

Daily Business Review

By Jonathan Mann

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Most Florida litigators know that an appeal begins with the filing of a notice of appeal in the trial court. In my experience, fewer trial attorneys are also familiar with the initial steps for an appellant to properly set up the appeal and perfect the record. No attorney wants to be embarrassed in front of their client and the appellate court later in the process by having to scramble to fix problems that should have been avoided. This discussion of the initial steps for setting up an appeal of a final order in a civil case (including family law cases) under Fla. R. App. P. 9.110 in Florida's state courts will help save you time and eliminate friction in the process. Please note that certain steps or other nuances may differ for some other kinds of appeals,

and you should always consult the applicable rules of appellate procedure for your specific matter.

File Any Additional Materials You Want Included in the Record on appeal

The time to ensure that the materials you need to support your arguments on appeal become part of the record on appeal, is prior to filing the notice of appeal. The circumstances vary by case. But in my experience, there are several frequently recurring examples that should alert practitioners they may need to take action to file documents if they have not made them part of the court file. These are: exhibits from a trial or other evidentiary hearing; items that were shown to, or considered by, the judge other than as evidentiary exhibits; proposed orders submitted to the judge by email or uploaded on another system; and hearing transcripts that already have been prepared but not filed. These documents will not become part of the record on appeal if not filed, so a party must act. File them under a notice of filing prior to filing your notice of appeal. Remember, Fla. R. App. P. 9.200(e) places the responsibility on the appellant to ensure the record on appeal is prepared and transmitted in accordance with the rules.

Draft the Notice of Appeal With Attention to Detail

The notice of appeal is a short document, but some attention to detail when preparing it can still help avoid issues later. Follow the template contained in Fla. R. App. P. 9.900(a) to appeal from a final order in a civil case. Include the court to which you are appealing, the correct rendition date of the order (i.e., date of its filing with the clerk, not signing by the judge), and the nature of the order. Attach the date-stamped copy of the appealed order so the clerk can verify that your notice of appeal is timely filed. Otherwise, you may receive an order from the court of appeal directing you to file the date-stamped copy of the appealed

order. If you filed the notice of appeal prior to a ruling on a pending motion postponing rendition (such as a motion for rehearing), Fla. R. App. P. 9.110(d) requires that you note the pendency of such a motion and the date it was filed, within your notice of appeal.

Pay the Filing Fees

Pay the filing fees to the trial court and the court of appeal right away. Failure to do so will result in an order warning that the court of appeal will dismiss the appeal (usually in 10 or 15 days) if the fee is not paid. It is possible to get an appeal reinstated if it is dismissed for failure to pay the filing fee if you act quickly, but that is not a good look or a position you want to be in.

Order Necessary Transcripts and Serve a Designation to the Court Reporter

If the hearing or trial transcripts have not yet been prepared prior to filing the notice of appeal, a party should immediately make arrangements with the court reporter to prepare and file the necessary transcripts. The party must then prepare and file a designation to the court reporter within 10 days of the notice of appeal, and be sure to serve it on the court reporter. Follow the template contained in Fla. R. App. P. 9.900(h). The designation notifies the clerk of the lower tribunal that transcripts are being prepared and will need to be included in the record once they are filed. Counsel should confirm that the court reporter executes and files the acknowledgment, as court reporters are not always familiar with the requirements of Fla. R. App. P. 9.200(b).

Consider Whether to File Directions to the Clerk

If an appellant does not file directions to the clerk within 10 days of the notice of appeal, the clerk prepares what might be called the “automatic record” as described in Fla. R. App. P. 9.200(a)(1). A party can file directions to the clerk using the form in Fla. R. App. P. 9.900(g) to add or subtract from what the rule specifies goes into the record by default. Often the entire case file from inception is not relevant to the issues on appeal, such as in an appeal of an order rendered post-judgment. In that case, a party may wish to direct the clerk to include only the court filings beginning with the final judgment. Skillful use of the directions to clerk mechanism helps ensure the record contains needed documents, keeps the record on appeal manageable in large cases, and reduces costs by allowing a party to exclude from the record unnecessary documents that the clerk would otherwise charge to include. If the appellant directs the clerk to transmit less than the entire record, the appellant must file with such direction a “statement of judicial acts to be reviewed” as required by Fla. R. App. P. 9.200(a)(2).

Review the Index to Record Closely and Pay the Clerk

The clerk of the lower tribunal has 50 days from the notice of appeal to serve the index to record. Fla. R. App. P. 9.110(e). Review it closely to make sure everything you need has been included. If it has not, contact the clerk. Make sure to pay the invoice sent by the clerk for preparation of the record, or the clerk will not transmit the record to the court of appeal.

Draft Your Brief on the Merits

You can now proceed to draft (or finish drafting) your initial brief, including your citations to the record on appeal as required by the rules. Hopefully, the small amount of work on the front end in taking the steps discussed above has eliminated a great deal of unnecessary work, stress and delay. Take a second to thank yourself for thinking ahead. You can devote precious attorney time to drafting the most persuasive brief possible rather than sorting out problems regarding the record on appeal. Good luck drafting your brief!

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