by Thomas A. Burns

Florida State and Federal Appellate Rules: Distinctions with a Difference

While the Florida and federal appellate rules are in many respects similar, in other ways they are quite different. This article briefly highlights some important distinctions between the state appellate rules applicable to civil appeals of final orders in the Florida district courts of appeal, and the federal appellate rules applicable to civil appeals of final judgments in the 11th Circuit.[1]

Notice of Appeal

At the outset, lawyers must understand that the deadline for filing a notice of appeal is jurisdictional — subject to a narrow exception in federal court only. In both state and federal court, unless the government is a party, the notice of appeal must be filed within 30 days of the rendition or entry of a final order.[2]

State appellate courts strictly enforce this 30-day jurisdictional deadline. Absent facts indicating "a party's ability to file a notice of appeal in a timely manner was stymied or hindered *by action attributable to the trial court or the clerk*," state appellate courts have no discretion to grant any good cause or excusable neglect exceptions to extend the 30-day window.[3]

Although the federal rules provide an exception to the default rule that allows for the district court either 1) to extend the 30-day deadline by motion,[4] or 2) to reopen the 30-day deadline by motion,[5] prudent practitioners should not depend on these exceptions. Compliance with the 30-day window is strongly advised in all appeals.

In state court, the notice of appeal is filed with the circuit court clerk, along with the appropriate filing fee, and with a copy of the final order attached.[6] In federal court, the notice is filed with the district court clerk, along with the appropriate filing fee, but it must merely "designate" rather than attach the judgment or order being appealed.[7]

Final Orders and Final Decisions

On a related note, it is also important that the lawyer understand when an order is "final" for state appellate purposes,[8] and what "final decisions" may be appealed in federal court.[9]

Under Florida law, an order is "final" for purposes of appeal "when it adjudicates the merits of the cause and disposes of the action . . . leaving no judicial labor to be done except the execution of the judgment."[10] An order is not final and appealable, moreover, unless it "include[s] specific 'language of finality.'"[11] For instance, an order dismissing a complaint "with prejudice" that does not "actually dismiss the action" is not final for appellate purposes.[12] But a written order that uses magic words — such as "plaintiff take nothing by the suit and go hence without day" — is final, because the additional language "lends the necessary unequivocal declaration of finality that will support an appeal."[13] A written order that "does not contemplate any further judicial labor with regard to the rights of the parties" — such as "Final Summary Judgment is *hereby entered*" — need not employ such special words to be sufficiently final for appeal.[14]

In the 11th Circuit, a decision is final and appealable so long as it effectively "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[15] There is more flexibility in federal court, however, when it comes to the language of the order. When, for example, a federal district court enters a written order granting summary judgment or dismissing a complaint — but does not enter a judgment because it retains jurisdiction over some "ministerial" task — the order is still final and appealable "even though it might appear that the district court still has something left to do that goes beyond executing the judgment."[16]

The Appellate Record

With respect to records on appeal, the lawyer is tasked with different responsibilities in assuring the record is prepared in the Florida district courts of appeal rather than his or her counterpart in the 11th Circuit.

In the Florida appellate courts, within 50 days of filing the notice of appeal, the circuit court clerk will automatically prepare the record.[17] The "automatic" record generally consists of everything filed in the lower tribunal except transcripts, discovery, and/or physical evidence.[18] If the lawyer wishes to include those additional items in the record, or limit the appellate record by excluding certain documents, the lawyer must file "Directions to Clerk" within 10 days of filing the notice of appeal, in the form indicated in the rules, directing the clerk to include or exclude those items in or from the record.[19] If transcripts are needed, counsel for the appellant must also serve a designation on the court reporter requiring preparation of the transcript, which is then filed with the court and served on the parties by the court reporter.[20]

This practice is different in the 11th Circuit. Within 14 days of filing the notice of appeal, appellants must either "order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary," or "file a

certificate stating that no transcript will be ordered."[21] Additionally, appellants may order a partial transcript as long as they file within 10 days of the notice of appeal a "statement of the issues" and serve copies of "both the order or certificate and the statement."[22] Otherwise, all documents filed in the district court are considered part of the appellate record without the need for directions to the clerk.[23]

The Briefs

The preparation of appellate briefs in state and federal court presents another potential source of confusion: They require different types of cover sheets (using different colors) and have different deadlines, which are triggered by different acts (*e.g.*, filing the record versus filing the notice of appeal). In state court, appellants must serve the initial brief "within 70 days of filing the notice" of appeal;[24] appellees must serve answer briefs "within 20 days after service of the initial brief";[25] appellants may serve reply briefs "within 20 days after service of the answer brief";[26] and cross-appellees may serve cross-reply briefs "within 20 days thereafter."[27] These deadlines may be extended by five days if the prior brief is served via U.S. mail.[28] Briefs served by other permissible means (which notably exclude electronic or facsimile service) do not entitle the recipient to additional time.[29] Appellate briefs in state court do not have colored covers. Service by mail is complete on mailing.[30]

In federal court, appellants must serve and file the principal brief "within 40 days after the record is filed"; appellees must file and serve the response brief "within 30 days after the appellant's brief is served"; and appellants may file and serve reply briefs "within 14 days after service of the appellee's brief."[31] The date on which the record is "deemed completed and filed" depends on whether a transcript is ordered.[32] If a transcript is ordered, the record is deemed completed "on the date the court reporter files the transcript with the district court." If a transcript is not ordered, it occurs "on the date the appeal is docketed in the court of appeals."[33] Appellants' principal briefs must have blue covers; appellees' response briefs must have red covers; and reply briefs must have gray covers.[34]

In cross-appeals, appellant's principal brief is blue; appellee's principal and response brief is red; appellant's response and reply brief is yellow; and appellee's reply brief is gray.[35] Appellant's principal brief must be filed and served "within 40 days after the record is filed," while appellee's principal and response brief must be filed and served "within 30 days after the appellant's principal brief is served." Appellant's response and reply brief must be filed and served "within 30 days after the appellee's principal and response brief is served, and appellee's reply brief may be filed and served "within 14 days after the appellant's response and reply brief is served."[36]

In federal court, these deadlines may be extended by three days as long as the brief is not served by hand delivery.[37] Service by mail or commercial carrier "is complete on mailing or delivery to the carrier," and service by electronic means "is complete on transmission, unless the party making service is notified that the paper was not received by the party served."[38]

Extensions of Time

The rules governing extensions of time for submitting appellate briefs are generally more flexible in the Florida district courts of appeal than in the 11th Circuit. In the 11th Circuit, such motions are primarily governed by Fed. R. of App. P. 27 and 11th Circuit Rules 26-1, 27-1, and 31-2. Eleventh Circuit Rules 26-1 and 27-1 require litigants to include in such motions a "statement that movant's counsel has consulted opposing counsel and that either opposing counsel has no objection to the relief sought, or will or will not promptly file an objection."

As an initial matter, extension requests "must be made or filed prior to the expiration of the due date for filing the brief or record excerpts" because the clerk "is without authority" to file belated extension motions.[39] And, importantly, the fact that an extension or other motion is pending "does not postpone the time for serving and filing any brief."[40] Therefore, until the 11th Circuit has granted an extension motion, prudent litigants should continue to govern themselves on the assumption that the due date will not be extended.

Moreover, the rules governing extension requests in federal court vary depending on the timing of the motion, the length of the extension requested, how the briefing schedule was set, and whether it is a first or subsequent request. First requests for extensions of seven or fewer calendar days "may be made by telephone or in writing" and "may be granted by the clerk."[41] But first requests seeking more than seven calendar days "must be made by written motion setting forth with particularity the facts demonstrating good cause, and will only be acted upon by the court."[42] When a litigant files the motion 14 or more calendar days before the due date, and it is denied seven or fewer calendar days before the due date, the deadline generally will be extended an additional seven calendar days "beyond the initial due date or the date the court order is issued, whichever is later."[43] Extension motions filed less than seven calendar days in advance of the deadline "will generally be denied," unless the movant demonstrates that good cause for the extension "did not exist earlier or was not and with due diligence could not have been known earlier."[44]

The standard for second extensions is much more difficult to meet. They are "extremely disfavored and are granted rarely."[45] Instead of merely showing "good cause," litigants seeking a second extension must now show "extraordinary circumstances that were not foreseeable at the time the first request was made."[46]

In contrast, state procedures for extension motions are much simpler, and the standard for granting them is generally more lenient. State extension motions are governed by Fla. R. of App. P. 9.300. They "shall" contain a certificate that movant's counsel "has consulted opposing counsel and that the movant's counsel is authorized to represent that opposing counsel either has no objection or will promptly file an objection."[47] Unlike federal court, the filing of an extension motion "shall toll the time schedule of any proceeding in the court until disposition of the motion," except in proceedings before the Florida Supreme Court, where a separate motion to toll must be filed.[48] Finally, counsel should consult the website of the applicable district court of appeal, as some of the courts have issued administrative orders regarding extension motions and other scheduling matters.

Conclusion

Lawyers who do not routinely handle appellate matters should consider consulting an appellate practitioner when handling an appeal in state or federal court, particularly since the initial task in an appeal — timely filing the notice of

appeal — is jurisdictional. The table on this page is offered to assist practitioners in navigating the basic rules governing appellate practice in state and federal court as they currently stand, with the important caveat that procedural rules may and do change frequently.[49]❑

	U.S. Court of Appeals for the 11th Circuit	Florida District Courts of Appeal
Notice of Appeal **FRAP 4** **Fla. R. App. P. 9.110**	Jurisdictional, but ***expressly allows*** good cause and excusable neglect exceptions. Judgment is final and appealable so long as it effectively ***ends the litigation on the merits and leaves nothing for the court to do but execute the judgment***.	Jurisdictional, but ***forbids*** good cause and excusable neglect exceptions. Order is not final and appealable unless it includes ***specific language of finality***.
Preparing the Appellate Record **FRAP 11** **Fla. R. App. P. 9.200**	Within 14 days after filing notice of appeal, appellants must order transcript or file certificate stating no transcript will be ordered. Appellants may order partial transcript by filing statement of issues within 14 days of the notice of appeal. Appellants must do whatever else is necessary to enable clerk to assemble and forward record.	To include transcripts and/or discovery, appellant must serve directions to clerk and designation to court reporter within 10 days of filing notice of appeal. Circuit court clerk will ***automatically prepare*** record within 50 days and will transmit record to appellate court within 110 days.
Preparing the Briefs in Regular Appeals **FRAP 28** **Fla. R. App. P. 9.210**	Appellant's Brief – ***Blue***, due 40 days after ***record is filed***. Appellee's Brief – ***Red***, due 30 days after service. Reply Brief – ***Gray***, due 14 days after service.	Initial Brief – Due 70 days after ***filing notice of appeal***. Answer Brief – Due 20 days after service. Reply Brief – Due 20 days after service.
Preparing the Briefs in Cross-appeals **FRAP 28** **Fla. R. App. P. 9.210**	Appellant's Principal Brief – ***Blue***, due 40 days after ***record is filed***. Appellee's Principal and Response Brief – ***Red***, due 30 days after service. Appellant's Response and Reply Brief – ***Yellow***, due 30 days after service. Appellee's Reply Brief – ***Gray***, due 14 days after service.	Initial Brief – Due 70 days after ***filing notice of appeal***. Answer Brief – Due 20 days after service. Reply Brief – Due 20 days after service. Cross-Reply Brief – Due 20 days after service.
Mail-service Rule **FRAP 26** **Fla. R. App. P. 9.420**	***Three*** additional days unless prior brief is hand delivered.	***Five*** additional days when prior brief served by U.S. mail, complete on mailing. No additional time if brief is served via facsimile, electronic mail, or overnight commercial carrier.
Obtaining Extensions of Time **FRAP 26** **Fla. R. App. P. 9.300**	Extension motions ***do not toll deadlines until resolved***. More difficult to obtain. More complex motions practice.	Extension motions ***toll deadlines until resolved***. More flexible. Simpler motions practice.

[1] This article is limited to civil appeals of final orders and decisions. It does not analyze the rules governing criminal appeals, the various extraordinary writs that may be filed in state and federal court, or other interlocutory appeals from nonfinal orders.
[2] Fla. R. App. P. 9.110(b) (rendition); Fed. R. App. P. 4(a)(1) (entry).
[3] *David M. Dresdner, M.D., P.A. v. Charter Oak Fire Ins. Co.*, 972 So. 2d 275, 280 (Fla. 2d D.C.A. 2008) (emphasis added).
[4] *See* Fed. R. App. P. 4(a)(5).
[5] *See* Fed. R. App. P. 4(a)(6).
[6] Fla. R. App. P. 9.110(d).
[7] Fed. R. App. P. 3(a)(1), (c), (e).
[8] *See* Fla. R. App. P. 9.030(b)(1)(A).
[9] *See* 28 U.S.C. §1291; Fed. R. App. P. 3.
[10] *McGurn v. Scott*, 596 So. 2d 1042, 1043 (Fla. 1992).
[11] *Monticello Ins. Co. v. Thompson*, 743 So. 2d 1215, 1216 (Fla. 1st D.C.A. 1999) (citations omitted).
[12] *Dedge v. Crosby*, 914 So. 2d 1055, 1056 (Fla. 1st D.C.A. 2005).
[13] *Allstate Ins. Co. v. Collier*, 405 So. 2d 311, 312 (Fla. 4th D.C.A. 1981).
[14] *State Farm Mut. Auto. Ins. Co. v. Open MRI of Orlando, Inc.*, 780 So. 2d 339, 340-341 (Fla. 5th D.C.A. 2001) (emphasis added).
[15] *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1368-69 (11th Cir. 2008) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).
[16] *SEC v. Carillo*, 325 F.3d 1268, 1272 (11th Cir. 2003) (citing *Turner v. Orr*, 759 F.2d 817, 820 (11th Cir. 1985)).
[17] Fla. R. App. P. 9.110(e).
[18] Fla. R. App. P. 9.200(a)(1).
[19] Fla. R. App. P. 9.200(a)(3).
[20] Fla. R. App. P. 9.200(b).
[21] Fed. R. App. P. 10(b)(1)(A)-(B).
[22] Fed. R. App. P. 10(b)(3).
[23] Fed. R. App. P. 10(a)(1)-(3).
[24] Fla. R. App. P. 9.110(f).
[25] Fla. R. App. P. 9.210(f).
[26] *Id.*
[27] *Id.*
[28] Fla. R. App. P. 9.420(e).
[29] *See id.*; Fla. R. App. P. 9.420(c) (service methods).
[30] Fla. R. App. P. 9.420(c).
[31] Fed. R. App. P. 31(a)(1).
[32] 11th Cir. R. 12-1.
[33] *Id.*
[34] 11th Cir. R. 32(a)(2); 11th Cir. R. 32 I.O.P. 1 ("covers of briefs operate for a busy court like traffic signals").
[35] Fed. R. App. P. 28.1(d).
[36] Fed. R. App. P. 28.1(f).
[37] *See* Fed. R. App. P. 26(c) (adding three days "unless the paper is delivered on the date of service stated in the proof of service," and stating "a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service").
[38] Fed. R. App. P. 25(c)(4).
[39] 11th Cir. R. 31-2(e).
[40] 11th Cir. R. 31-1(c).
[41] *Id.*
[42] *Id.*
[43] 11th Cir. R. 31-2(b).
[44] 11th Cir. R. 31-2(c).
[45] 11th Cir. R. 31-2(d).
[46] *Id.*
[47] Fla. R. App. P. 9.300(a).
[48] Fla. R. App. P. 9.300(b).
[49] The chart references the Federal Rules of Appellate Procedure, but practitioners should also consult the 11th Circuit rules which correspond numerically to the applicable federal appellate rules.

Thomas A. Burns *is a senior associate with Hill Ward Henderson. Before joining the firm, Burns practiced appellate litigation with Sidley Austin LLP and Gibson, Dunn & Crutcher LLP in Washington, D.C., and served as a law clerk to 11th Circuit Judge Susan H. Black.*

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