and not by certiorari, because the Constitution does not use the word *certiorari* in this context in connection with the district courts as it does in speaking of the Supreme Court. See THE SUPREME COURT, *Direct Review of Interlocutory Orders, supra.* Moreover, R. 3.1 provides that "except where petitions for certiorari are permitted by law or by these rules, all appellate review shall be by appeal." This can be a life or death matter, for in Jones v. Johnson, 98 So.2d 506 (2d D.C.A. Fla. 1957), the district court of appeal denied a petition for certiorari seeking to review an interlocutory order, on the ground that petitioner should have appealed.

[131]FLA. CONST. art. V, §5 (3).

[132]"Until otherwise provided by the legislature, orders of the Florida Industrial Commission shall be subject to review only by petition to the District Courts of Appeal for writ of certiorari." FLA. CONST. art. V., §26 (10).

Orders of the full Industrial Commission are subject to review only by certiorari in the district court of appeal "in the appellate district in which the issues involved were determined by a deputy commissioner . . . ." FLA. STAT. §440.27 (1) (1957). Orders of the board of review of the Florida Industrial Commission regarding unemployment compensation claims are subject to review "only by petition for writ of certiorari to the District Court of Appeal in the Appellate District in which the issues involved were decided by an Appeals Referee . . . ." *Id.* §443.07-

Extraordinary Writs

The district courts are given plenary authority to issue extraordinary writs.[133] The writ of habeas corpus may be issued by the district courts or any of their judges, returnable before the issuing court, an individual judge of that court, or the circuit court.[134]

c. Attorneys, Rule 2.3

The rules pertaining to attorneys[135] contain no significant changes from the previous rules of the Supreme Court upon the subject,[136] except for minor alterations in wording that make it clear that the new rules apply to attorneys before all appellate courts and are not restricted to the Supreme Court.

PART III. PROCEEDINGS GENERALLY

The rules in Part III apply to the proceedings covered by Part IV, "Special and Extraordinary Proceedings," and Part VI, "Criminal Appeals," except that the specific provisions of these parts control when they are in conflict with the general provisions of Part III.

Nature of Proceedings, Rule 3.1.

All appellate review is by appeal except when petitions for certiorari are permitted by law or by the rules.[137] The substance of Rule 3.1 was contained in Rule 12.1 of the Supreme Court Rules, which abolished writ of error and provided that all relief previously ob-

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(4) (e).

Water resources department decisions, if based upon adversary proceedings, may be reviewed by the district court of appeal. *Id.* §373.161.

Further on review of administrative orders, see the discussion of R. 4.1 *infra* p. 41. See also Codomo v. Shaw, 99 So.2d 847 (Fla. 1958); note 89 *supra* and text pertaining thereto.

[133]FLA. CONST. art. V, §5 (3).

[134]*Ibid.*

[135]R. 2.3a, d (3).

[136]Sup. Ct. R. 8-11.3 (1955); see Truett, *The New Florida Appellate Rules of Practice,* 8 U. FLA. L. REV. 93 (1955); Warren, *Appellate Procedures — in Florida — Adjusted to the New 1955 Supreme Court Rules,* 9 MIAMI L.Q. 375 (1955), reproduced at 31 FLA. STAT. ANN. 435 (1956).

[137]R. 3.1.

tained in this manner could be obtained by appeal as in equity.

Rule 4.1 requires that rulings of any commission or board be reviewed by certiorari.[138] Constitutional certiorari can still be used in exceptional circumstances to review interlocutory orders at law. This is the case if it clearly appears that the lower court acted without jurisdiction, or if the order does not conform to the essential requirements of law and it may cause material injury throughout subsequent proceedings for which the remedy by appeal will be inadequate. In *Brooks v. Owens*,[139] which originated under former article V, the Supreme Court reviewed by certiorari a trial court order that struck the defendant's answer and adjudged him in default because of his refusal to comply with a court order requiring him to disclose the limits of his liability insurance.

Supreme Court Rule 28 provided, in substance, that the taking of an appeal, when the proceedings should have been by certiorari, should not be ground for dismissal, but that the notice of appeal and the record thereon should be regarded as a petition for certiorari or a petition in the nature of certiorari.[140] This rule has been dropped from the Florida Appellate Rules. Therefore, if an appeal is taken from an interlocutory order or decision at law that is not reviewable by appeal, the appeal will be dismissed even though the order or decision may be one that is reviewable by constitutional certiorari under Rule 4.5c. Many members of the bar wanted to retain Supreme Court Rule 28 in the new rules. However, the view that the restoration of the rule would result in more harm than good has prevailed.

Commencement of Proceedings, Rule 3.2

The method and place for commencing the proceeding depends on the nature of the proceeding involved. Appeals are commenced by filing the notice of appeal and depositing the filing fee of $25.00 with the clerk of the lower court. Petitions for writ of certiorari and original, special, and extraordinary proceedings are commenced by filing the petition or initial pleading with the clerk of the appellate court and paying him the $25.00 filing fee.

Contents of Notice. The requirements as to the form and content

[138]See discussion under PART IV, *Review of Administrative Boards and Agencies, infra.*

[139]97 So.2d 693 (Fla. 1957).

[140]See Cortina v. Cortina, 98 So.2d 334 (Fla. 1957), for an application of R. 3.1.

of the notice of appeal are substantially unchanged, except that the notice must now include the title of the court to which the appeal is taken as well as the title of the court from which it is taken. If the appeal is interlocutory in nature the notice must state this fact.

A notice of appeal will not bring up for review judgments, orders, or decrees not specified therein. In *Klemenko v. Klemenko*[141] the Supreme Court held that an appeal from denial of a rehearing does not bring up the final decree for review on its merits; hence the Court will dismiss the appeal on its own motion.

Effect of Filing Notice. Both the filing of the notice of appeal and the payment of the $25.00 filing fee to the clerk of the court are jurisdictional requirements, which must be met prior to expiration of the time within which an appeal may be taken. Under Supreme Court Rule 12.3, which forms the basis for Rule 3.2a of the appellate rules, the payment of a filing fee was not a jurisdictional requirement and the filing fee was not paid until the docketing of the appeal. Under the new rule the filing fee is paid to the clerk of the lower court; but most lower court clerks, in order to reduce bookkeeping, prefer that the check or money order be made payable to the clerk of the appellate court. This is expressly permitted by Rule 3.2a.

Supreme Court Rule 12.3 did not require that a copy of the notice of appeal be filed in the appellate court. Thus the Supreme Court did not have records of all appeals from their inception. Appellate Rule 3.2a requires that a certified copy of the notice of appeal be transmitted by the clerk of the lower court to the clerk of the appellate court within five days of the original filing of the notice in the lower court. This transmittal of notice to the appellate court is not a jurisdictional requirement as are the original filing of the notice and payment of the filing fee.

The clerks of the Supreme Court and of the district courts of appeal are required, by Rule 2.1b (5) and Rule 2.2b (5) respectively, to docket the cases and number them in the order in which the notices of appeal or other originating pleadings are filed in the appellate court.

Time. In some of the preliminary drafts of the appellate rules the time period for taking appeals was reduced to thirty days. On final adoption, however, the time was restored to sixty days from ren-

[141] 97 So.2d 11 (Fla. 1957).

dition of the final order, decision, judgment, or decree. The rule is similar to Supreme Court Rule 12.2, except for minor changes. The sixty-day period is inapplicable if another period of time is provided by a statute that has not been superseded by the rules, or by some other rule. Thus, the sixty-day period does not apply to criminal appeals, because other times are provided by Rules 6.2 and 6.3; and appeals in bond validation proceedings are limited by Rule 4.3 to twenty days after rendition of the decree. It was originally proposed that the time for taking an interlocutory appeal be restricted to twenty days, but this was changed to sixty days on final adoption of the rules.

The time for commencement of appeals is calculated from the date of the "rendition" of the final decision, order, judgment, or decree. After the date of rendition is determined under the definition in Rule 1.3, the time is to be computed in accordance with Rule 3.18, which governs the computation of time.

Part III of the rules is not concerned with the types of decisions, orders, judgments, or decrees that may be reviewed by appeal. Rule 3.2, however, has been construed as authorizing appeals under Part III from "final" decisions, orders, judgments, or decrees only. Appeals can be had from interlocutory orders or decrees only in accordance with Rule 4.2, which limits interlocutory appeals to orders or decrees in equity, orders or decrees entered after final decrees, and orders at common law relating to venue or jurisdiction over the person. Hence, it has been held in a number of recent cases that there can be no appeals from interlocutory orders or decisions in law cases that do not fall within the scope of Rule 4.2a. If such decisions are reviewable at all it is only by constitutional certiorari under Rule 4.5c, unless an interlocutory appeal is deemed authorized by a statute that has not been superseded by the rules.

The requirement that a judgment must be final before it is appealable under Part III has been construed to prevent an appeal from an order granting a motion for summary judgment,[142] from an order granting a directed verdict,[143] and from a voluntary nonsuit taken by plaintiff after the trial court had granted defendant's motion for summary judgment.[144]

Section 59.04 of Florida Statutes 1957 permits appeals from an

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[142]Renard v. Kirkeby Hotels, Inc., 99 So.2d 719 (3d D.C.A. Fla. 1958).
[143]Schutzer v. Miami, 99 So.2d 729 (3d D.C.A. Fla. 1958).
[144]Ramsey v. Aronson, 99 So.2d 643 (Fla. 1957).

order granting a new trial, and section 59.05 permits appeals from orders of nonsuit even though such orders are interlocutory in character. Since there is no rule that specifically outlines the types of decisions reviewable and there is no rule stating that orders of this type shall not be reviewable by appeal, these two sections apparently should be regarded as rules of court under Rule 1.4.[145]

Costs. Supreme Court Rule 29 and section 59.09 of Florida Statutes 1957 have been retained, without change, in Appellate Rule 3.2f. This rule requires that the original plaintiff pay all costs "that have accrued in or about the suit, and have been specifically taxed against him, up to the time the appeal is taken." In *Spector v. Ahrenholz*[146] the district court of appeal dismissed the plaintiff's appeal because of his failure to pay these costs, even though he had not received a copy of the cost judgment and had no actual knowledge of its entry. The court held that the plaintiff was charged with knowledge of the judgment, since it was entered, filed, and recorded.

In *Funke v. Federal Trust Company*[147] it was held that an appellee waived his right to insist upon dismissal of the appeal for nonpayment of costs by a plaintiff-appellant when the motion to dismiss was not filed until a number of months after the notice of appeal was filed, and after a number of stipulations had been entered into for extension of the time for filing both the appellant's and appellee's brief.

Basis of Hearings and Determination, Rule 3.3

Rule 3.3 is substantially the same as Supreme Court Rule 31. It provides that "appeals will be heard and determined on assignments of error, appendices and briefs . . . ; but the record-on-appeal will be referred to when necessary to settle material conflicts between the parties." The Supreme Court has held, however, that the appellate court does not have to resort to the record-on-appeal in order to decide a case when the appellant has failed to include sufficient matter in his appendix to enable the court to decide the case.[148] Rule 3.7j

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[145]In Ramsey v. Aronson, *supra* note 144, the district court of appeal assumed that §59.05 is still in effect.

[146]99 So.2d 714 (3d D.C.A. Fla. 1958).

[147]99 So.2d 636 (3d D.C.A. Fla. 1958).

[148]Bolick v. Sperry, 82 So.2d 374 (Fla. 1955). In Williams v. Grogan, 100 So.2d

now permits an appendix to be omitted if the record-on-appeal consists of a certified transcript or stipulated statement of seventy-five pages or less.

Filing and Service of Papers, Rule 3.4

Subparagraph "a" of Rule 3.4 is new; it has no counterpart in the Supreme Court Rules. This rule makes it clear that copies of papers need not be filed except when specifically required. Copies of briefs and appendices are required to be filed under Rule 3.7. Rule 3.4 notes a very significant difference between *filing* and *service*. "Service" is complete on mailing, but to be filed a paper must actually reach the clerk. Thus, merely mailing the notice of appeal on the last day allowed would not be timely.

Paragraph "b" of Rule 3.4 was taken from Supreme Court Rule 30 with a proviso — "but service by mail shall add 3 days to the time allowed to do any act required to be done within a certain time after service of a notice or paper" — added to make the appellate rules coincide with the Florida Rules of Civil Procedure in this respect.

Subparagraph b (5) is new. It requires copies of all papers, including the notice of appeal, to be served on the adverse party or his attorney at or prior to the time of filing. Under the Supreme Court Rules service of a copy of the notice of appeal was not required, although this was done as a matter of general practice.

Assignments of Error, Rule 3.5

Rule 3.5a is the same as Supreme Court Rule 34.1; it requires that the appellant file his assignments of error with the clerk of the lower court within ten days after the notice of appeal is filed. Filing within this period is not a jurisdictional requirement, but if filed late the appeal may be dismissed.[149]

Under this rule, as under the Supreme Court Rules, the appellate court, except for fundamental errors[150] that were raised in the lower

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407 (Fla. 1958), Justice Thornal stated that an appellant's brief without an appendix is subject to timely motion to strike.

[149]Quality Furniture House, Inc. v. General Bond and Discount Co., 97 So.2d 203 (3d D.C.A. Fla. 1957).

[150]*E.g.*, rendition of an adverse affirmative judgment against a party against whom no affirmative relief was claimed or proved has been held to be fundamental error. DeFonce Constr. Co. v. Ewing, 99 So.2d 718 (3d D.C.A. Fla. 1958).

court,[151] will review only those questions that are presented by properly assigned errors.[152] An assignment of error must relate to some judicial act of the trial court.[153] In the case of a verdict not supported by the evidence or excessive in amount, the assignment of error will have to be from the denial of a directed verdict[154] or a new trial.[155]

Rule 3.5b makes a very substantial change from Supreme Court Rule 34.2 by making cross-assignments of error compulsory. The old rule provided that "failure of an appellee to file cross assignments of error, shall not prevent him from appealing from an adverse ruling." The new rule reads as follows:[156]

> "Within 10 days after the appellant has filed his assignments of error, the appellee *if he desires review on any adverse ruling must* file his cross assignments of error with the said clerk." (Emphasis added).

Rule 3.5c preserves Supreme Court Rule 32 intact. Under this rule the assignments of error must clearly and distinctly point out the errors relied on. They must be carried forward and argued in the brief of the party making the assignment or they will be waived.[157]

Rule 3.5d is new; it has no exact counterpart in the old rules. This rule provides that "the time for filing assignments and cross assignments of error may be extended by the appellate court or the lower court." It will be noted that Rule 3.5d does not specifically require that an extension of time be based on good cause. A district court of appeal has held that the time limit for filing assignments of

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[151]Clark v. Osceola Clay and Top Soil Co., 99 So.2d 869 (Fla. 1957).

[152]Red Top Cab and Baggage Co. v. Grady, 99 So.2d 871 (3d D.C.A. Fla. 1958).

[153]*Ibid.*

[154]Southwestern Lumber Co. v. Roberts, 99 So.2d 875 (1st D.C.A. Fla. 1958); Lee County Lumber Co. v. Marshall, 98 So.2d 510 (1st D.C.A. Fla. 1957); 6551 Collins Ave. Corp. v. Millen, 97 So.2d 490 (3d D.C.A. Fla. 1957). In these cases the district courts held that failure to move for a directed verdict at the close of the evidence would preclude appellate review of sufficiency of evidence to support the verdict. These cases are overruled by the Florida Supreme Court in Ruth v. Sorenson, ... So.2d ..... (Fla. 1958).

[155]Red Top Cab and Baggage Co. v. Grady, 99 So.2d 871 (3d D.C.A. Fla. 1958).

[156]R. 3.5b.

[157]Ramsey v. Aronson, 99 So.2d 623 (3d D.C.A. Fla. 1957). Good practice as well as the appellate rules direct that an appellant shall state in his brief the points relied on for reversal, and that the specific assignments of error from which the points argued arise should be stated. DeFonce Constr. Co. v. Ewing, 99 So.2d 718 (3d D.C.A. Fla. 1958).

error should not be extended except "on timely application supported by a sufficient reason for delay, or, after the time has expired, upon a showing of good cause for default."[158]

Record-on-Appeal, Rule 3.6

The major content of Rule 3.6 was derived from Supreme Court Rule 33, "Form of Record-on-Appeal," and Supreme Court Rule 34, "Preparation of Record-on-Appeal."

Content. Subparagraph "a" provides, as heretofore, that the record-on-appeal "shall consist either of an original record or a transcript of record, or a stipulated statement . . . ." The last sentence has been added to permit an appellant to use a transcript instead of the original record, without a court order or stipulation, if he is willing to bear the expense of the transcript. The use of a transcript seems to be preferred by many attorneys. This was particularly true when the entirety of the original record had to be prepared and transmitted to the appellate court regardless of the materiality of many parts of the record. This objection has now been eliminated to a great extent by Rule 3.6b, which permits the parties to designate the portions of the original record that they wish to have transmitted.

Responsibility for Preparation and Transmittal. Subparagraph "b" of Rule 3.6 is new, although the portion that places the responsibility on the appellant to see that the duties of the clerk and the reporter are complied with is somewhat similar to the provision of Supreme Court Rule 33.2. The latter provided that the responsibility for conformance with that rule should rest upon the appellant. Under subparagraph "b" the primary responsibility for preparing and transmitting the record-on-appeal rests on the clerk of the lower court and the court reporter, while the appellant has supervisory responsibility. To discharge his supervisory responsibilities the appellant is given a

[158]Quality Furniture House, Inc. v. General Bond and Discount Co., 97 So.2d 203, 205 (3d D.C.A. Fla. 1957). The court held that a motion for additional time for filing assignments of error did not show good cause when it alleged, "For grounds hereof, appellant shows unto the court, that due to economic circumstances, it was unable to provide the fees requested by counsel, or to procure other counsel to represent appellant in the perfection and completion of this pending appeal, and that its undersigned counsel was unwilling to proceed therein until financial arrangements had been completed to his satisfaction." *Id.* at 204.

remedy that he did not have previously, to enforce the duties of the clerk and reporter by motion.

Subparagraph "c" permits the appellant to prepare the record-on-appeal if he sees fit to do so. Supreme Court Rule 34.3 (d) permitted the appellant to prepare a transcript, but there was no corresponding provision permitting the appellant to prepare the original record when it was to be the record-on-appeal. Even though subparagraph "c" permits the appellant to prepare the record, and thus perform this duty for the clerk, transmittal of the record is to be handled by the clerk of the lower court in all instances.

The content of the record-on-appeal, whether it be the original record or a transcript, is determined by the directions given to the clerk of the lower court and by the designations to the court reporter when portions of stenographically reported proceedings are to be included. Under Supreme Court Rule 34.3 (a), directions to the clerk were employed only when a transcript was used in lieu of the original record.

Rule 3.6d (2) places an affirmative burden on both parties to file and serve designations of the portions of the stenographically reported proceedings to be included in the record-on-appeal. If a party does not deem any portion of such proceedings to be necessary to the record-on-appeal, an affirmative statement to this effect must be filed, and served on the adverse party. The original of the designations to the reporter is to be filed with the clerk of the lower court and copies served on the reporter and the adverse party or his attorney. Supreme Court Rule 33.3 (a) did not specifically designate the place for filing the designations to the reporter.

Rule 3.6e requires the reporter to "furnish to appellant at his expense such copies [of the transcribed notes] as he shall order." This provision is necessary because Rule 3.6i (3) requires the appellant to serve copies of the reporter's transcribed notes on the adverse party in certain situations.

The original record, or a transcript of the record, is prepared and transmitted in much the same manner that it was under the Supreme Court Rules. There are, however, several important differences to be noted. The entire original record no longer need be included when the directions to the clerk specify less than the entire record. The appellant should have the clerk prepare not only the original index but the copies required by Rule 3.6i (4) to be served on all parties.

Supreme Court Rule 33.4 provided that when the original record was being used, the original papers, including the transcript of testi-

mony, should be fastened together in one or more volumes, containing not more than 200 pages per volume, with the pages numbered consecutively. This precluded the reporter's transcribed notes from being bound separately and given a separately numbered sequence. The same rule has been carried forward into Rule 3.6f(2), but this must be regarded as qualified by Rule 3.6e, which provides that the "transcript of the testimony may be bound and paged separately in volumes not to exceed two hundred pages each."

Rule 3.6i clarifies a number of matters. Subparagraph (1) makes it clear that when the record-on-appeal has been prepared by the appellant, it must not be held in the hands of the appellant until time for transmittal to the clerk of the appellate court but must be properly filed with the clerk of the lower court.

Supreme Court Rule 33.3(c) required the appellant to furnish appellee a copy of the reporter's transcribed notes, with the pages numbered to coincide with the numbering in the record-on-appeal. This rule created difficulties because the record-on-appeal did not have to be completed at the time the reporter's notes were to be served. Hence it was often impossible to number the reporter's transcribed notes to coincide with the numbering in the record-on-appeal. The language of the Supreme Court rule was broad enough to require service of a copy of the reporter's transcribed notes, even when a party already had a copy in his hands, because they had previously been transcribed in the course of the trial proceedings. Rule 3.6i(3) now makes it unnecessary for the reporter's transcribed notes to be numbered to coincide with the numbering of the record-on-appeal. It also eliminates the necessity for serving a copy of the reporter's transcribed notes when they are being included in a transcript of the record, or when a copy of the transcript is already possessed by the appellee.

Supreme Court Rule 34.4(b) required a transcript of the record to be filed in the appellate court within fifty days from the date the appeal was taken. Rule 33.2 required the record-on-appeal, when the original record was involved, to be transmitted by the clerk of the lower court to the clerk of the Supreme Court within ninety days after the notice of appeal had been filed. Rule 3.6i requires the record-on-appeal to be filed with the clerk of the lower court and transmitted by him to the clerk of the appellate court without regard to whether it is the original record or a transcript.

Rule 3.6j sets forth the time schedule applicable to the acts required to be done with respect to the record-on-appeal. It should

be noted that this time schedule relates solely to the record-on-appeal. The times for filing notices of appeal, assignments of error, and briefs are prescribed by Rules 3.2b, 3.5, and 3.7 respectively.

The Supreme Court Rules had no time limit within which the original record-on-appeal had to be prepared, other than the ninety-day time limit for transmittal. As noted previously, the transcript had to be completed and filed in the lower court within fifty days of the filing of the notice of appeal. The new rule requires the record-on-appeal, whether it be the original record or a transcript, to be completed and filed with the clerk of the lower court within fifty days after the filing of the notice of appeal; and when a transcript is used the appellant is given another ten days within which to serve a copy of the transcript upon the appellee. The record-on-appeal, whether the original record or the transcript, is now held in the office of the clerk of the lower court from the time it is filed until 110 days after the filing of the notice of appeal. This change in time schedule is designed to keep the record-on-appeal in the trial court for a period of sixty days after it has been prepared, and until all briefs have been prepared and filed.

Under Rule 3.7 the appellant's brief is due forty days before the record-on-appeal is required to be filed in the appellate court. This would normally mean that the appellant's brief is due seventy days after the notice of appeal is filed. The appellee is given twenty days after being served with a copy of the appellant's brief within which to file and serve his brief. This means that if the full time schedule is taken by all parties, the appellee's brief will be filed and served ninety days after the notice of appeal is filed. The appellant has twenty days after being served with the appellee's brief within which to file and serve his reply brief, and this could be as late as 110 days after the filing of the notice of appeal. Under the schedule of the original Supreme Court Rules, it was possible for the original record to have been transmitted to the Supreme Court before the appellant's reply brief was due.

Rule 3.6j (2) is new; it permits either the lower court or the trial court to reduce or enlarge the time schedules. Any order entered by the lower court is subject to review by the appellate court on motion after notice. It is to be noted that when an extension of time is obtained for the doing of an act it automatically extends the time for the doing of other acts that bear a time relation to it. Thus an extension for the completion and filing of the record-on-appeal will extend the time for transmitting it by a corresponding number of

days, and the time for filing the appellate brief will likewise be extended without a specific order. This was designed to obviate the difficulties that often arose when one time was extended without securing the extension of another time related to or dependent upon it.

Briefs, Rule 3.7

Appellate Rule 3.7 preserves the basic practice that existed under Supreme Court Rule 36. There have been some changes of the times for filing and service of briefs, and an extension of time for filing may now be secured in either the lower court or the appellate court. Under Supreme Court Rule 36.4, extensions of time on briefs could be secured only in the appellate court. A proviso has now been added which makes it clear that an appellant need not file and serve a reply brief if he does not care to do so.

Briefs may now be duplicated in a clear, readable manner, such as mimeographing, as well as being printed and typewritten. Formerly the length of briefs was restricted to twenty-five printed or fifty typewritten pages. The length has now been extended to fifty pages, exclusive of appendices, whether printed or typewritten.

There have been several changes with reference to appendices. An appendix in excess of fifty pages in length is now required to be bound separately. An appendix may be omitted completely if the record-on-appeal consists of a certified transcript or a stipulated statement of seventy-five pages or less. If the transcript of the testimony is bound and paged separately, copying of the testimony in the appendix may be avoided by simply referring in the appendix to pages of the transcript that the party desires the court to read.

Power of Lower Court, Rule 3.8

Rule 3.8 is the same as Supreme Court Rule 34.7, except that a certified copy of any order entered by the lower court under this rule must now be filed with the clerk of the appellate court, by the moving party, within five days after entry of the order.

To a certain extent, Rule 3.8 overlaps Rule 3.5d, which permits the appellate court or the lower court to extend the time for filing assignments and cross-assignments of error; Rule 3.6j (2), which permits the appellate court or the lower court to extend the time for the doing of acts relating to the record-on-appeal; Rule 3.61, which deals with the correcting or completing of the record, and Rule 3.7d, concerning the extension of time for the filing of briefs.

Motions, Rule 3.9

Rule 3.9a provides:

> "If no other procedure or pleading is specifically provided, requests to the court for an order or ruling shall be by way of motion filed with the clerk of the court and served on the opposite party or his attorney."

Subparagraph "d" has been taken from Supreme Court Rule 37, subparagraph "c" from Rule 38 and subparagraphs "e" through "i" from Rule 39. As originally adopted, Rule 3.9 (b), (c) continued the motions to quash an appeal as frivolous, and to affirm, but with the proviso in subparagraph "f" that no argument be permitted on such motions unless requested by the court. At the time Rule 3.9 was adopted, there were many who wished to dispense with the motion to affirm.

The amendments adopted by the Supreme Court on March 19, 1958, to become effective July 1, 1958, contain a number of changes in Rule 3.9. The last sentence of subparagraph "b," which provided that a motion to quash may be combined with a motion to affirm, and subparagraph "c," permitting motions to affirm judgments, have been omitted from these amended rules.

Oral Arguments, Rule 3.10

Rule 3.10 on oral arguments has been taken from Supreme Court Rule 40, but changes have been made in the time allowed. The Supreme Court rule permitted not more than ten minutes to a side on motion day, even though the hearing was on an interlocutory appeal or petition for writ of certiorari rather than a motion. Subparagraph "b" of the new rule allows forty-five minutes to a side in the Supreme Court and thirty minutes in the district courts. This is the general time allowed, and no distinction is made between motion days and other days, except that on motion day arguments on motions will be limited to ten minutes to a side, unless the court enlarges the time for good cause shown by application filed at least five days prior to the hearing date. The intent and purpose of the rule was to permit forty-five minutes or thirty minutes to a side, even on motion days, when the matter to be argued is an interlocutory appeal, a petition for writ of certiorari, or an extraordinary proceeding under Part IV.

It is understood, however, that notwithstanding this change in the rule, some courts are restricting all arguments on motion days to ten minutes to a side unless an extension of time is specifically obtained.

Parties, Rule 3.11

Rule 3.11 continues in effect Supreme Court Rule 13, "Summons and Severance Abolished, Parties to Appeal"; Rule 41, "Attorneys and Guardians Ad Litem Below Deemed Such Here"; and Rule 42, "Death of Parties and Substitutions."

In subparagraph "b" on joinder in appeal, which was taken from Supreme Court Rule 13.2, a new sentence has been added to the effect that if the appeal is commenced more than fifty days after rendition of the judgment appealed from, the appellee shall be allowed ten days after being served with a copy of the notice of appeal within which to file his joinder in appeal and his assignments of error. This was felt to be a necessary safeguard, in view of the change in practice made by Rule 3.5b, which provides for compulsory cross-assignments of error by appellees.

Advancement of Causes, Rule 3.12

Rule 3.12 permits the court for good cause shown or on its own motion to advance any cause for final hearing. It replaces Supreme Court Rule 43, which specifically entitled certain types of proceedings to advancement.

In *Atlas Travel Service v. Morelly*[159] the District Court of Appeal for the First District had occasion to consider the advancement of a cause on an appeal that was perfected prior to July 1, 1957, and thus governed by the Supreme Court Rules rather than the Florida Appellate Rules. In holding that the case was not entitled to advancement under Supreme Court Rule 43, the court observed that although Florida Appellate Rule 3.12 afforded complete latitude to the court to advance causes for final hearing upon a showing of good cause, the rule would be strictly construed to the end that litigants should receive equal treatment, and that only those cases that have traditionally been entitled to preferential consideration would be taken out of order. The court said that mere possibilities or threat of in-

[159]97 So.2d 496 (1st D.C.A. Fla. 1957).

convenience or hardship would not justify the court in giving preference to any individual suit upon a crowded calendar.

Dismissal of Causes, Rule 3.13

Rule 3.13 is taken from Supreme Court Rule 44, but the procedure for effectuating a dismissal has been simplified by permitting a proceeding to be dismissed upon the filing of a stipulation for dismissal. The former rule required both parties to notify the court of the settlement, and the appellant, within ten days thereafter, to file praecipe for dismissal.

Subparagraph "b" changes Supreme Court Rule 44.2 by substituting a notice for dismissal for a praecipe for dismissal and striking out at the end the words *and paying the cost of the appeal.*

Rehearings, Rule 3.14

This rule is derived from Supreme Court Rule 45. The former provision that the petition for rehearing must be heard and passed upon by the same division that decided the case originally has been eliminated, since the appellate courts no longer sit in divisions. Subparagraph "f" permits a reply to a petition for rehearing. This is a departure from the previous practice, which permitted no pleadings in response to a petition for rehearing.

Mandate, Rule 3.15

Rule 3.15 is based on Supreme Court Rule 46. Subparagraph "c," on bond validations, is new, as is the last sentence of subparagraph "a." Rule 3.15a provides that "when a judgment of reversal is entered which requires the entry of a money judgment on a verdict the mandate shall be deemed to require such money judgment to be entered as of the date of the verdict."

Under the appellate rules as originally adopted, a decision of a district court of appeal was not subject to review by the Supreme Court on certiorari until the mandate issued.[160] This rule has been changed by the amendments adopted March 19, 1958, to become effective July 1, 1958.

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[160]See State v. Coogan, 99 So.2d 243 (3d D.C.A. Fla. 1957).

Taxation of Costs, Rule 3.16

Although Rule 3.16 is based to a great extent on Supreme Court Rule 47, it changes the provision that permitted the clerk of the Supreme Court to assess costs in the mandate. Subparagraph "b" now provides that all costs, including appellate costs, shall be taxed in the lower court, pursuant to law.

Subparagraph "e," on attorneys' fees for services in the appellate court, is new; it specifies the procedure for the allowance of attorneys' fees in the appellate court when such fees are allowable by law, as in divorce cases.

Computation of Time, Rule 3.18

This rule has no counterpart in the Supreme Court Rules; it is based upon Rule 1.6a of the 1954 Florida Rules of Civil Procedure. The appellate rule puts Saturdays in the same category as Sundays and legal holidays. The last sentence of the rule provides that if an act is required to be performed on a day certain and that day falls on a Saturday, a Sunday, or a legal holiday, the act shall be performed on the next day that is not Saturday, Sunday, or a legal holiday. This inclusion of Saturday is not found in the Rules of Civil Procedure.

PART IV. SPECIAL AND EXTRAORDINARY PROCEEDINGS

Review of Administrative Boards and Agencies, Rule 4.1

Rule 4.1 provides that certiorari is the exclusive method available for review of the "rulings of any commission or board."[161] In the extremely important case of *Codomo v. Shaw*[162] the Supreme Court held that this provision superseded section 475.35 of Florida Statutes 1955, which provided that rulings of the Florida Real Estate Commission might be appealed to the circuit court, and that certiorari is now the sole means of review of such a ruling. The Court also held

[161]An amendment effective July 1, 1958, makes it clear that R. 4.1 is also intended to apply to review of a ruling made by an individual administrative officer acting in a quasi-judicial capacity. See R. 1.3, as amended March 19, 1958. An example is an order of the Commissioner of Agriculture revoking the license of a dealer in agricultural products, after hearing, pursuant to FLA. STAT. §604.25 (1957).

[162]99 So.2d 849 (Fla. 1958).

that the certiorari jurisdiction of the circuit court to review such an order was not impaired by amended article V.[163] From the reasoning in this case it is inferable that all existing statutes that provide for appeal of an administrative ruling are superseded by Rule 4.1.

A special method is provided and required by Rule 4.1 for preparation of the record in proceedings to review compensation orders of the Florida Industrial Commission. It will be recalled that these proceedings must be taken in the district courts of appeal.[164]

Interlocutory Appeals, Rule 4.2

Rule 4.2 provides:

> "Appeals from interlocutory orders or decrees in equity, orders or decrees entered after final decree, and orders at common law relating to venue or jurisdiction over the person may be prosecuted in accordance with this rule . . . ."[165]

Because the rule is not limited to any one court, it must be intended to apply to all three of the appellate courts.[166] Although there seems to be little difficulty in applying this rule to practice in the district courts,[167] there is a serious constitutional impediment to application of the rule in the Supreme Court,[168] and complications arise in reference to the circuit courts.

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[163]*Id.* at 852. The Court stated: "We find no suggestion that the traditional jurisdiction of the circuit courts to issue writs of certiorari has been diminished or impaired by new Article V, Section 6 of the Constitution. The writ of certiorari is therefore available to obtain review in such a situation as this, where, as we have held, no other method of appeal is available. DeGroot v. Sheffield, Fla., 95 So.2d 912; Lorenzo v. Murphy, 159 Fla. 639, 32 So.2d 421. We conclude that the circuit court now has the same jurisdiction to review, by certiorari, an order of the Florida Real Estate Commission as it formerly had to review, by certiorari, an order of any inferior tribunal or agency in a judicial or quasi-judicial proceedings, where no statutory method of review was provided. See DeGroot v. Sheffield, supra, 95 So.2d 912."

Regarding the certiorari jurisdiction of the Supreme Court, see THE SUPREME COURT, *Review of District Courts of Appeal Decisions, supra.* For the certiorari jurisdiction of the district courts of appeal, see note 130 *supra.*

[164]See note 132 *supra.*

[165]See Jones v. Johnson, 98 So.2d 506 (2d D.C.A. Fla. 1957); notes 128-30 *supra.*

[166]See R. 1.1.

[167]See FLA. CONST. art. V, §5 (3).

[168]See FLA. CONST. art. V, §4 (2); THE SUPREME COURT, *Direct Review of Inter-*

Former Supreme Court Rule 14 provided for appeals from interlocutory orders or decrees *in equity*. Such an appeal was to be prosecuted "by proceedings in the nature of certiorari." Appellate Rule 4.2 makes two significant changes in the old practice: (1) in addition to equity interlocutory orders and decrees, orders at common law relating to venue or jurisdiction over the person are now reviewable; and (2) the form and mechanics of review for both equity and law proceedings are by appeal instead of by proceedings in the nature of certiorari. The addition of review of orders at common law relating to venue or jurisdiction over the person was made to apply the special method of interlocutory appeals to matters that formerly had been reviewed by writ of certiorari.[169]

Appellate Rule 4.2 contains several measures designed to speed and simplify the usual appeal procedure for the special purposes at hand. Notice of appeal and assignments of error must both be filed within sixty days from rendition of the interlocutory order or decree. Different times were proposed in other drafts but the Court finally decided to retain the sixty-day period of the former rule, which had become familiar to the bar. Only "certified copies of the appeal papers and the judgment or order appealed from" are allowed as the record, since the appendices are expected to supply the limited information necessary to a judicial determination of the questions involved. The maximum elapsed time for service of briefs is reduced to thirty days, and hearings are possible on five days' notice "on any Monday following the date for filing of the last brief."[170]

Bond Validation Proceedings, Rule 4.3

This is a new rule, which adapts the simplified procedure for interlocutory appeals to final bond validation proceedings.[171] The time for taking an appeal is limited to twenty days instead of the regular sixty days, but this is not a change from the former practice.[172] Rule 4.3 also requires that "a certified transcript of the proceedings shall

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locutory Orders, supra.

[169]See Enfinger v. Baxley, 96 So.2d 538 (Fla. 1957) (venue); Kauffman v. King, 89 So.2d 24 (Fla. 1956) (venue); Florio v. Colquitt Hardware Co., 160 Fla. 92, 33 So.2d 722 (1948) (jurisdiction over the person).

[170]Monday is motion day in the Supreme Court and in the third district court, but not in the second district court.

[171]*Cf.* FLA. STAT. §75.08 (1957).

[172]*Ibid.*

be filed with the appellant's brief and a copy served on opposing counsel." The time within which a petition for rehearing may be filed is reduced from fifteen to ten days. The provision that a petition for rehearing "shall receive immediate consideration of the court" seems to imply that no reply, as allowed by Rule 3.14f, will be permitted in these cases. Although the rule is not limited to the Supreme Court, it is clear that amended article V gives exclusive appellate jurisdiction in proceedings for the validation of bonds and certificates of indebtedness to that court.

Appeals in Probate and Guardianship Proceedings and Cases Involving Estates of Infants, Rule 4.4

This rule simply indicates that the general rules governing appeals apply to this special class of appeals. It replaces former Supreme Court Rule 18. Although not limited to a particular court, this rule can apply only to the district courts because of the jurisdictional provisions of amended article V.

Extraordinary Writs, Rule 4.5

Generally. Effective July 1, 1958, a substantial change is brought about by the addition of a new subparagraph to Rule 4.5a:[173] "(5) *Notice.* Unless otherwise ordered by the chief justice at least five days notice shall be given to the adverse party of intention to apply for the issuance of any writ mentioned herein."

This provision apparently conflicts with Rule 4.5g(1), which was changed by the original committee from requiring five days' notice to requiring only reasonable notice. This change seems to make extraordinary writ practice correspond to motion practice, although now in the Supreme Court, at least, such matters are to be heard at hours assigned by the clerk, rather than on motion days after five days' notice.[174] It is submitted that this will be of little use in most cases. It is also not clear why the chief justice is designated to relax the rule, which is otherwise designed to apply to district courts and circuit courts as well as the Supreme Court.

Mandamus. Rule 4.5b is substantially the same as former Supreme

[173]Supreme Court order of Mar. 19, 1958.
[174]R. 2.1f(2).

Court Rule 21. Rule 4.5b (1) is drafted to apply only to the Supreme Court, in compliance with article V, which limits Supreme Court jurisdiction in mandamus and quo warranto to cases in which "a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency, is named as respondent." Article V does not, however, limit in this manner the power of district and circuit courts to issue writs of mandamus and quo warranto.

Certiorari. Rule 4.5c makes several changes in former Supreme Court Rule 22. Rule 4.5c (1) provides that an "application for writ of certiorari shall be by petition filed in the Court within 60 days from the rendition of the decision, order, judgment or decree sought to be reviewed." In this sentence "rendition" replaces "date,"[175] and "decision" replaces "proceeding," to make it clear that the rule applies also to review of appellate courts. In the preliminary drafts the time within which a petitioner must file and serve his petition, brief, and transcript was limited to thirty or forty days, but the final draft retained the sixty-day time allowance of the old rules. However, the respondent is now given twenty days to file and serve his brief, as contrasted with the ten days allowed by the former Supreme Court rule. This time was extended because of reports from members of the bar that it was extremely difficult to prepare briefs adequately in this type of case within the ten-day period. The rule contains two new provisions: (1) "unless otherwise ordered by the Court," the petition is to be accompanied by a certified transcript of the record; (2) "unless otherwise ordered by the Court," copies of the petition, transcript, and brief are to be served on respondent "on or before the time the application is filed with the Clerk of the Court."

The rule requires "serving" rather than the former "furnishing" of the transcript, petition, and briefs. Another new provision allows the petitioner to file a reply brief.[176]

During the time the rules were being drafted a theory had some currency that the Supreme Court would adopt a policy of strict construction of the provisions of amended article V that establish review of district court decisions by certiorari to the Supreme Court.[177] At

[175]The Third District Court of Appeal apparently overlooked this change; see Inglehart v. Miami Beach, 97 So.2d 487 (3d D.C.A. Fla. 1957). See R. 1.3 for definition of "rendition."

[176]R. 4.5c (4).

[177]This approach is unofficial of course, and only events can tell what the

the preliminary stage of filing the original petition and respondent's reply, ordinarily there would be no oral argument.[178] If the Court decided to accept provisional jurisdiction it would issue the writ and "call for such further arguments and briefs as it may deem desirable and fix the time therefor."[179] The perviously quoted provisions allowing the Court to dispense with an initial filing of a transcript and service of the petition, brief, and transcript on respondent were calculated to establish flexibility for application to situations such as the above.

Effective July 1, 1958, the Supreme Court has amended Rule 4.5c (6) to read as follows:

> *"From District Court to Supreme Court.* Where any decision of a district court of appeal (1) affects a class of constitutional or state officer, or (2) passes upon a question certified by such district court to be of great public interest, or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision.
>
> "No such petition for certiorari will be considered or granted unless petitioner shall have filed petition for rehearing with the district court of appeal and prior to the denial of such petition shall have filed in the district court of appeal a notice of intention to petition the Supreme Court for writ of certiorari, which notice of intention shall operate to stay the mandate of the district court of appeal until expiration of time for filing petition for certiorari or if such petition for certiorari be filed, until such time as the same is disposed of by the Supreme Court. Failure to file a petition for certiorari after the filing of notice of intention hereunder or the filing of a frivolous petition for certiorari shall subject the petitioner to such penalties or damages as shall be fixed by the Supreme Court or district court of appeal.
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> "The petition for certiorari shall be filed in the Supreme Court within sixty (60) days from the denial of petition for re-

Supreme Court intends to do to facilitate review in these cases.

[178]See R. 4.5c (6); the Court could permit oral argument, if desirable in a particular case. A petitioner seeking oral argument should file his request with his petition, pursuant to R. 4.5a (4) and 3.10.

[179]R. 4.5c (6).

hearing by the district court of appeal and shall set forth briefly and clearly the grounds for invoking jurisdiction of the Supreme Court and the facts relied upon for issuance of the writ.

"Only so much of the record as shall be necessary to show jurisdiction in the Supreme Court and establish facts relied upon by the petitioner shall be attached to or filed with the petition.

"Copy of petition with certificate of filing the same in the Supreme Court shall be filed in the district court of appeal.

"In appropriate instances Form i in Rule 7.2 may be used.

"Copy of petition, supporting portions of the records and brief shall be served on respondent or his attorney on or before the time petition is filed with the Clerk of the Supreme Court. The respondent shall file his brief in opposition to the writ and serve a copy thereof upon the petitioner within twenty (20) days after he has been served with a copy of the petition, supporting portions of the record and brief of petitioner.

"The Supreme Court shall consider the petition, supporting portions of the record and briefs and if the Court shall not have jurisdiction or if the petition is without merit, shall deny the same. If the Court determines to entertain further proceedings, the Court will set the same for oral argument on a day certain and at said time may order the filing of such further record or briefs as it may deem desirable for proper disposition of the cause, or that, upon motion of either party, it may determine is essential therefor."

There has not been sufficient time to ponder the changes which have been brought about by the Supreme Court Order of March 19, 1958, so the remarks in connection with these changes are apt to be superficial. The following things appear as possibly undesirable characteristics of the amendment: (1) the amendment makes a jurisdictional statement; (2) a petition for rehearing is mandatory; (3) there is no requirement for service on opposing parties of the notice of intention to petition; (4) the petition is to be filed within sixty days from denial, but there is no provision for the possibility that a grant of petition for rehearing might correct errors and still leave ground for a petition for certiorari; (5) there is no provision for the form of brief, nor a requirement that brief accompany the petition when filed in the Supreme Court; (6) whether the record may be prepared in transcript form or heard on the original record is not

indicated; (7) the time for filing a copy of the petition in the district court is not indicated; (8) the provision of 4.5c(4) for a reply brief by petitioner is omitted; (9) the amendment appears to make oral argument mandatory; (10) if the Supreme Court chooses to deny certiorari without opinion the rule itself makes such denial undesirably ambiguous as to whether it was based on jurisdiction or on the merits.

Prohibition and Quo Warranto. The drafters of the appellate rules considered it desirable that the rules should be restricted as far as possible to "practice and procedure." Accordingly, when Rule 4.5d, pertaining to prohibition, was adapted from former Supreme Court Rule 23, reference to statutes dealing with substantive matters was deleted. The same motive prompted the only change from former Supreme Court Rule 24, from which Rule 4.5e, regarding quo warranto, was taken; again, references to statutes dealing with substantive matters have not been included in this rule.

Habeas Corpus. With only two significant changes, Rule 4.5f retains the provisions of former Supreme Court Rule 25. The traditions surrounding constitutional application of the writ of habeas corpus as a means of preventing illegal detention of the person moved the draftsmen to eliminate any reference to a formal application of the writ.[180] Thus the words *when application is made therefor* were deleted as a condition to the issuance of the writ. The new reference to "an order to show cause" indicates the court's discretionary power to obtain the restraining official's justification of the detention without requiring immediate production of the petitioner before the court.[181] Again, because of the traditional constitutional power of the court to issue the writ without delay if warranted by the situation, the appellate rule deleted the requirement of a mandatory notice to the attorney general of *application* for a writ of habeas corpus. But Rule 4.5f(2) requires that notice of the *issuance* of the writ shall be given the attorney general "if the validity of any statute, or criminal proceeding or conviction" is attacked.

Constitutional Writs. Entertainment of applications for constitutional writs, Rule 4.5g, is to be after "reasonable" notice to the

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[180]See Sneed v. Mayo, 66 So.2d 865 (Fla. 1953); *cf.* Anglin v. Mayo, 88 So.2d 918 (Fla. 1956).

[181]See *In re* Lewis, 114 Fed. 963 (N.D. Fla. 1902).

adverse party, rather than the inflexible five days' notice of former Supreme Court Rule 26. In the provision that "no such petition will be entertained unless an appeal has been commenced," the word *commenced* replaces *perfected* in order to utilize the definition in Appellate Rule 3.2. The rest of this appellate rule is substantially similar to former Supreme Court Rule 26.

Certified Questions, Rule 4.6

In addition to sharing equally the cost of the certificate, as was provided under Supreme Court Rule 27, the parties to a certified question must now share equally the cost of the filing fee. The only other significant change in the former Supreme Court rule is that briefs of all parties are required to be filed within fifteen days after the certificate is filed, as opposed to practice under Supreme Court Rule 27, which required opposite parties to file briefs "within fifteen and ten days, respectively."

Appellate Review by Circuit Courts, Rule 4.7

This is an entirely new rule, added after the bulk of the rules, including Part VI, had attained final form based on a two-court rather than a three-court appellate system. As pointed out in the discussion of Rule 1.1, Rule 4.7 is designed to apply the appellate rules to the circuit courts when they are exercising appellate jurisdiction.[182] The Florida Appellate Rules in their two-court stage applied to criminal, as well as civil, appellate jurisdiction; and no suggestion was made at the time Rule 4.7 was drafted or adopted that this pattern was to be changed with respect to the circuit courts. In view of this fact, and because of the broad inclusive language of the first sentence of Rule 4.7,[183] it is submitted that the failure of the criminal appeals Rule 6.1, on applicability, to include the circuit courts was an oversight. The

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[182]In regard to the circuit court's appellate procedure, see the following sections of FLA. STAT. (1957): (1) civil courts of record, §§33.11, 34.19; (2) county courts, §§34.18,.19; (3) justice of the peace courts, §37.08; (4) juvenile courts, §39.14, also §81.28, certiorari to the appellate court; (5) small claims courts, §42.18; (6) criminal jurisdiction: municipal courts, §932.52, justice of the peace courts, §§932.53-.56; (7) appeals from county court to circuit court: restoration to mental competency, §394.22 (b).

[183]"The Florida Appellate Rules shall govern procedure in the circuit courts in the exercise of their appellate jurisdiction."

Supreme Court has corrected this oversight in the changes to Rule 6.1, to become effective on July 1, 1958.[184]

In recognition of the limited and fairly uncomplicated scope of questions within the circuit court's appellate jurisdiction, Rule 4.7 provides for a reduced filing fee and allows the circuit courts to establish a set of procedural rules adapted to the exigencies of the particular case – provided that such rules are adopted at a proper preliminary hearing and are made to apply to the cause throughout the review.

PART V. SUPERSEDEAS ON APPEAL

Historically, the provisions on supersedeas that appear as Florida Appellate Rules 5.1 through 5.11 can be traced back to the Florida statutes, Rule 35 of the Supreme Court Rules of 1949, and Rule 19 of the Supreme Court Rules of 1955. The general purpose, scope, mechanics, and effect of supersedeas are fully discussed in a number of works on Florida appellate practice.[185]

It has been said that while the right to an appeal is conferred by the Constitution, the right to a supersedeas in connection with an appeal is conferred and regulated by statute.[186] Under revised article V of the Constitution and the Florida Appellate Rules, the approach is now different. The right to supersedeas is completely conferred and regulated by the rules. The only statutes of any current force are those that do not conflict with the rules and that remain in effect as rules of the Court under Rule 1.4. The statutory provisions on supersedeas are now to be found in sections 59.13 and 59.14 of Florida Statutes 1957. These statutes can now be given effect only in so far as they do not conflict with the provisions or purposes of the appellate rules.

Under Rule 5.1, the granting of a supersedeas or stay on interlocutory appeals in equity is discretionary with the lower court, subject to review by the appellate court. On the other hand, section 59.13 (1) provides that "every appeal shall operate as a stay or supersedeas under the following conditions." In so far as this provision might appear to grant supersedeas as a matter of right in instances in

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184See Part VI *infra*.

185*E.g.*, 1 FLORIDA LAW AND PRACTICE, *Appeals*, §§110-23 (1955); KOOMAN, FLORIDA CHANCERY PLEADING AND PRACTICE §172 (1939).

186KOOMAN, *op. cit. supra* note 185, at 407.

which the rule makes it discretionary, the statute must be regarded as of no further force.

Section 59.13 (9) of the 1957 statutes provides that nothing therein shall be construed as denying the appellate court jurisdiction to grant supersedeas in the same manner as the trial court. The rule contains no corresponding provision; it evidently contemplates that all supersedeas or stay orders shall in the first instance be entered in the lower court, subject to review by the appellate court, which may under Rule 5.10 review, modify, overrule, or discharge the order of the lower court.

Rule 35 (f) of the 1949 Supreme Court Rules provided that when a petition for certiorari had been applied for or was imminent, the lower court might grant a supersedeas upon the giving of bond, provided that the petition was presented to the Supreme Court within twenty days. The petitioner had to further agree to pay all costs, damages, and expenses occasioned by reason of the stay proceedings, together with such other conditions as might be fixed by the lower court in the event the order or judgment sought to be reviewed was not quashed, modified, or reversed. This provision was omitted from the 1955 Supreme Court Rules and has also been omitted from the Florida Appellate Rules. Section 59.13 (7) of the 1957 statutes, however, contains a provision for supersedeas on certiorari that is identical with Rule 35 (f) of the 1949 Supreme Court Rules. Supersedeas will often be desirable when certiorari is being sought under Rule 4.5c. Since the provisions of the statute on certiorari are consistent with the rule on interlocutory appeals, it might be well to consider this section of the statutes as still in force as a rule of court under Rule 1.4. Although this point has not yet been expressly passed upon by the appellate courts, it is understood that many of the circuit courts are granting supersedeas on certiorari, in accordance with the practice heretofore prevailing under the statute.

Under the new rules, as under the former rules and statutes, the application or motion to the lower court for supersedeas is an *ex parte* proceeding, on which no notice to the opposing party or his counsel is necessary. The practice of many lawyers, however, is to give notice of such applications or motions. It is felt that this is a desirable practice, since the presence and viewpoint of both parties will often enable the lower court to condition the order or fix the amount of the bond in such a way as to preclude the necessity for appellate review.

Rule 5.3b contains one important qualification with reference to

the *ex parte* nature of applications for supersedeas. In probate and guardianship proceedings and cases involving estates of infants, the terms, conditions, and amount of the bond are to be fixed by the lower court upon notice to the appellee.

The provisions of Rules 5.6 through 5.9 concerning bonds are the same as those found in Supreme Court Rules 19.6 through 19.9 and sections 59.13 (2) through 59.13 (5) of the Florida Statutes 1957.

Rule 19.4 of the 1955 Florida Supreme Court Rules contained a special provision on the supersedeas or stay of Industrial Commission orders, and this provision has been carried forward as Florida Appellate Rule 5.4. A corresponding provision is not to be found in chapter 59 of Florida Statutes 1957 or in the 1949 Supreme Court Rule 35.

Rule 5.10 contains provisions for appellate review of supersedeas orders. This rule is based upon Rule 19.10 of the 1955 Supreme Court Rules, with several changes. The Supreme Court rule provided for review by motion heard on any motion day, provided five days' notice of the hearing was first given to the adverse party. The new rule permits such motions to be disposed of on days other than motion days, and provides for "reasonable" notice of the hearing rather than five days' notice. Section 59.13 (6) of Florida Statutes 1957 appears to provide for appellate review only if the bond is arbitrary, unreasonable, or improper. The rule goes much further than the statute in that it permits not only review of the order fixing the condition and amount of the bond but also permits review of orders refusing to grant a supersedeas or stay.

Supreme Court Rule 19.12 provided that a supersedeas bond was not necessary on appeals by the state or any of its political subdivisions, or any officer, board, commission, or other public body of the state, or any of its political subdivisions in a purely official capacity. This provision has been eliminated from the Florida Appellate Rules because of a feeling that the matter is amply covered by statute,[187] which should be treated as still in effect as rules of court under the terms of Rule 1.4.

PART VI. CRIMINAL APPEALS

The rules governing criminal appeals to the Supreme Court and the district courts of appeal, which are found in Part VI of the Florida Appellate Rules,[188] were to a very considerable extent modeled

[187]FLA. STAT. §59.14 (1957).

[188]Amended R. 6.1, effective July 1, 1958, will incorporate apt words specifically

after provisions found in chapter 924 of Florida Statutes 1957 and the Rules of the Supreme Court of Florida.[189] However, a number of changes were made and some entirely new provisions were added.

It was apparent that certain provisions of other parts of the Florida Appellate Rules would from time to time be applicable to criminal appeals, as, for example, Rule 3.4, relating to the filing and service of papers, and Rule 3.9b, dealing with motions to quash appeals. Therefore, Rule 6.1 makes the provisions of the other parts applicable to criminal appeals to the Supreme Court and the district courts of appeal except when they are inconsistent with the provisions of Part VI.

Time for Taking an Appeal, Rules 6.2, 6.3

The time for the taking of an appeal by a defendant, covered by Rule 6.2, follows closely section 924.09, Florida Statutes 1957, except that the rule allows a defendant to take an appeal "from the judgment *or* sentence, *or both*" within ninety days after the sentence is entered, while the statute authorized a defendant to appeal "from *both* judgment and sentence" within ninety days after entry of sentence.

Rule 6.3 incorporates the provision of section 924.10, which allows the state thirty days after entry of the order or sentence appealed from in which to take an appeal. When a defendant takes an appeal from the judgment, this rule also permits the state, not later than ten days after the defendant files his assignments of error and serves a copy thereof, to take an appeal authorized by section 924.07 (4). This section permits the state to take an appeal from a ruling on a question of law adverse to it when the defendant is convicted and appeals from the judgment. Prior to the incorporation of this new provision in Rule 6.3, there was much uncertainty as to the time for the state to take an appeal under section 924.07 (4). The only provision as to the time for taking such an appeal was section 924.10, which allowed the state only thirty days after entry of the order or sentence appealed from. However, the state's right to take an appeal under section 924.07 (4) did not accrue until the defendant had taken an appeal from the judgment. Therefore, when the state took such

making Part VI applicable to criminal appeals to circuit courts, including appeals from municipal courts.

[189]Whenever reference is made herein to a rule or rules of the Supreme Court of Florida, it means the rule or rules of said Court superseded by the Florida Appellate Rules.

an appeal, it could not comply with the time requirement of section 924.10 if the defendant's appeal from the judgment was taken more than thirty days after the entry thereof. Under this new provision it is clear that the state has ten days after the defendant appeals from the judgment and files and serves his assignments of error in which to take an appeal in the nature of a cross-appeal, as permitted by section 924.07 (4). This, of course, makes it immaterial whether the defendant's appeal is taken before or after the expiration of thirty days from the entry of judgment.

Rule 6.3 contains a new provision which requires the board of county commissioners to pay a $25.00 filing fee to the clerk of the appellate court when the state takes an appeal in a criminal case by filing a notice of appeal.

Manner of Taking an Appeal, Rule 6.4

Rule 6.4 incorporates the provisions of section 924.11 (1), relating to the manner of taking an appeal, except that it omits that part of the statute making the service of a copy of the notice of appeal essential to the taking of an appeal and hence essential to the vesting of appellate jurisdiction in the appellate court. This rule adds, as an essential part of the taking of an appeal by a defendant, the requirement that he deposit a filing fee of $25.00 with the clerk of the lower court unless he has been adjudged insolvent prior to the time of filing his notice of appeal. In other words, a defendant who has not been adjudged insolvent can now take an appeal only by filing a proper notice of appeal *and* by depositing a filing fee of $25.00.

Rule 6.4 also contains a new provision requiring that, *within five days* after the filing of a notice of appeal, the clerk of the court in which it is filed shall send a certified copy thereof *and* the filing fee to *the appellate court.* The clerk is also required to send a certified copy of the notice of appeal to the attorney general, together with a statement of the offense charged or convicted of, within said five-day period. Section 924.12 provides that, upon the taking of an appeal in a felony case, the clerk shall *immediately* send certified copies of the notice of appeal to the *Supreme Court* and the attorney general, but does not require him to send a statement of the offense charged or convicted of.

Since Rule 6.3 requires the board of county commissioners to transmit the filing fee to the clerk of the appellate court when the state files a notice of appeal, the requirement of Rule 6.4 that the clerk of the lower court send the filing fee to the appellate court ap-

parently applies only when the defendant takes the appeal.

Rule 6.4 also introduces a new provision giving the state the option to take an appeal authorized by section 924.07 (4) by filing cross-assignments of error in lieu of filing a formal notice of appeal. A further new provision requires that when the state takes an appeal from a district court of appeal, the notice of appeal shall be signed by the attorney general.

Service of Notice of Appeal, Rules 6.5, 6.6

Rule 6.5 provides that a copy of the notice of appeal shall be served on the prosecuting attorney when an appeal is taken by the defendant from a trial court, and upon the attorney general when it is taken by the defendant from a district court of appeal. However, there is nothing in the rules to indicate that the service of such copy is essential to the taking of an appeal and the vesting of appellate jurisdiction in the appellate court. Although section 924.11 permitted an appeal to be taken only by filing the required notice of appeal *and* by serving a copy thereof, neither Rule 6.4, prescribing how an appeal may be taken, nor Rule 6.5, requiring service of a copy of the notice of appeal, makes service of a copy thereof an essential element of taking an appeal. Therefore, it may be assumed that an appeal by a defendant will confer jurisdiction on the appellate court even though he does not serve a copy of his notice of appeal, but that if such service is not made in accordance with Rule 6.5 the appellate court may, in its discretion, dismiss the appeal.

Rule 6.6a provides the method of service of a copy of a notice of appeal filed by the state except when the appeal is taken under the authorization of section 924.07 (4). However, it does not appear that either said rule or Rule 6.4 makes such service essential to the vesting of appellate jurisdiction in the court to which the appeal is taken. Rule 6.6a requires service on the defendant, if his place of residence is known, *and* on the attorney, if any, who appeared for him at the trial, with no provision for service by publication. On the other hand, section 924.13 required service on the attorney only if he resided or practiced in the county and only if the defendant's place of residence was unknown and he was not imprisoned in the county. Also, section 924.13 provided for service by publication in the event that service could not otherwise be made in accordance with the said statute. The rule governs over the statute.[190]

[190]See R. 1.4.

Rule 6.6b is new. It provides for service upon the defendant when the state appeals under section 924.07 (4) by filing either a notice of appeal or cross-assignments of error, and for the mode of such service.

Assignments of Error and Directions to Clerk, Rule 6.7

Rule 6.7a requires that within twenty days after filing of a notice of appeal, except one filed by the state under authority of section 924.07 (4), the appellant shall file his assignments of error and directions to the clerk and serve copies thereof. Section 924.11 (2) allowed only ten days after the filing of notice of appeal in which to file directions to the clerk, but it permitted the filing of assignments of error within ten days after the lodging of the appeal record in the appellate court. It was considered that the orderly conduct of an appeal requires that the assignments of error be filed before the record is made up and lodged in the appellate court, and that twenty days for filing assignments of error and directions to the clerk was all that could reasonably be allowed.

Rule 6.7b, providing for the filing of the appellee's directions to the clerk and for the service of a copy thereof, is in accord with the previous practice under Florida Supreme Court Rules 34.3 (b), 34.4 (a), and 35.1.

Rule 6.7c is new. It requires the filing of cross-assignments of error by the state and the service of a copy thereof when, after the defendant appeals from the judgment, the state takes an appeal under authority of section 924.07 (4) by filing a notice of appeal instead of merely filing cross-assignments of error as permitted by Rule 6.4.

Rule 6.7d is also new. It authorizes an appealing defendant to file additional directions to the clerk, serving a copy thereof, within five days after the filing of cross-assignments of error by the state for the purposes of an appeal taken by it under authority of section 924.07 (4).

In accordance with the pre-existing practice, Rule 6.7e permits the time for filing assignments of error and directions to the clerk to be extended by either the lower court or the appellate court. However, it forbids any extension of time for the state to take an appeal authorized by section 924.07 (4) by filing cross-assignments of error instead of by filing a notice of appeal.

Rule 6.7f, authorizing the parties to stipulate as to the contents of the appeal record and authorizing them to agree upon a condensed

statement in narrative form of all or part of the testimony, follows the second paragraph of section 924.11 (2).

Rule 6.7g, making formal exceptions to rulings, orders, or charges of the court unnecessary, follows section 924.11 (3).

Transcribing and Filing Reporter's Notes, Rule 6.8

Rule 6.8, relating to the transcribing and filing of the notes of the reporter upon the taking of an appeal, substantially follows sections 924.23 and 924.24, except that the rule provides for the filing of an original and two copies of the court reporter's transcript without regard to whether the appeal is taken by the defendant or by the state. The statutes required the filing of only the original of such transcript when the appeal was taken by the defendant and for the filing of the original and three copies when the appeal was taken by the state.

Preparation and Transmission of the Record, Rule 6.9

Preparation and transmission of the record to the appellate court when the defendant takes the appeal is the subject of Rule 6.9, which follows section 924.25 in large part. The important difference is that the statute required the clerk of the trial court to transmit the original record to the appellate court and to deliver one copy to the attorney general if the appeal was to the Supreme Court and the other copy to the appellant's attorney or to the appellant if he had no attorney, while the rule requires the clerk to deliver the record and two copies thereof to the attorney for the defendant, or to the defendant if he has no attorney, and requires the *defendant* to file the record in the appellate court and to serve a copy thereof upon the attorney general within forty days after the defendant takes his appeal.

Briefs, Rule 6.11

Rule 6.11, relating to the contents of briefs and the times for filing and serving copies of them, is modeled after Supreme Court Rules 35.2 (b), (c) and 36. However, Rule 6.11 allows the appellant twenty days after service of a copy of the appellee's brief in which to file a reply brief, whereas Supreme Court Rule 35.2 (c) allowed only ten days. Underlying this change was the belief that ten days is often an insufficient time for a busy lawyer to prepare and file a reply brief.

Bail, Rule 6.15

Rule 6.15, which deals with the allowance of bail pending appeal and for the review of orders granting or denying bail on appeal, is entirely new, although it follows the practice of the Supreme Court prior to its adoption. The requirement of this rule that the sufficiency of the application to the lower court for bail pending appeal be tested by applying the principles laid down in *Younghans v. State*[191] will undoubtedly be a guiding light to trial courts and counsel. The lower court is also directed, when denying bail pending appeal, to state in its order of denial the reasons therefor, so that the appellate court will be advised of the basis for the denial and will not have to cast about in the record to ascertain the reasons for denial.

Rehearing, Rule 6.17

Rule 6.17 provides that an application for rehearing shall be made in accordance with Rule 3.14 and substantially continues in effect the provisions of Supreme Court Rule 45. It appears that, by virtue of Rule 6.1, Rule 3.14f, which allows the adverse party to file and serve a reply to a petition for rehearing within five days after being served with a copy of such petition, is applicable to a petition for rehearing in a criminal case.

Rules Continuing Previous Practices, Rules 6.10, 6.12, 6.13, 6.14, 6.16

A number of the remaining rules are substantially in accord with former provisions in chapter 924, Florida Statutes 1957, or the Supreme Court Rules. New Rule 6.10, for example, regarding transmission of the record to the appellate court when an appeal is taken by the state, is in accord with section 924.26. Former Supreme Court Rule 40.1 is followed closely by Rule 6.12, relating to requests for oral argument. Rule 6.13 is modeled after section 924.29; it provides for the dismissal of appeals for failure to prosecute them. Section 924.30 is copied into Rule 6.14, which gives precedence to appeals in criminal cases, and the scope of review is prescribed by Rule 6.16, the same as in section 924.32.

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[191]90 So.2d 308 (Fla. 1956).

APPEALS TO SUPREME COURT, DISTRICT COURTS OF APPEAL, AND CIRCUIT COURTS

CIVIL APPEALS

Step	*What*	*When*	*Where*	*Authority*	*Comments*
1	NOTICE OF APPEAL. File with $25.00 fee and serve copy of notice on other parties. Original plaintiff must pay costs before appealing.	60 days from rendition of final decision, judgment, order, or decree	Lower court, with certified copy to appellate court	R. 3.2, 3.4b (5)	See R. 7.2a for form. Time for filing notice of appeal and paying filing fee is jurisdictional and cannot be waived or extended.
2	ASSIGNMENTS OF ERROR. Directions to clerk and to designations reporter by appellant.	Within 10 days from Step 1	Lower court. (Copies to be served on other parties and copy of designation to be served on reporter.)	R. 3.5a, 3.6d (1), (2)	
3	CROSS-ASSIGNMENTS OF ERROR. Cross-directions and designations by appellee.	10 days from Step 2	Same as Step 1	R. 3.5, 3.6d	
4	COMPLETION, CERTIFICATION, AND FILING OF REPORTER'S TRANSCRIBED NOTES.	Within 30 days after filing and service of appellant's designations	Lower court	R. 3.6j	

Step	*What*	*When*	*Where*	*Authority*	*Comments*
5	RECORD-ON-APPEAL		Lower court		Duty of preparing and transmitting rests on clerk of lower court. Appellant shall enforce compliance by motion in lower or appellate court. Appellant may elect to prepare the record-on-appeal.
	a. Completion and filing	Within 50 days after filing notice of appeal		R. 3.6j (1)	
	b. Service of copy of reporter's transcribed notes	10 days after record has been prepared and filed		R. 3.6j (1)	
	c. Service of copy of transcript	60 days after notice of appeal is filed		R. 3.6j (1)	
	d. Transmittal of record-on-appeal to appellate court	110 days after notice of appeal is filed		R. 3.6j (1)	Transmittal is to be by clerk of a lower court
6	MOTION TO QUASH OR AFFIRM	On or before day appellee is required to file his brief	Appellate court	R. 3.9 until July 1, 1958. After July 1, 1958, motions to affirm are eliminated by amendment of March 19, 1958.	Motions may be combined; used when no other procedure or pleading is specifically provided; further proceedings and filings will be suspended until disposition of the motion.

7	BRIEFS		Appellate Court (original and one copy together with proof of service).		
	a. Appellant's	40 days before record-on-appeal is required to be filed in the appellate court.		R. 3.7	Must serve one copy and appendix upon appellee; extension may be granted by lower or appellate court for good cause.
	b. Appellee's	Within 20 days after appellant's brief has been served on him		R. 3.7	For contents see R. 3.7g.
	c. Appellant's Reply Brief (optional)	Within 20 days after appellee's brief has been served on him		R. 3.7	Must be filed and served at least 5 days prior to oral argument except upon special order of appellate court.
8	REQUEST FOR ORAL ARGUMENT	Applied for at time applicant's first brief is filed	Same as Step 7	R. 3.10	Must be filed on a separate paper; for time limitations see R. 3.10b; participation limited to 2 attorneys.
9	AMICUS CURIAE BRIEFS	With consent of all parties at any time or upon motion timely filed within 80 days after filing of notice of appeal		R. 3.7k	If relying upon consent of parties, written consent must be filed with appellate court prior to filing of the brief.
10	PETITION FOR REHEARING	15 days after filing of decision or order of the appellate court	Appellate court. (Proof of service must be filed with petition).	R. 3.14	Only one petition allowed; no new ground or position shall be taken.

Step	*What*	*When*	*Where*	*Authority*	*Comments*
11	REPLY TO PETITION FOR REHEARING	Within 5 days after being served with copy of the petition	Appellate court. (Serve copy on opposing party.)	R. 3.15b	
12	MOTION FOR NEW ATTORNEY TO PARTICIPATE	When attorney not original attorney of record or member of his firm wishes to participate after appeal is filed or docketed	Appellate court	R. 2.3d	Withdrawal of attorney must be sanctioned by the court.
13	SERVICE OF PAPERS	Copies of all papers required to be filed to be served on other parties at or prior to time of filing		R. 3.4	Proof of service to be made by certificate on original paper or separately.
		CRIMINAL APPEALS			
1	NOTICE OF APPEAL				
	a. By defendant	90 days after either judgment or sentence	Lower court	R. 6.2, 6.4	For service requirements see R. 6.5.*
	b. By state	30 days after entry of order or sentence appealed from	Lower court	R. 6.3, 6.4	For service requirements see R. 6.6.*

2	FILING FEE (25.00)				
	a. By defendant	With notice of appeal	Lower court	R. 6.4	*
	b. By state	No stated time limit	Appellate court	R. 6.3	**
3	ASSIGNMENTS OF ERROR	20 days after Step 1	Lower court	R. 6.7	**
4	DIRECTIONS TO CLERK				
	a. By appellant	20 days after Step 1	Lower court	R. 6.7	**
	b. By appellee	10 days after filing and service of appellant's directions	Lower court	R. 6.7	**

*R. 6.4 requires that within 5 days after a notice of appeal is filed, the clerk shall transmit a certified copy thereof and the filing fee to the appellate court and a certified copy to the attorney general, together with a statement of the offense charged or convicted of. However, R. 6.3 requires the board of county commissioners to transmit the filing fee to the appellate court when the state appeals; and the clerk of the Supreme Court and the clerks of some, perhaps all, of the district courts of appeal look to the county for this filing fee instead of to the clerk of the trial court. Also, no filing fee is required of an appealing defendant when he has been adjudged insolvent before filing his notice of appeal (R. 6.4); in such case the custom is for the board of county commissioners to remit the filing fee to the appellate court.

**This chart does not deal with appeals in the nature of cross-appeals taken by the state under §924.07 (4) after the defendant has appealed, since such a cross-appeal is seldom taken by the state. The time for taking the appeal is fixed by R. 6.3. The option to take it by filing cross-assignments of error instead of a notice of appeal is given by R. 6.4. Certain provisions of R. 6.7 relating to directions and additional directions to the clerk and to cross-assignments of error are also applicable.

Step	*What*	*When*	*Where*	*Authority*	*Comments*
5	TRANSCRIPT OF RECORD				
	a. When defendant appeals	40 days after Step 1	Appellate court	R. 6.9	Clerk prepares certified original and two copies and delivers them to defendant's attorney, or to defendant if he has no attorney. Defendant is required to transmit original to appellate court and one copy to attorney general.
	b. When state appeals	40 days after Step 1	Appellate court	R. 6.10	Clerk prepares certified original and two copies and transmits the original to appellate court, one copy to defendant, and one to the attorney general.
6	BRIEFS				All briefs must be prepared in accordance with R. 3.7 except that an appendix is not required, and an original and one copy must be filed. No brief can exceed 50 pages without the permission of the appellate court. The appellant may file a reply brief but is not required to do so.
	a. Appellant's	30 days after Step 5	Appellate court	R. 6.11	
	b. Appellee's	20 days after Step 6 (a)	Appellate court	R. 6.11	
	c. Appellant's reply brief	20 days after Step 6 (b)	Appellate court	R. 6.11	

7	REQUEST FOR ORAL ARGUMENT				
	a. By Appellant	At time appellant's first brief is filed	Appellate court	R. 6.12, 3.10	Either party may request oral argument, but neither is required to do so. Applications must be filed on separate paper and copy served on opposite party.
	b. By Appellee	At time appellee's brief is filed	Appellate court	R. 6.12, 3.10	

TABLE OF HEADINGS AND SUBHEADINGS