

**CHAPTER 9: APPEALS FROM NON-FINAL ORDERS:
WHAT CAN BE APPEALED, WHEN AND HOW**

A. Introduction.

Some orders can be appealed before final judgment, and a person does not always have to wait for a final order or for the case to be over to appeal. That is, in certain situations, appeals of “non-final” orders may be allowed. The kinds of non-final orders that can be appealed immediately depend on the type of case and the type of order. The non-final orders that can be appealed are limited to those listed and described in Florida Rule of Appellate Procedure 9.130.

They include orders that:

1. concern venue (i.e., the county or location of the lawsuit);
2. grant, continue, modify, deny, or dissolve injunctions, or refuse to modify or dissolve injunctions;
3. determine the jurisdiction of the person (i.e., whether the court has authority over the parties);
4. determine the right to immediate possession of property;
5. determine, in family law matters:
 - a) the right to immediate monetary relief,
 - b) rights or duties regarding child custody or time-sharing in a parenting plan, or
 - c) that a marital agreement is invalid in its entirety;
6. determine whether a party is entitled to arbitration, or to an appraisal under an insurance policy;
7. determine that, as a matter of law, a party is not entitled to workers' compensation immunity from the lawsuit;
8. determine whether or not to certify a class (i.e., as in a class action lawsuit);

9. determine that, as a matter of law, a party is not entitled to absolute or qualified immunity in a civil rights claim arising under federal law;

10. determine that a governmental entity has taken action that has inordinately burdened real property under the Bert Harris Property Rights Protection Act, found in section 70.001, Florida Statutes;

11. determine the issue of forum non conveniens (inconvenient forum or location for the lawsuit);

12. determine that, as a matter of law, a party is not entitled to sovereign immunity; or

13. grant or deny the appointment of a receiver, and terminate or refuse to terminate a receivership.

Generally, a district court of appeal does not have jurisdiction over, and cannot review, any non-final orders that are not listed in rule 9.130. It should be noted that orders disposing of motions that suspend rendition of a final order are not reviewable separately from a review of the final order, provided that orders granting motions for new trial in jury and non-jury cases are reviewable by the same method as for a final appeal.

B. Time for Appealing a Non-Final Order.

A party must file a notice of appeal of a non-final order in the lower tribunal clerk's office within 30 days of the date that the non-final order is rendered, meaning the date the order is signed and filed with the lower tribunal's clerk's office. Unlike a motion for rehearing of a final order, a motion for rehearing of a non-final order will not stop, or "toll," the 30-days-to-appeal clock. Thus, the notice of appeal of a non-final order will still need to be filed within 30 days of the date the order is rendered, even if a party asks the trial judge to reconsider or rehear the order to be appealed.

Some non-final orders are entered after a final order is entered. Those non-final orders are only reviewable or appealable if they fit within one of the categories set out in Florida Rule of

Appellate Procedure 9.130, discussed above. If an order does not fit into one of those categories, a party usually must wait for a later final order ending the case or proceeding in order to appeal. Even if a party cannot appeal a non-final order right away, the party can still ask the appellate court to review any non-final order in an appeal from the later final order or judgment.

In addition, if a party cannot take an immediate appeal from a non-final order, there may be other ways to try to get an appellate court to review the order before there is a final judgment. A party may ask the appellate court to review a particular order by filing an extraordinary writ. *See* Chapter 10, Extraordinary Writs.

In some cases, an order may make the case final as to one or more parties, even though the case is continuing against other parties. If an order ends the case as to some of the parties, but the case is still continuing as to other parties, a party may appeal that order. One example is an order dismissing a case with prejudice against one party, but not against other parties. That kind of an order may be a final judgment as to one party, but not as to others. This is usually called a partial final judgment. Appeals from partial final judgments that end the case against one party, but let it continue against other parties, are still appeals from final order or judgments, not appeals of non-final orders. Appeals from final orders are discussed in Chapter 8, the Appellate Process Concerning Final Appeals.

Again, if a party does not appeal from a non-final order that is listed in Florida Rule of Appellate Procedure 9.130 as appealable before final judgment is entered, that party does not lose the right to appeal after final judgment. That party can still get initial review of that non-final order on appeal from the final order or final judgment in the case. However, if the order makes the case final as to one or more parties, the party wanting to appeal that order must take any appeal as to those parties at once or lose the right to appeal at a later time. In other words, if it's a non-

final order, it can be challenged in an appeal from the final judgment. But if it's a final order, it must be appealed within 30 days.

A party can appeal more than one non-final order in a single appeal if all the orders being appealed were timely filed within 30 days of that date on which each order was entered. In other words, multiple non-final orders may be reviewed by a single notice of appeal if the notice is timely filed as to each of those non-final orders.

C. Where the Appeal Needs to Be Filed and What a Notice of Appeal Looks Like.

The notice of appeal of a non-final order is filed the same way as in final appeals. *See* Chapter 8, the Appellate Process and Final Appeals; Chapter 3, Pulling Together the Record on Appeal. In most cases, a party must file the notice of appeal, together with the filing fees, with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed. The notice must be designated as a notice of appeal of non-final order.

An example of the general format for a notice of appeal is contained in Florida Rule of Appellate Procedure 9.900 (forms). A notice of appeal in a civil case might look like this:

IN THE CIRCUIT COURT OF THE 13TH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

Case No. _____

Mr. Smith, Defendant/Appellant

v.

Ms. Jones, Plaintiff/Appellee

NOTICE OF APPEAL

Notice is hereby given that Defendant/Appellant, Mr. Smith, appeals to the Second District Court of Appeal the order of this court rendered on November 2, 2015. The nature of the order is a non-final order which is reviewable under Florida Rule of Appellate Procedure 9.130 (specify subsection). [Attach a copy of the order appealed, per Rule 9.130(c)].

Mr. John Smith

[address, e-mail address, & phone number]

The notice of appeal should also include a certificate of service, which might look like this:

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was furnished to _____ (name of opposing party), at (address, city, state, zip, and/or e-mail address), by (e-mail) (delivery) (mail) on _____ (date).

Mr. John Smith
222 N.W. 2nd Street
City, State 11111
Telephone: (234) 567-8901

By: _____
Mr. John Smith

Note that if it is the defendant who is appealing, the defendant's name is listed first in the case name, or "caption," of the notice of appeal (instead of the plaintiff's name). A conformed copy of the order(s) identified in the notice of appeal should be enclosed with the notice.

D. The Main Ways that a Non-Final Appeal Is Different From a Final Appeal.

While the non-final appeal is pending, the lower tribunal proceeding will keep going. This means that unless a stay order is entered, the lower tribunal may continue moving forward with and deciding all matters, including trial or final hearing. The only thing the lower tribunal cannot do while the appeal is pending is enter a final order disposing of the case. If the appeal is about questions of jurisdiction or venue, the lower tribunal will usually grant a motion for a stay, but motions seeking a stay should be filed promptly. *See* Chapter 11, Stays Pending Review.

There are two other main ways that an appeal from a non-final order in a civil case differs from an appeal after final judgment. First, the appellant's initial brief is due served within 15 days of filing the notice of appeal, rather than 70 days. (But the time for the appellee's answer brief and the appellant's reply brief remains the same as in a final appeal). Secondly, in a non-final appeal,

unlike appeals from final orders or judgments, the clerk of the lower tribunal does not prepare a record on appeal and send it to the appellate court. Instead, the appellant in a non-final appeal must put together an “appendix” containing the important documents that the appellate court needs to have to decide the non-final appeal. The appendix is filed with the court and a copy served on the other parties at the same time as the initial brief. *See* Florida Rule of Appellate Procedure 9.220.

The appendix in a non-final appeal must contain the order that the appellant wants the appellate court to review, and the relevant pleadings, motions, transcripts and other documents on record that the appellant needs to understand the case and decide the issues on appeal. It must also contain an index, or table of contents, in the beginning of the appendix to help the appellate court find the specific items that the appellant wants the appellate court to consider. The appendix is usually separate from the brief and has its own cover page and certificate of service. If the appellate court determines that the appendix is incomplete, it may direct a party to supplement the appendix with the missing parts of the lower tribunal file that the appellant decides it needs to review the non-final appeal.

E. Special Issues for Non-Final Appeals in Criminal Cases.

In criminal cases, a defendant may generally appeal, in addition to final judgments (including withholding of adjudication and sentences), orders entered after final judgment or after a finding of guilt. Those orders include orders revoking or modifying probation or community control, or both, or orders denying relief in postconviction proceedings under Florida Rules of Criminal Procedure 3.800(a), 3.801, 3.850, 3.851, or 3.853. *See also* Chapter 13, Appeals of Motions for Postconviction Relief.

The State in a criminal case may appeal (1) orders dismissing an indictment or information or any count thereof or dismissing an affidavit charging the commission of a criminal offense, the

violation of probation, the violation of community control, or the violation of any supervised correctional release; (2) orders suppressing before trial confessions, admissions, or evidence obtained by search and seizure; (3) orders granting a new trial; (4) orders arresting judgment; (5) orders granting a motion for judgment of acquittal after a jury verdict; (6) orders discharging a defendant under Florida Rule of Criminal Procedure 3.191; (7) orders discharging a prisoner on *habeas corpus*; (8) orders finding a defendant incompetent or insane; (9) orders finding a defendant intellectually disabled under Florida Rule of Civil Procedure 3.203; (10) orders granting relief under Florida Rule of Criminal Procedure 3.801, 3.850, 3.851, or 3.853; (11) orders ruling on a question of law if a convicted defendant appeals the judgment of conviction; (12) orders withholding adjudication of guilt in violation of general law; (13) orders imposing an unlawful or illegal sentence or imposing a sentence outside the range permitted by the sentencing guidelines; (14) orders imposing a sentence outside the range recommended by the sentencing guidelines; (15) orders denying restitution; and (16) as otherwise provided by general law for final orders. *See* Florida Rule of Appellate Procedure 9.140(c). The State, as provided by general law, may also appeal to the circuit court non-final orders rendered in the county court.

The procedures in criminal non-final appeals differ from those in civil non-final appeals. The criminal defendant's notice of appeal must be filed with the clerk of the lower tribunal with copies to the State Attorney and the Attorney General within 30 days of the date the order was rendered. In criminal appeals, the clerk of the lower tribunal is to prepare and serve the record on appeal within 50 days of the filing of the notice of appeal and the initial brief is to be served within 30 days of service of the record or designation of appointed counsel, whichever is later. All further briefs (the answer and reply briefs) follow the same time-frame as for civil appeals. *See* Florida Rule of Appellate Procedure 9.140(b)(3), (f)(1), & (g).

In cases of summary denial (without a hearing) of petitions for post-conviction relief under Florida Rule of Criminal Procedures 3.800(a), 3.801, 3.850, or 3.853, the clerk of the lower tribunal is to send the appellate court the motion, the order, any motion for rehearing, and any order denying rehearing, plus all attachments to any of these items. The record on appeal in these cases is discussed more in the Chapter on Pulling Together the Record on Appeal. No briefs are required, but the appellant may file a brief within 15 days of filing the notice of appeal. *See* Florida Rule of Appellate Procedure 9.141.

F. Special Issues for Non-Final Appeals in Juvenile Delinquency Cases

In juvenile delinquency cases, the State may appeal: (1) orders dismissing a petition for delinquency or any part of it, if the order is entered before the beginning of an adjudicatory hearing; (2) orders suppressing confessions, admissions, or evidence obtained by search and/or seizure before the adjudicatory hearing; (3) orders granting a new adjudicatory hearing; (4) orders arresting judgment; (5) orders discharging a child under Florida Rule of Juvenile Procedure 8.090; (6) orders ruling on a question of law if a child appeals an order of disposition; (7) orders constituting an illegal disposition; (8) orders discharging a child on *habeas corpus*; and (9) orders finding a child incompetent pursuant to the Florida Rules of Juvenile Procedure. The affected child, parent, legal guardian, or custodian may appeal (1) an order adjudicating or withholding adjudication of delinquency or disposition order; (2) orders entered after an order adjudicating or withholding adjudication of delinquency, including orders revoking or modifying community control; (3) an illegal disposition; and (4) any other final order as prescribed by law. *See* Florida Rule of Appellate Procedure 9.145(c).

The procedures in non-final juvenile delinquency cases differ from those in non-final civil appeals in a number of ways. The State's notice of non-final appeal must be filed in the lower tribunal within 15 days of the order, and before the beginning of the adjudicatory hearing. If the

child is in detention and the case is stayed during an appeal by the State, the child is to be released if the offense would be subject to bail if the child were charged as an adult; otherwise, the lower tribunal has discretion to release the child. All references to the child in all court documents are to be by initials, not by name, and all papers are treated confidentially.

There are also several types of orders that are immediately appealable in juvenile dependency cases or in cases involving the termination of parental rights. In juvenile dependency, termination of parental rights, and cases involving children and families in need of services, only certain persons may appeal to the appropriate court within the time and in the manner that the Florida Rules of Appellate Procedure prescribe. Those persons are limited to: any child, any parent, guardian ad litem, or legal custodian of any child, any other party to the proceeding affected by an order of the lower tribunal, or the appropriate state agency as provided by law.

The procedures in non-final juvenile dependency and termination of parental rights cases also differ from those in non-final civil appeals. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed. *See* Sections 39.510 and 39.815, Florida Statutes, and Florida Rule of Appellate Procedure 9.146. All references to the child or the parents are to be by initials, not by name, and all papers are treated confidentially. The courts are to give priority to appeals in these cases. A termination of parental rights order with placement of the child for later adoption is suspended while the appeal is pending, although the child continues in custody. *See also* Chapter 14, Appeals of Orders Rendered in Dependency and Termination of Parental Rights Proceedings.

G. Special Issues for Non-Final Appeals in Workers' Compensation Cases.

In workers' compensation cases, an appeal can be taken from any non-final order that determines:

- (1) jurisdiction (the court's ability to hear the case);

(2) venue (the county where the case is heard); or

(3) compensability, provided that the order expressly finds an injury occurred within the scope and course of employment and that the claimant is entitled to receive causally related benefits in some amount, and provided further that the lower tribunal certifies in the order that determination of the exact nature and amount of benefits due to the claimant will require substantial expense and time. *See* Florida Rule of Appellate Procedure 9.180(b)(1).

The procedures in non-final workers' compensation appeals differ from civil non-final appeals in several important ways. The notice of appeal, already outlined above, must also include a brief summary of the types of benefits affected by the order. It must also include a statement setting forth the time frames involved. Such a statement could be, for example: "I hereby certify that this appeal affects only the following periods and classifications of benefits and medical treatment," followed by a list of the benefits and time periods involved in the appeal. Such benefits may be withheld pending the outcome of the appeal. Within 15 days after filing the notice of appeal, the appellant must file the initial brief with the court, and serve a copy on each of the other parties. The brief must be accompanied by an appendix that contains the order to be reviewed, along with any other documents or transcripts which were filed in the lower tribunal and which would be helpful to the appellate court in understanding the case on appeal. *See also* Chapter 17, Workers' Compensation Appeals; Chapter 3, Pulling Together the Record on Appeal.

H. Special Issues for Non-Final Appeals in Administrative Law Cases.

In many situations, the Administrative Procedure Act, Chapter 120, Florida Statutes, determines whether a non-final administrative agency action or order may be immediately appealed. Section 120.68, Florida Statutes, provides that non-final agency orders may be appealed if review of the final agency decision would not provide an adequate remedy. If a

would-be appellant's case is not one governed by Chapter 120, Florida Statutes, that appellant needs to check the particular statutes that govern that appellant's type of case to see if appellant can appeal a particular non-final order.

The procedures for what needs to be done to obtain review of a non-final order in an administrative law case are different from the procedures in other types of cases. In administrative cases, an appellant generally files a petition for review of non-final agency action under the Administrative Procedure Act, together with Florida Rules of Appellate Procedure 9.100(b) and (c). *See* Florida Rule of Appellate Procedure 9.190(b)(2)&(c)(3). Instead of filing a notice of appeal, an appellant must file a petition for review (which is similar to an initial brief), along with the filing fees, within 30 days of rendition of the order to be reviewed. The administrative judge, the hearing officer, or the individual members of the administrative agency are not named as respondents (opposing parties). A copy of the petition must be served on the administrative agency. The petition must include the name of the court that is going to be reviewing the order, the name and designation of all parties on each side of the case, the basis for the court's jurisdiction (authority to hear the case), the facts on which appellant relies in seeking relief, the nature of the relief sought (what the appellant wants the appellate court to do), and the legal argument with supporting cases, statutes, and rules. The appellant must sign and certify that he/she has served copies to the opposing side and to the administrative agency.

The appellant must also file and serve an appendix in accordance with Florida Rule of Appellate Procedure 9.220, which may not contain any matter not made part of the record in the administrative agency. The appendix must contain the order that the appellant wants the court to review and should contain any other documents that the appellant thinks the court will need to decide the appeal. If the court makes a preliminary, or initial, determination that the appellant's petition is within its authority to review and may state a claim on which it can grant relief, the

court will issue an order to show cause and require the other side to file a response and explain why the relief the appellant seeks should not be granted. The court will then generally give the appellant a chance to reply to that response. The court will then make its decision.

In cases not governed, or controlled, by the Administrative Procedure Act, different procedures (often a petition for writ of certiorari) may be provided. The appellant should review the particular statutes that govern the case in question to see what procedures may apply. *See also* Chapter 15, Administrative Appeals; Chapter 3, Pulling Together the Record on Appeal.

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