CHAPTER 3: ASSEMBLING THE RECORD ON APPEAL

A. Overview of the Record on Appeal

An appeal is decided based solely on the documents, evidence, arguments and proceedings that occurred in the lower tribunal. In general, the "record on appeal" or "appellate record" is a collection of the documents, pleadings, motions, evidence, and hearing or trial transcripts that were filed in the lower tribunal or trial court. The appellate court reviews the appellate record, i.e., the record of what happened in the trial court, in order to review whether the decision reached by the lower tribunal or trial court was correct or incorrect. Throughout this chapter, "lower tribunal" means the lower court, agency, or division that originally decided the case, through a trial or other proceeding. When the lower tribunal is a court, it is often called the trial court.

Most of the information an appellate party needs to know about the contents, timing, and requirements for the record on appeal can be found in Florida Rules of Appellate Procedure 9.200 (the record), 9.140 (criminal appeals), 9.141 (postconviction appeals), 9.180 (workers' compensation), and 9.900 (appellate forms). This chapter provides a general overview of these rules. It first addresses rule 9.200 and the appellate record generally. It will also address some of the main differences for a few of the different types of cases and appeals. An appellate party should remember that this chapter simply provides an overview of general requirements. Because there are important differences between the specific rules of procedure that apply to different types of cases and appeals (like civil, criminal, postconviction, workers' compensation, administrative, etc.), appellate parties must carefully study the specific rules of procedure that apply to the type case and type of appeal they are filing.

The record on appeal generally includes all of the pleadings, motions, documents, and exhibits that were filed in the lower tribunal or trial court. Fla. R. App. P. 9.200(a)(1). It also

includes copies of the orders entered by the lower tribunal and transcripts of any hearings or trials. The record gives the appellate court a history of the case, and it is limited to what was actually filed in and considered by the lower tribunal. Parties cannot add new evidence or documents that were not filed with the lower tribunal prior to entry of the order being appealed.

Depositions and other discovery are only included in the record on appeal if a party filed them in the trial court before the order being appealed was entered. Physical evidence, meaning the actual object(s) entered into evidence (for example, a gun), is typically not included in the record on appeal at all. There are also some types of routine documents that usually will not be included in the record because they usually will not be relevant to the appeal. Such documents include as summonses, praecipes, subpoenas, returns of service, and notices of hearing or depositions. A summons is a document served on defendants which notifies them of the lawsuit and what initial actions they need to take to defend against it. A return of service is the proof that the summons was properly served on the defendant. A praecipe is somewhat like a summons, but it tells the defendant to do something or to show why he or she has not done it. These types of documents will not be automatically included in the record. If these items are relevant in the specific appeal, a party will need to ask the clerk to include them in the record. Fla. R. App. P. 9.200(a)(1). For example, an appellant would want to ask the clerk to include the summons and any return of service documents in the appellate record if he or she wanted to argue on appeal that the judgment is invalid because the original service of the summons and lawsuit papers was invalid such that he or she did not receive proper notice of the lawsuit.

An appellate court cannot review what happened in the lower tribunal without a record. See Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979). An appellate court generally presumes that the lower tribunal's decision is correct (the "presumption of correctness"), unless the person who filed the appeal can clearly show that the lower tribunal made

some type of harmful error or mistake or that the rule or law in question is illegal or unconstitutional. Without a complete record, the appellate court is limited to correcting errors that are apparent on the face of the order on appeal. See, e.g., Chirino v. Chirino, 710 So. 2d 696 (Fla. 2d DCA 1998). The party who filed the appeal and who is asking the appellate court to reverse, remand, or correct the lower tribunal's decision, is the party responsible for making sure the appellate court has everything it needs to review the lower tribunal's decision based on what happened below. Fla. R. App. P. 9.200(e).

B. Getting the Record on Appeal to the Appellate Court

1. The Record in Nonfinal Appeals and Original Proceedings

There is an important distinction between "final" appeals, "nonfinal" appeals, and original proceedings when assembling the appellate record. See Fla. R. App. P. 9.110 (final appeals), 9.130 (nonfinal appeals), and 9.100 (original proceedings). The difference between final and nonfinal appeals and original proceedings is discussed in greater detail in Chapters 1, 8, 9, and 10 of this Handbook. In nonfinal appeals and original proceedings the parties submit record documents to the appellate court directly, not through the lower tribunal clerk, by filing an appendix with the initial or answer brief (nonfinal appeals) or the petition and response (original proceedings). Fla. R. App. P. 9.130(e) and 9.100(g). An appendix includes any documents relevant to the issues raised in the appeal and that are necessary for the appellate court to come to a decision. Fla. R. App. P. 9.200. An appendix must include an index or table of contents that gives the title of each document and the page number of the appendix where it can be found. The appendix should be separate from the brief or petition/response. Many appellate courts prefer that the parties identify the documents individually using bookmarks if they are submitting them electronically as a PDF. While this is a requirement for attorneys submitting an appendix, it is not currently a requirement for pro se litigants.

In most cases, parties should arrange all of the documents in chronological order, from the oldest to the newest. That is, the appendix should begin with the first document filed with the lower tribunal, then continue in the order in which the remaining documents were filed, and end with the order being appealed. If a pro se party files a paper copy of the appendix with the appellate court, the appendix must be on standard 8½" x 11" paper. If any documents are on larger pieces of paper, the party compiling that appendix should reduce the documents to standard, 8½" x 11" size paper when copying them.

As in final appeals, the parties may only include in the appendix copies of documents that were filed in and considered by the lower tribunal before the order being appealed was entered. When possible, the parties should use copies of documents that include the filing date or clerk's stamp in their appendix. When including a copy of a lower tribunal order, especially the order on review, the party should obtain a signed or "conformed" copy of the order from the lower tribunal. The clerks of the circuit courts are increasingly posting filed documents on their websites, making it relatively easy for litigants to save and print out filed versions of their pleadings and court orders.

2. The Record in Final Appeals

Generally in most final appeals, and in some postconviction appeals, the appeals division of the lower tribunal clerk's office assembles the record on appeal the same way: by copying the parts of the lower tribunal's file that go into the record on appeal, numbering those pages, and placing those pages into an electronic PDF document. The clerk's office then prepares an electronic index to the record on appeal, which includes the title of each record document and the record page number on which it can be found. With the amendments to rule 9.200 that took effect on January 5, 2016, the lower tribunal clerk is now required to paginate the record on appeal so that the PDF pages match the record page numbers, make the PDF record text searchable, and bookmark the record. Fla. R. App. P. 9.200(d). The clerk will attach the trial transcripts in a PDF

file separate from the main record but matching the pagination of the index. Fla. R. App. P. 9.200(d)(2). These new requirements help make the electronic record easier for the parties and the appellate court to navigate.

The lower tribunal clerk's office provides a copy of the record on appeal to each of the parties in most criminal cases and in nonsummary postconviction appeals. Fla. R. App. P. 9.140(f)(4) and 9.141(b)(3)(B). In civil cases, the clerk's office initially sends each party a copy of only the record index. It is then generally up to the parties to either compile their own copy of the record using the record index, or obtain an electronic copy of the record from the clerk. Fla. R. App. P. 9.110(e). The lower tribunal clerk is not required to provide a copy of the record or the index to the parties in a summary postconviction appeal. Fla. R. App. P. 9.141(b)(2)(B). After preparing the record and index, the lower tribunal clerk's office will electronically transmit both to the appellate court.

When an appellant files a notice of appeal without specific directions to the clerk, the lower tribunal clerk will automatically include only the documents required by rule in the appellate record when it transmits the record to the appellate court. Fla. R. App. P. 9.200(a)(1). This is what happens in most appeals.

C. Assembling the Record on Appeal Generally

1. Filing Directions to the Trial Court Clerk

To designate particular items from the lower tribunal file for the clerk to include in or exclude from the record on appeal, the appellant will need to file a document called "directions to clerk." Fla. R. App. P. 9.900(g). The directions should be filed in the court that heard the case within 10 days of the date that the notice of appeal was filed. Fla. R. App. P. 9.200(a)(2). In the directions the appellant should clearly identify which items the appellant wants to include and which items the appellant wants to exclude, if any, from the record. Rule 9.900(g) contains a

sample form to use when filing directions with the lower tribunal clerk. If the appellant files directions with the clerk, the appellee, the other party to the appeal, has 20 days from the notice of appeal to file a similar document directing the clerk to include other documents and exhibits that the appellee wants in the record. Fla. R. App. P. 9.200(a)(2).

If the appellant chooses to direct the clerk to exclude items from the record or to include only particular documents instead of sending the whole record to the appellate court, the appellant will also need to file a "statement of judicial acts" in lower tribunal at the same time as the directions to the clerk. Fla. R. App. P. 9.200(a)(2). A statement of judicial acts tells the appellate court which of the lower tribunal's actions the appellant wants the appellate court to reverse. The statement of judicial acts also allows the appellee to decide whether to add additional portions of the record.

2. Transcripts and Designations to the Court Reporter

When there has been a trial, evidentiary hearing, deposition, or other proceeding in the lower tribunal that is relevant to the order being appealed, the record should include a transcript. A transcript is a written record of a spoken court proceeding. It often contains the most important information for an appeal. Transcripts are prepared by an official court reporter or court transcriptionist, who either attended the proceeding or transcribed the proceeding from a recording.

Most criminal proceedings have a court reporter present or are audio recorded for later transcription. However, in civil cases the parties must arrange for a court reporter to be present or for a recording of the proceedings to be made. If they do not, there will not be any transcript available to include in the record on appeal. Once a court proceeding has been transcribed, either party may file it in the court file for inclusion in the record on appeal. In civil cases, the presence of a court reporter or electronic recording device at the court proceeding is not enough. The parties must request that a court reporter create an official transcript of the proceeding and then ensure

that it is filed with the lower tribunal clerk before the transcript can be included in the record on appeal.

Within 10 days of filing the notice of appeal the appellant must file a designation with the court reporter or transcriptionist present at or responsible for transcribing the recording of the proceeding clearly identifying which court proceedings need to be transcribed and filed with the lower tribunal clerk. Fla. R. App. P. 9.200(b)(1). The appellee has 20 days from the date the notice of appeal was filed to designate any additional proceedings that need to be transcribed and included in the record. Fla. R. App. P. 9.200(b)(1). The designation should list the dates of all of the days of trial and any hearings that need to be transcribed. In civil cases the designation should also include the names and addresses of the other parties that should be served with a copy of the transcript. If the party filing the designation does not direct the court reporter or transcriptionist to serve a copy of the transcript on all of the parties to the appeal, that party must serve a copy of the transcripts on the other parties within 5 days of receiving the transcripts. Fla. R. App. P. 9.200(b)(3). For a sample form for serving designations on the court reporter or transcriptionist, refer to rule 9.900(h). In criminal cases, service of the transcripts on the parties is a little different. See Fla. R. App. P. 9.140(f)(2). Consult section (E) of this chapter for more information.

The court reporter has 30 days from the date of the designation to prepare the transcript. Fla R. App. P. 9.200(b)(2). After receiving the designation, the court reporter will fill out the "court reporter's acknowledgement" section with the date the designation was received and the estimated date of completion of the listed transcript. Fla. R. App. P. 9.200(b)(3). Within 5 days of receiving the designation, the court reporter will send the completed acknowledgement to the clerk of the appellate court and the parties. If the court reporter cannot prepare the requested transcript within 30 days, the court reporter may ask the appellate court, by way of a motion, for extra time. If the court reporter will need more than 30 days, another option is for the appellant to

file a motion for an extension on behalf of the court reporter; such a motion should be filed well before the 30 days is over and should ask the appellate court to extend the time for the court reporter to prepare the transcript and to also "toll" or extend all other deadlines accordingly (that helps avoid a situation where the briefs are due before the record is even complete). If the court reporter and/or appellant asks for that extra time, the appellate court will then either grant or deny the court reporter's request for extra time and issue an order telling the court reporter and the parties when the transcript is due. See Fla. R. App. P. 9.200(b)(3),(e).

Parties should remember that when they want to include transcripts of depositions or other proceedings that did not include the lower tribunal judge as a participant, the transcripts must have been before the lower tribunal, either introduced into evidence or attached to a motion, pleading, or other filing. As with other record documents, the appellate court may only consider transcripts that were considered by the lower tribunal in coming to its decision. See, e.g., Parker v. Parker, 109 So. 2d 893, 894 (Fla. 2d DCA 1959) ("A deposition is not a part of evidence before the court unless made so pursuant to the rules of evidence and the rules of court.").

3. Record Stipulations and Reconstruction

Rarely, instead of preparing a record on appeal, both sides work together to prepare what is called a "stipulated statement" for the appellate court. Fla. R. App. P. 9.200(a)(3). This may save costs when the appellant must pay for the appellate record and is a separate and distinct procedure than reconstructing the transcripts of a hearing when there was no court reporter or electronic recording available at the court proceeding. A stipulated statement must be approved by both parties. It shows how the case proceeded in the lower tribunal, what the lower tribunal decided, includes copies of record documents as is necessary to review the decision on appeal, and must be filed with the lower tribunal clerk for transmission to the appellate court. If the parties

intend to rely on a stipulated statement, they should advise the lower tribunal clerk as soon as possible. Fla. R. App. P. 9.200(a)(3).

If there was no court reporter present at the court proceeding or a transcript is otherwise unavailable, the parties may agree on a prepared statement of the evidence or the proceedings. The party seeking to recreate the record of the proceeding should prepare the statement from the "best available means," which includes the memories of the parties. They should then serve the statement on the opposing party, who has 10 days from the date of service to object or propose amendments to the statement. After that, the statement of evidence and any objections or proposed amendments are filed with the lower tribunal. The lower tribunal will settle any disagreements and give final approval to the statement of evidence. The court-approved statement can then become part of the appellate record. Fla. R. App. P. 9.200(b)(4).

4. Cross-Appeal

Sometimes in an appeal, the appellee also files a cross-appeal, which is explained in more detail in Chapters 8 and 9. The appellee then becomes the appellee/cross-appellant, and the appellant becomes the appellant/cross-appellee. If there is a cross-appeal, the cross-appellant has 20 days from the date the notice of appeal was filed to file a designation directing the clerk of the lower tribunal to add documents, exhibits, or transcripts to the record on appeal. If the cross-appellant designates less than the entire record, then the cross-appellant must serve a statement of judicial acts to be reviewed with the cross-appellant's designation. The cross-appellee then has 10 days after service of the cross-appellant's designation and statement of judicial acts to be reviewed, to designate any other items for inclusion in the record on appeal. When there is a cross-appeal, the total time for the clerk of the lower tribunal to prepare and transmit the record is extended by 10 days. Fla. R. App. 9.200(c).

5. Correction and Supplementation of the Appellate Record

The appellant is responsible for checking the record on appeal to make sure that everything the appellate court needs to make a decision on the issues raised is included. If one of the parties believes that the record contains an error or omission (e.g., a mislabeled document, a mistake in record page numbers, or a document filed with the lower tribunal but missing from the record on appeal), the appellant or appellee may correct it: (1) by agreeing with opposing counsel to stipulate to the correction, (2) by filing a motion to correct the mistake with the lower tribunal clerk before the clerk sends the record to the appellate court, or (3) if the lower tribunal clerk's office has already sent the record to the appellate court, by filing a motion to supplement or correct the record on appeal in the appellate court asking the appellate court to make or allow the correction or supplementation. Fla. R. App. P. 9.200(f)(1).

If a party believes that the lower tribunal clerk has left a necessary item out of the record on appeal, the party cannot just file the document with the appellate court clerk or attach it to his or her brief. If the lower tribunal clerk has not yet filed the record in the appellate court, the party may arrange for correction or supplementation of the record with the lower tribunal clerk. This is typically done by filing a designation identifying the documents to be supplemented. However, if the lower tribunal clerk has already transferred the record to the appellate court, the party must instead file a "motion to supplement the record" in the appellate court. This motion should identify the missing filing by date and title and should explain why it needs to be in the record.

In a civil case, if the appellate court believes that the record is incomplete or wants a particular document, transcript, or exhibit that neither party designated with the lower tribunal clerk, the appellate court will generally order the appellant to make arrangements with the lower tribunal clerk to supplement the record. In a criminal case, the appellate court may order the lower tribunal clerk to supplement the particular document, transcript, or exhibit directly. Pursuant to

rule 9.200(f)(2), the appellate court will give the parties a chance to supplement the record rather than decide the appeal on an incomplete record.

D. Civil Appeals

1. Timing

In civil cases, the lower tribunal clerk will serve a copy of the index to the record on the parties within 50 days of the date that the notice of appeal is filed. The lower tribunal clerk will electronically transmit copies of the index and the record on appeal to the appellate court within 110 days of the date that the notice of appeal is filed. Fla. R. App. P. 9.110(e). The time for preparation and transmission of the appellate record is automatically extended by 10 days when there is a cross-appeal. In civil cases, the clerk's office initially sends each party a copy of only the record index. It is then generally up to the parties to either compile their own copy of the record using the record index, or obtain an electronic copy of the record from the clerk.

If the clerk needs more time to prepare the record, the clerk may request an extension, or a party may request an extension on behalf of the clerk. See 9.200(b)(3),(e). A motion for extension should be filed well before the time expires, and if a party is filing the motion, it should generally ask the court to extend both the time for the clerk to prepare the record and to "toll" or extend all other deadlines in the appeal accordingly (so that the briefs are not due before the record is due).

2. Costs

Generally, in civil appeals the appellant is responsible for the costs of preparation and transmission of the record on appeal. When an appellate party designates a proceeding to be transcribed, that party must pay for the original and any necessary copies of the transcript. Necessary copies include the copies that will be sent to the appellate court and the opposing party. Unless the party ordering the transcript has made some other arrangements with the court reporter, when that party orders the transcript in the designation, that party must also pay the court reporter

one-half of the estimated cost of the transcript. When the court reporter delivers the completed transcript and copies, that party must pay the rest of the transcript costs. Fla. R. App. P. 9.200(b)(1).

A party to a civil appeal who does not have the money necessary to pursue the appeal may file an application for determination of indigent status with the trial court. See Fla. R. App. P. 9.430; §§ 57.081, 57.082, 27.52, Fla. Stat. However, indigency does not automatically mean that the lower tribunal clerk will transmit the record or that the court reporter will prepare the transcripts without cost in an appeal. See, e.g., §§ 27.52, 57.081, 57.082, Fla. Stat.

E. Criminal Appeals

1. Introduction

This section describes the record on appeal in a direct criminal appeal from the trial court to the appellate court. A "direct appeal" is an appeal from a conviction or sentence in a criminal case. An appeal from an order on a postconviction motion, such as a motion under Florida Rule of Criminal Procedure 3.800, 3.801, 3.850, or 3.853, is a "postconviction appeal." The next section, section (F), will describe preparation of a record in a postconviction appeal. See also Fla. R. App. P. 9.140 (criminal appeals) and 9.141 (postconviction appeals).

2. Timing

In a criminal appeal, the lower tribunal clerk will serve a copy of the record on the parties and electronically file the record in the appellate court within 50 days of the filing of the notice of appeal unless the proceedings designated for transcription by the parties are not timely filed with the lower tribunal clerk. If the designated transcripts are late, the clerk will serve a notice of inability to complete the record on the appellate court, the parties, and the court reporter. The record is then due within 20 days of the date that the court reporter files the transcripts with the lower tribunal clerk.

3. Costs

If a criminal defendant does not have the money for a criminal appeal, the defendant may ask the trial court to declare him indigent. See Fla. R. App. P. 9.430; §§ 57.081, 57.085 Fla. Stat. If the trial court agrees that the party is indigent, the indigent party does not have to pay for the transcripts, but still must prepare and serve a statement of judicial acts to be reviewed and a designation to the court reporter. The statement of judicial acts to be reviewed lists all of the issues the appellant intends to bring up on appeal. The appellant's designation to the court reporter should list only the proceedings that relate to the issues that the indigent party is planning to bring up in the appeal. Copies of the statement of judicial acts to be reviewed and the designation to the court reporter should be served on the State.

When the record on appeal has been prepared, the clerk's office will send the State and, if the defendant has been declared indigent, the defendant or his appointed attorney, a copy of the record on appeal. If the defendant has not been found indigent, the lower tribunal clerk will send him a copy of the index to the record on appeal, as the clerk's office does in a civil appeal.

F. Postconviction Appeals

1. Introduction

In postconviction appeals, the record may be prepared differently depending on whether there was an evidentiary hearing on the postconviction motion. Appeals from orders entered on a postconviction motion after an evidentiary hearing are called "nonsummary postconviction appeals." Fla. R. App. P. 9.141(b)(3). Appeals from orders entered on a postconviction motion without an evidentiary hearing are called "summary postconviction appeals." Fla. R. App. P. 9.141(b)(2).

2. Nonsummary Postconviction Appeals

a) Timing

The lower tribunal clerk will prepare the record on appeal and electronically transmit the record on appeal to the appellate court and serve a copy on the parties within 50 days of the date that the notice of appeal was filed. Fla. R. App. P. 9.141(b)(3)(A).

b) Costs

As in direct criminal appeals, the clerk's office automatically sends a copy of the record on appeal to the State and, if the defendant has been declared indigent, to the defendant. If the defendant has not been declared indigent, the clerk will send only a copy of the index to the record on appeal to the defendant. If the appellant has been declared indigent, the state will bear the costs of transcription of the evidentiary hearing. However, if the appellant has not been declared indigent, it will be the appellant's responsibility to pay the cost of preparing the transcript. Failing to pay the cost of preparing the evidentiary hearing transcript can delay preparation of the record on appeal.

c) Directions to the Clerk and Designations to the Court Reporter

If the appellant does not file directions to the lower tribunal clerk identifying the specific filings to be included or excluded from the record on appeal, the lower tribunal clerk's office will automatically include the postconviction motion, the State's response, a reply if one was filed, the order on the motion, attachments to any of these documents, and a transcript of the evidentiary hearing. If there was a motion for rehearing, the clerk's office will include the rehearing motion, the State's response, any reply, the order on the motion, and attachments to any of these documents. Fla. R. App. P. 9.141(b)(3)(B)(1).

In a nonsummary postconviction appeal, the appellant does not have to file a designation to the court reporter. If the appellant does not file a designation, the lower tribunal clerk's office will tell the court reporter to transcribe the evidentiary hearing. Fla. R. App. P. 9.141(b)(3)(A).

Just as in any appeal, it is the appellant's responsibility to make sure the record on appeal contains everything the appellate court will need to decide the issues on appeal. If something is missing that was part of the lower tribunal file below, it is the appellant's responsibility to file a motion to supplement the record as described in section (C)(5) of this chapter.

3. Summary Postconviction Appeals

In a summary postconviction appeal the clerk will include in the record on appeal the postconviction motion, the State's response, a reply if one was filed, the order on the motion, and attachments to any of these documents. If there was a motion for rehearing, the record on appeal will also include that motion, the State's response, the reply, the lower tribunal's order on the motion, and attachments to any of these documents. Fla. R. App. P. 9.141(b)(2)(A).

In summary postconviction appeals, the rules do not require the clerk's office to put new page numbers on the pages of the appellate record or to prepare an index. However, the appellate court may order it to do so. Similarly, the clerk's office is not required to send a copy of the appellate record or an index to the parties. Fla. R. App. P. 9.141(b)(2)(B). But some appellate courts require the clerk to do so. See e.g., In re: Preparation of Records in Review of Proceedings in Collateral or Post-Conviction Criminal Cases, Fla. Admin. Order 02-2 (Fla. 1st DCA Jan. 18, 2002) (available at http://www.1dca.org/orders/02-2.pdf)

G. Workers' Compensation Appeals

1. Introduction

Workers' compensation claims are brought in the Office of the Judges of Compensation Claims (OJCC), a part of the Department of Administrative Hearings. Consult Chapter 17 of this Handbook for more information on workers' compensation claims. The requirements for preparing and filing the appellate record in workers' compensation cases are found in Florida Rule of Appellate Procedure 9.180(f), (g), and (h)(2). This includes the contents of the record, who is

responsible for preparing it, paying for it, and submitting it to the appellate court. The process for preparation of the record in appeals from final orders is started by the filing of the notice of appeal with the Judge of Compensation Claims' (JCC) office that decided the case. As discussed below, in appeals of nonfinal orders allowable under rule 9.180(b)(1), the notice of appeal initiates the time limit for submitting the initial brief and the appendix to that brief which serves as the record in such appeals.

2. Appeals from Final Orders

Rule 9.180(f)(1) requires that the record in workers' compensation appeals of final orders include all petitions for benefits, all notices of denial of the claim filed by the employer or its insurance company, as well as any pretrial stipulations, pretrial orders, trial memoranda, depositions, or other exhibits the JCC admitted into evidence, motions for rehearing (and responses to them), the order(s) addressing any motions for rehearing, the transcripts of any hearings held before the JCC, and the order that is being appealed. If there is anything that was filed with the workers' compensation judge that is not on this list and which a party wants to be in the record on appeal, or does not want to be in the appellate record, a party (or all parties) may designate other items for inclusion in or omission from the record in accordance with the process explained in rule 9.200(f), and section (C)(1) of this chapter, by filing a notice of designation with the JCC.

Evidence, such as documents, reports, deposition transcripts, or testimony at trial, that a party asked the JCC to admit into evidence, but which the JCC ruled was not admissible, is generally not included in the record or considered on appeal. However, rule 9.180(f)(2) states that a party may direct that the record include such evidence if the evidence was proffered and the exclusion of the evidence is one of the issues on appeal. In other words, if a party asked the JCC to admit something into evidence, the JCC refused to do so, and the party is appealing that refusal, that party should request the JCC to include it in the record on appeal. See Fla. R. App. P.

9.180(f)(2). But this can be done only if, at the hearing, the party seeking to have the evidence admitted asked the JCC to accept it so that the appellate court can review the evidence and decide if it should have been admitted.

Rule 9.180(f)(4) allows the parties to agree on the contents of the appellate record. In this situation, the parties would file a written stipulation of the record with the clerk for the JCC, and that stipulated record along with the order being appealed would be transferred to the appellate court. Rule 9.180(9) provides that rule 9.200(a)(3) applies in workers' compensation appeals. As explained in section (C)(3) of this chapter, under 9.200(a)(3), the parties may prepare a stipulated statement explaining how the issues on appeal arose and were decided by the JCC. The order appealed should be attached to this statement as well as those parts of the record necessary for the court of appeal to decide the issues on appeal. If this process is chosen, the parties are required to inform the clerk of the OJCC and file the stipulated statement with the clerk within 60 days.

Rule 9.180(f)(6) provides that the deputy chief judge of compensation claims shall designate the person to prepare the record on appeal, and that the clerk of the OJCC is to supervise the record's preparation. When the record (including any transcript(s)) is ready, the clerk of the OJCC sends it to the JCC who presided over the case to review it and certify that it was prepared according to the rules and send it to the court of appeal within 60 days after the notice of appeal is filed. The JCC is also required to provide an electronic image copy of the record to the lawyers for represented parties, and to any unrepresented party. Rule 9.180(f)(8) allows the JCC to extend the time for delivery by 30 days, but any further extensions requires permission from the appellate court.

Generally, pro se parties receive a copy of the record on a CD through the mail. However, they may also register for electronic access to the OJCC case by going to the eJCC website, https://www.fljcc.org/eJCC, signing up for an account, and then filling out the "request for eJCC

Access to Case" form found at: https://www.fljcc.org/JCC/forms.asp. After completing all of the steps to gain eJCC access to their case, pro se parties may view and download a copy of the appellate record, which is also on their OJCC docket. As with all public records, pro se parties may make a public records request for any missing document they may want.

3. Appeals from Nonfinal Orders

Rule 9.180(b)(1) allows for appeals from only three types of nonfinal administrative orders: orders on jurisdiction, venue, or compensability. The proper method of submitting the record in an appeal in these cases is to include the relevant materials in an appendix to the appellate brief, as discussed in section (B)(1) of this chapter. Rule 9.180(h)(2) provides that in an appeal from a nonfinal order in a workers' compensation case, the "[a]ppellant's initial brief, accompanied by an appendix as prescribed by rule 9.220, shall be served within 15 days of filing the notice" of appeal. Thus, once an appellant files a notice of appeal of one of the nonfinal orders allowed by rule 9.180(b)(1), that party has just 15 days to file an initial brief and appendix. Therefore, it may be advisable to make sure that all documents and transcripts have been obtained before filing the notice of appeal, but keep in mind that the deadline for filing the notice is 30 days after the JCC sends the nonfinal order to the parties either by mail or email, and if the notice of appeal is late the appeal will be waived. See Fla. R. App. P. 9.180(b)(3).

Rule 9.220(b) provides that the appendix shall contain an index (which is a list of the items included in the appendix and the page number on which they can be found), a conformed copy of the order being appealed, and all of the documents that concern or support the appellant's argument on appeal. This includes, for example, any petitions for benefits, motions, responses to motions, and any exhibits or records that were admitted into evidence. Also, if there were any hearings on the issue decided in the non-final order, the appendix should include a transcript of the hearing(s). The appellant may already have copies of the papers that were filed in the JCC that are needed to

include in the appendix. If so, the appellant can usually prepare the appendix from these copies. Otherwise, the appellant may obtain copies of those documents from the judge of compensation claims or through the eJCC electronic filing system. The copies do not have to be certified, but they must be accurate and the appellate parties cannot change or mark up the copy. If a transcript or other record of a hearing is needed for the appendix, the appellant may need to request a copy of the audio recording from the OJCC and then have the audio recording transcribed for inclusion in the appendix.

Rule 9.220(c) provides that the appendix should be filed in electronic (PDF) format unless a paper copy is allowed. The rule then discusses the formatting requirements for an appendix in paper format. The rule provides that, a paper appendix "shall be separately bound or separated from the petition, brief, motion, response, or reply by a divider and appropriate tab, and" that the paper size should be 8 ½ by 11 inches. Please see Chapter 1 for more information on electronic filing in the appellate courts.

The appellee may decide that the appellant's appendix is incomplete or missing important documents or transcripts that were part of the record below. If so, the appellee can file an appendix with the answer brief, following the same format and procedure discussed above and in section (B)(1) of this chapter, including any additional documents that the appellee thinks are necessary for the appellate court to consider. If the appellant files a reply brief and wants to include additional documents from the lower court’s record for the appellate court to review that have not already been included in an appendix, the appellant can file an additional appendix with the reply brief.

4. Costs

The appellant is responsible for paying the cost of preparing the record in a worker's compensation appeal. The cost of preparing the record in a workers' compensation appeal is addressed in rule 9.180(f)(5). For appeals from final orders, subdivision (f)(5)(A) of this rule states

that within 5 days after the contents of the record have been determined, the OJCC must serve notice on the appellant of the estimated cost of preparing the record. At this point, the appellant must either (1) pay the estimated costs within 15 days after service of the notice of the estimated costs, or (2) file a motion asking to be excused from paying all or some of the costs as provided in rule 9.180(g)(3). If the appellant fails to deposit with the JCC the estimated costs, the OJCC will notify the appellate court, which may dismiss the appeal.

Rule 9.180(g)(3) states that the cost of the record will be waived or excused if the appellant can show that the appellant is "insolvent" or "indigent." According to the law, an appellate party is insolvent or indigent if the party has stopped regularly paying his/her debts and cannot pay his/her debts when they are due, or if a bankruptcy court has entered an order stating that an appellate party is insolvent. According to rule 9.180(g)(3)(B), if an appellate party believes that he/she meets these criteria, that party must file a verified petition with the judge of compensation claims within 15 days after the date the judge sent the notice of estimated costs to that party, stating that the appellate party is insolvent. If the verified petition is filed before receiving the notice of estimated costs or more than 15 days after the judge sent the notice of estimated cost, the petition will be denied as untimely. For purposes of pursuing this petition, the party who filed it is referred to as the petitioner rather than as the appellant.

A sample form titled "Verified Petition: Relief from Paying Cost of Record Preparation" can be found online at www.jcc.state.fl.us/JCC/forms.asp. Rule 9.180(g)(3)(D) provides that the petition must be sworn, signed by the appellant, and notarized by a notary public. The petitioner must attach to the petition a complete and detailed "Financial Affidavit," which must also be sworn, signed by the petitioner, and notarized by a notary public. The financial affidavit must list all of the party's assets, liabilities, and income, including assets owned with the party's spouse. A form for the financial affidavit is also available at www.jcc.state.fl.us/JCC/forms.asp. The

petitioner must also attach a copy of any directions filed with the judge of compensation claims specifying which filings the party directed be included in the record.

Rule 9.180(g)(3)(E) states that, when filing the petition for relief, financial affidavit, and a copy of the directions with the judge of compensation claims, the petitioner must also provide copies of the same documents to all other parties to the appeal and to the Division of Workers' compensation (whose website is http://www.fldfs.com/wc/), the office of general counsel of the department of financial services (the department's website is http://www.fldfs.com), and the clerk of the appellate court.

Rule 9.180(g)(3)(F) provides that, after the JCC gives 15 days' notice of the petition to the other parties and the Division of Workers' Compensation, the JCC is to promptly set the matter for a hearing. However, if there is no objection to the petition from any of the other parties or the Division within 20 days, then the JCC can enter an order on the petition without a hearing. Rule 9.180(g)(3)(G) provides that, if the JCC denies the petition, or grants it in part, then the petitioner/appellant must deposit the estimated costs with the JCC within 15 days of the order and, if the appellant fails to do so, the OJCC will notify the appellate court, which may dismiss the appeal. If the appellant decides to withdraw the petition to be relieved of paying for the cost of record, the payment should be submitted when the petition is withdrawn.

5. Transcripts

As noted in section (G)(2) of this chapter, the record in appeals from final orders is supposed to include transcripts of all hearings held by the JCC. Just as in civil appeals, if an appellant needs a transcript of a hearing that was held before the judge of compensation claims, the appellant needs to make arrangements to have a court reporter at the hearing or to be sure the judge will electronically record the hearing, and to have the hearing transcribed. Rule 9.180(f)(6)(A), provides that the deputy chief judge of compensation claims is the one who selects

the transcriber or reporter to prepare the necessary transcript(s), and requires the deputy chief judge to notify the parties of the selection. Subdivision (f)(6)(B) of the rule allows for a party to object to the selection of transcriber, in writing, within 15 days of service of the notice of selection. If there is an objection, the deputy chief judge is to hold a hearing on the matter within 5 days. Subdivision (f)(6)(C) of the rule requires the transcriber selected by the deputy chief judge to certify and deliver an electronic version any transcript(s) to the clerk of the OJCC, and to do so in sufficient time for the OJCC to include the transcript(s) in the appellate record. The transcriber must also notify the parties when the transcript(s) is delivered to the clerk of the OJCC. In an appeal from a nonfinal order, if a transcript or other record of a hearing is needed for the appendix, the appellant may need to request a copy of the audio recording from the OJCC and then have the audio recording transcribed for inclusion in the appendix.

6. Supplementing the Appellate Record

As with an appeal from a final order in a civil case, the parties to a workers' compensation appeal may obtain permission from the appellate court to supplement or correct the record. Rule 9.180(f)(9) explains that the provisions of rule 9.200(f), discussed in section (C)(5) of this chapter, apply to workers' compensation appeals. If there is an error or if something is missing from the record, the parties can stipulate to a correction, the JCC can correct the record before transmitting it, or the appellate court can order the record to be corrected. Any error or omission in the record discovered before the record is transmitted should be brought to the JCC's attention by a motion to supplement or correct the record. If the error or omission is discovered after the record is transmitted to the court of appeal, such motion should be filed with the court of appeal. When it is necessary to supplement or correct the record originally prepared, the procedures concerning the costs of preparing and submitting the record are repeated.

Likewise, if the appellant determines that the appendix that was filed with the initial brief in the appeal of a nonfinal order, the appellant can file a motion with the appellate court requesting permission to amend the appendix to include missing items.

H. Administrative Appeals

1. Introduction

In certain circumstances, Florida law allows parties to appeal decisions or rules issued by Florida state agencies. Fla. R. App. P. 9.190. As in any appeal, without a complete record of all documents that led up to the agency's decision or rule, the appellate court will not be in a position to determine whether the agency made an error. Therefore, appellant has the same duty to make sure that the appellate court receives all of the necessary documents by direction or supplementation.

The procedures for furnishing the record to the appellate court in an administrative appeal are primarily found in Florida Rules of Appellate Procedure 9.190 and 9.200, and all parties involved in the appeal should carefully review and comply with those rules. In challenges to an agency's nonfinal orders and appeals from "immediate" final orders pursuant to section 120.569(2)(n), Florida Statutes, the record will not be prepared by the agency clerk, but instead must be an appendix prepared by the parties and attached to their briefs as described in section (B)(1) of this chapter. See Fla. R. App. P. 9.190(c)(2)(F)&(c)(3) and 9.220. Otherwise, as in other types of appeals, when a party files a notice of appeal of a state agency's final decision or rule, a formal record will be prepared by the agency clerk. As in civil appeals, the parties to an administrative appeal will only receive a copy of the record index, not a copy of the entire appellate record. The parties should construct their personal record using the index and their personal copies of record documents.

If a party to an agency appeal needs to review the appellate record, that party can make arrangements with the agency clerk to review it before it is sent to the appellate court. After the record has been sent to the appellate court, an appellate party can call the clerk of the appellate court to review the record there. Alternatively, many state agencies now have online dockets posted on their web sites, which provide easy public access to copies of most, if not all, documents in the record on appeal. For example, the Division of Administrative Hearings' online docket is accessible at www.doah.state.fl.us.

2. Directions to the Agency Clerk

The appellant generally has 10 days to send the agency clerk written directions identifying the documents to be included or excluded from the record on appeal. The appellee has an additional 10 days to send the agency clerk supplemental directions to include any important documents that may be missing from the appealing party's directions. A standardized "directions to clerk" form is included in the appellate rules and may be used as template in preparing directions to the agency clerk. Fla. R. App. P. 9.900(g). The agency clerk is typically located at the same address as the agency's main headquarters. Most state agencies have a rule published in the Florida Administrative Code identifying their particular agency clerk's address. The agency clerk's name and address can also be obtained by calling the agency's lawyer or searching the agency's website. Like any other pleading, motion, or other paper filed in a legal proceeding, a copy of the directions to the agency clerk must be served on all other parties in the case. It is also wise to send a courtesy copy to the clerk of the appellate court.

The types of documents that should be included in the record on appeal will depend on the type of agency action being appealed and the types of issues raised on appeal. In this regard, it is very important to review rule 9.190(c) and sections 120.57(1)(f) and (2)(b) and 120.574(2)(d), Florida Statutes, which specifically identify the types of documents that must be included in

various types of administrative appeals. As in other types of appeals, such documents normally include, all notices, pleadings, motions, memoranda of law, hearing transcripts, evidence, proposed orders, and orders issued in the administrative proceeding. Fla. R. App. P. 9.190(c). Also like other appeals, the record may generally include only documents that were filed with and reviewed by the state agency before it issued the decision or rule being appealed. Fla. R. App. P. 9.190(c)(1). If documents not on file with the agency are included in the appellate record, the appellate court may strike the document from the record and may even penalize (or "sanction") the party who was responsible for placing them in the appellate record.

3. Transcripts of Agency Proceedings

If the agency action was based on evidence or other presentations made at one or more hearings, it is critical to make sure that a transcript of those hearings is included in the record on appeal. Most state agencies have a duty to make sure that the final hearing is "preserved" by providing a certified tape recording or a court reporter. However, it can sometimes be difficult to get an accurate transcript from a tape recording. Therefore, if a party is considering appealing the agency's decision in the future, that party should request that the agency's lawyer have a court reporter present at all important hearings. If the agency declines to do so, the party should consider hiring a court reporter at that party's own expense. Otherwise, the appellate court will not have an accurate record of what happened at the hearing, and as a result, may not be able to adequately review the issues raised on appeal.

If a relevant hearing transcript was not ordered before the agency issued its decision or rule, the appealing party will be responsible for ordering and paying for this transcript and including it in the record on appeal. If the appellant wins the appeal, the transcription expenses may be recoverable from the losing party or losing parties by filing an appropriate motion to tax appellate costs in a timely manner after the appeal has ended. See Fla. R. App. P. 9.400.

4. Costs

In administrative appeals, the agency clerk may or may not impose fees for electronically transmitting the record to the appellate court. If the record is large, which is often the case, the cost to prepare the record could be significant. Therefore, if costs are a concern to an appellant, before deciding to appeal the appellant should check with the agency clerk to determine whether they will be a charge and to get an estimate of any anticipated fees for preparing the record.

5. Timing

From the date that the notice of appeal is filed, the agency clerk has 50 days to prepare and serve the index to the record on appeal. Fla. R. App. P. 9.110(e). Many times, the agency clerk is unable to meet this deadline and needs an extension of time. If so, the appealing party should file a motion asking the appellate court to grant the agency clerk an extension to prepare the record index. The motion should be filed well before the deadline. In addition to asking for an extension on behalf of the agency clerk, it should also ask the appellate court to "toll" or extend all of the other deadlines in the appeal accordingly.

6. Supplementation

When an appellate party receives the record index, the party should carefully review it to make sure that it is complete. If a party believes that a document is missing from the record index or is mislabeled, that party can file a motion to supplement or correct the record with the appellate court explaining the situation, and requesting correction of the error or supplementation with the missing document. Motions to correct or supplement the appellate record are discussed in detail in section (C)(5) of this chapter.

If a party's review of the record index reveals that one or more documents that were never considered by the agency have been included in the record on appeal, the party can file a motion to strike with the appellate court requesting that those documents be "stricken" from the record on

appeal. Additional forms for use on appeal can be found in the Florida Rules of Appellate Procedure, which can be obtained at a local court, agency law library, law school library or on the Florida Bar's website at http://www.floridabar.org.