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SUBCOMMITTEE REPORT FORM AD HOC SUBCOMMITTEE ON MANDATE CHANGE

Date: June 3, 2013
Chair: Rob Telfer
Members attending: Rob Telfer; Elizabeth Wheeler; Kristin Norse; Judge Wetherell
Meeting Dates: The group met electronically between May 21 and June 3, 2013.

I. History / Background

Chair Ufferman appointed this ad hoc subcommittee upon receiving a letter from Tom Hall dated May 20, 2013, concerning recent Chapter 2013-25, Laws of Florida, which Governor Scott approved on April 17, 2013, and which will become effective January 1, 2014. Pertinent to the ACRC, Chapter 2013-25 creates Section 43.44, Florida Statutes, which reads as follows:

43.44 Mandate of an appeals court.—An appellate court may, as the circumstances and justice of the case may require, reconsider, revise, reform, or modify its own opinions and orders for the purpose of making the same accord with law and justice. Accordingly, an appellate court may recall its own mandate for the purpose of allowing it to exercise such jurisdiction and power in a proper case. A mandate may not be recalled more than 120 days after it has been issued.

Chapter 2013-25 also repealed statutory terms of court applicable to the circuit courts, district courts of appeal and the Florida Supreme Court. It also allows the Florida Supreme Court to establish terms of court for it and for the lower courts, if it wishes.

The Rules of Judicial Administration Committee appointed an ad hoc subcommittee to determine if it needed to propose any rule amendments in light of Chapter 2013-25, Laws of Florida. That ad hoc subcommittee proposed two amendments to Rules 2.205(b)(5) and 2.210(b)(4). The Rules of Judicial Administration Committee's chair requested that the ACRC review the proposed revisions, which are reflected below (underlined words are additions):

2.205(b)(5): *Issuance of Mandate: Recordation and Notification.* The clerk shall issue such mandates or process as may be directed by the court. If, within 120 days after a mandate has been issued, the court directs that a mandate be recalled, then the clerk shall recall the mandate. Upon the issuance or recall of any mandate, the clerk shall record the issuance or recall in a book or equivalent electronic record kept for that purpose, in which the date of issuance or date of recall and the manner of transmittal of the process shall be noted. In proceedings in which no mandate is issued, upon final adjudication of the pending cause the clerk shall transmit to the party affected thereby a copy of the court's order or judgment. The clerk shall notify the attorneys of record of the issuance of any mandate, the recall of any mandate, or the rendition of any final judgment. The clerk shall furnish without charge to all attorneys of record in any cause of any order or written opinion rendered in such action.

2.210(b)(4): *Issuance of Mandate: Recordation and Notification.* The clerk shall issue such mandates or process as may be directed by the court. If, within 120 days after a mandate has been issued, the court directs that a mandate be recalled, then the clerk shall recall the mandate. If the court directs that a mandate record shall be maintained, then upon the issuance or recall of any mandate the clerk shall record the issuance or recall in a book or equivalent record kept for that purpose, in which shall be noted the date of issuance or the date of recall and the manner of transmittal of the process. In proceedings in which no mandate is issued, upon final adjudication of the pending cause the clerk shall transmit to the party affected thereby a copy of the court's order or judgment. The clerk shall notify the attorneys of record of the issuance of any mandate, the recall of any mandate, or the rendition of any final judgment. The clerk shall furnish without charge to all attorneys of record in any cause a copy of any order or written opinion rendered in such action.

Chair Ufferman requested that the ad hoc subcommittee (1) consider the RJA's proposed amendments and provide feedback, and (2) determine if the ACRC needs to do anything in response to the legislation

II. Summary of the Issues:

The issues considered by the ad hoc subcommittee were whether the ad hoc subcommittee had any feedback on the RJA's proposed amendments, and whether any amendments to Rule 9.340 are necessary.

III. Majority Position:

With respect to the RJA's proposed amendments, the ad hoc subcommittee unanimously approved of the proposed amendments and had no substantive feedback. Chair Ufferman communicated this to the RJA chair.

With respect to whether any amendments to Rule 9.340 are necessary, each of the ad hoc subcommittee members provided analysis of Section 43.44's potential impact on Rule 9.340, and Judge Wetherell also solicited and provided insight from First District Court of Appeal Clerk Jon Wheeler. The ad hoc subcommittee also reviewed pertinent portions of the Final Bill Analysis for HB 7017, and *Chapman v. St. Stephens Protestant Episcopal Church*, 105 Fla. 683, 138 So. 630 (Fla. 1932).

After consideration, the ad hoc subcommittee, in a 3-1 vote, recommended an amendment to Rule 9.340(a) to reflect the 120 day limit in Section 43.44. One member of the ad hoc subcommittee felt that no changes were needed to Rule 9.340 because the period within which the court may recall its mandate is now provided in statute and the proposed rule amendment is simply a restatement of the statute. The ad hoc subcommittee also considered but decided against adding language to limit the time within which a motion to recall a mandate

could be filed. Such a limitation has never been codified. If experience under the amended rule suggests that such a limitation is warranted, the issue can be reconsidered in the future.

V. Proposed Amendment

RULE 9.340. MANDATE

(a) **Issuance of Mandate.** Unless otherwise ordered by the court or provided by these rules, the clerk shall issue such mandate or process as may be directed by the court after expiration of 15 days from the date of an order or decision. A copy thereof, or notice of its issuance, shall be served on all parties. The court may direct the clerk to recall its mandate, but not more than 120 days after its issuance.

(b) **Extension of Time for Issuance of Mandate.** Unless otherwise provided by these rules, if a timely motion for rehearing, clarification, or certification has been filed, the time for issuance of the mandate or other process shall be extended until 15 days after rendition of the order denying the motion, or, if granted, until 15 days after the cause has been fully determined.

(c) **Entry of Money Judgment.** If a judgment of reversal is entered that requires the entry of a money judgment on a verdict, the mandate shall be deemed to require such money judgment to be entered as of the date of the verdict.

Committee Notes

1977 Amendment. This rule replaces former rule 3.15. The power of the court to expedite as well as delay issuance of the mandate, with or without motion, has been made express. That part of former rule 3.15(a) regarding money judgments has been eliminated as unnecessary. It is not intended to change the substantive law there stated. The 15-day delay in issuance of mandate is necessary to allow a stay to remain in effect for purposes of rule 9.310(e). This automatic delay is inapplicable to bond validation proceedings, which are governed by rule 9.330(c).

1984 Amendment. Subdivision (c) was added. It is a repromulgation of former rule 3.15(a), which was deleted in 1977 as being unnecessary. Experience proved it to be necessary.

VI. Time Consideration for Adopting Proposal:

This statutory change takes effect January 1, 2014. Thus, the Florida Supreme Court needs to review the proposed amendment before this effective date.

SUBCOMMITTEE REPORT FORM
AD HOC SUBCOMMITTEE ON MANDATE CHANGE

Date: August 21, 2013
Chair: Rob Telfer
Members attending: Rob Telfer; Elizabeth Wheeler; Kristin Norse; Judge Wetherell
Meeting Dates: The ad hoc subcommittee met electronically after the June 28, 2013 meeting of the ACRC

I. History / Background

For a complete recitation of the history and background of the proposal under consideration, please see the Subcommittee Report dated June 3, 2013. In sum, Chair Ufferman appointed this subcommittee and requested that it review Chapter 2013-25, Laws of Florida, which Governor Scott approved and which will become effective January 1, 2014. With respect to this statutory change, Chair Ufferman specifically requested that the ad hoc subcommittee review and consider Section 43.44, Florida Statutes, and then: (1) review proposed rule amendments suggested by the Rules of Judicial Administration; and (2) consider whether any amendments to the Rules of Appellate Procedure were necessary. Section 43.44, Florida Statutes, provides as follows:

43.44 Mandate of an appeals court.—An appellate court may, as the circumstances and justice of the case may require, reconsider, revise, reform, or modify its own opinions and orders for the purpose of making the same accord with law and justice. Accordingly, an appellate court may recall its own mandate for the purpose of allowing it to exercise such jurisdiction and power in a proper case. A mandate may not be recalled more than 120 days after it has been issued.

Chapter 2013-25 also repealed statutory terms of court applicable to the circuit courts, district courts of appeal and the Florida Supreme Court. It also allows the Florida Supreme Court to establish terms of court for it and for the lower courts, if it wishes.

The ad hoc subcommittee considered and approved the proposed amendments to Rules 2.205(b)(5) and 2.210(b)(4).

The ad hoc subcommittee considered and recommended an amendment to Rule 9.340(a), to reflect the appellate court's 120 day limit to recall its mandate. The proposed amendment to Rule 9.340(a) read as follows:

RULE 9.340. MANDATE

(a) Issuance of Mandate. Unless otherwise ordered by the court or provided by these rules, the clerk shall issue such mandate or process as may be directed by the court after expiration of 15 days from the date of an order or decision. A copy thereof, or

notice of its issuance, shall be served on all parties. The court may direct the clerk to recall its mandate, but not more than 120 days after its issuance.

(b) Extension of Time for Issuance of Mandate. Unless otherwise provided by these rules, if a timely motion for rehearing, clarification, or certification has been filed, the time for issuance of the mandate or other process shall be extended until 15 days after rendition of the order denying the motion, or, if granted, until 15 days after the cause has been fully determined.

(c) Entry of Money Judgment. If a judgment of reversal is entered that requires the entry of a money judgment on a verdict, the mandate shall be deemed to require such money judgment to be entered as of the date of the verdict.

At the meeting of the ACRC on June 28, 2013, some members expressed some reservations concerning the proposed amendment to Rule 9.340(a). Notably, Jeffrey Kuntz raised the following concern, which he subsequently provided to the ad hoc subcommittee chair in an e-mail:

My general concern was the fact that the statutory deadline/timeline seems to eradicate the power of the appellate court to recall its mandate. While the general rule is that a mandate can only be recalled during the term of court, there seem to be many exceptions to that rule. The courts have determined the exceptions exist and that they have the jurisdiction to invoke the exceptions, can the legislature really take away those power? Further, since 1977, the power of the courts to control their mandate as been expressed in a rule of procedure. *See* Fla. R. App. P. 9.340 (see 1977 Committee Notes which stated that "the power of the court to expedite as well as delay issuance of the mandate, with or without motion, has been made express."). Can the legislature alter this rule of procedure?

That being said, generally the issues I believe that I raised at the June 28, 2013 ACRC meeting were the following:

1. I questioned whether it is the role of the legislature to put a time limit on the power of the Florida Supreme Court (or the other appellate courts) to exercise jurisdiction over its judgments. However, I assume that issue has been discussed, reviewed, and considered.
2. I also questioned whether this statute limits powers (i.e. jurisdiction) the courts have decided that they have over their judgments.
3. If a time limit is instituted, I believe the rule should be drafted to require the motion to recall mandate to be filed within any time as opposed to requiring the court to recall its mandate within a time frame. The Seal of the Supreme Court of Florida includes —the official motto [which] is the Latin phrase *Sat Cito Si Recte* which means "Soon enough if done rightly." [See the Court's About Page](#). —The phrase indicates the importance of taking the time necessary to reach the correct result." Given its seal, it would seem odd to require the Court to rule within a time frame regardless of whether or not that ruling is right.

There are cases where a mandate is recalled to prevent a miscarriage of justice, when the mandate was improvidently issued, mistake, and related issues. In 1981, the First District summarized some of these cases as follows:

In *Chapman v. St. Stephens Protestant Episcopal Church*, 105 Fla. 683, 138 So. 630 (1932), the Supreme Court held that it has jurisdiction to modify or change its own judgment of reversal during the term at which the judgment was rendered, when it is made to appear to the court that it has committed an error which requires such change of its judgment in order to prevent a miscarriage of justice, even though a mandate has been issued and lodged in the circuit court. The court stated the rule that jurisdiction of an appellate court over its own judgments persists to the end of the term at which the judgment is rendered, and then absolutely terminates, in the absence of statute or rule having the effect of a statute in force to the contrary, and that the appellate court in a proper case may recall its mandate and reassume jurisdiction over its own judgments during the term at which they were entered. See *Colonel v. Reed*, 379 So. 2d 1297 (Fla. 4th DCA 1980). In *Barth v. City of Miami*, 146 Fla. 542, 1 So.2d 574 (1941), the court recalled its mandate during the same term and reconsidered a case involving a negligence complaint which it had previously affirmed the dismissal of. The affirmance was based on law which was changed by the court in a subsequent decision, *City of Tampa v. Easton*, 145 Fla. 188, 198 So. 753 (1940), a case which extended and widened the domain of municipal liability. The court reconsidered the Barth case based on the law announced in *City of Tampa v. Easton*. A similar situation occurred in *Jerry v. State*, 174 So. 2d 772 (Fla. 2nd DCA 1965). In that case also the court recalled its mandate in order to conform the ruling in Jerry to a recent decision of the court in *Jones v. State*, 174 So. 2d 452 (Fla. 2nd DCA 1965). The court held that it retained the right to recall and vacate a mandate for good cause until the end of the term in which the mandate was issued.

Westberry v. Copeland Sausage Co., 397 So. 2d 1018, 1019 (Fla. 1st DCA 1981); see also *Lovett v. State*, 11 So. 176, 180 (Fla. 1892) (The court has the power at any time to amend its judgment if it is erroneous by reason of a misentry of the clerk, or by reason of any other mistake, or that such judgment may be set aside and treated as a nullity if it has been procured by fraud, or is the result of misapprehension.”); *Zielke v. State*, 839 So. 2d 911, 913 (Fla. 5th DCA 2003) (We conclude that our jurisdiction had not expired because a motion for rehearing subsequently determined by us to be timely was filed and pending when the prior term of court ended. This being so, the mandate was improvidently issued and should be withdrawn.”).

On the main point for which I was called, one of the issues I raised at the June 28, 2013 meeting related to the court’s all writs jurisdiction. The Florida appellate courts have the inherent power to enforce our mandates and to give such judgment, sentence or decree as the court below should have given.” *Stuart v. Hertz Corp.*, 381 So. 2d 1161, 1163 (Fla. 4th DCA 1980) (citing *Posner v. Posner*, 257 So.2d 530 (Fla.1972); *Cone v. Cone*, 68 So.2d 886 (Fla.1953); *A. M.*

Klemm & Son v. City of Winter Haven, 141 Fla. 60, 192 So. 652 (1939)). The ~~all~~ writs” provision is not an independent basis for jurisdiction, but instead ~~operates~~ as an aid to the Court in exercising its ultimate jurisdiction, ‘conferred elsewhere in the constitution.” *Williams v. State*, 913 So. 2d 541, 543 (Fla. 2005). I continue to believe that no time limit imposed by the legislature could impede the constitutional all writs jurisdiction. However, I am not able to find the cases I referenced at the June 28, 2013 meeting.

Even if a mandate cannot be recalled, the rule should not be drafted in a manner that gives a false impression that the courts favor a timeline over justice. *Joseph v. State*, 447 So. 2d 243, 246–247 (Fla. 3d DCA 1983) (~~to~~ur disability to recall the mandate in Neal’s case does not mean that Neal is without remedy and that his convictions must forever stand. Our system of justice, properly concerned with the finality of decisions, is flexible enough to allow that the doctrine of finality may give way when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications.” (quoting *Witt v. State*, 387 So.2d 922, 925 (Fla. 1980)). Going back to the Great Seal of the Florida Supreme Court, justice is accomplished ~~Soon enough if done rightly.~~” I do not believe a time limit imposed by the legislature can put a time frame on soon enough.

In light of the comments of Mr. Kuntz and others at the June 28, 2013 meeting of the ACRC, Chair Ufferman asked that the ad hoc subcommittee reconsider the proposed amendment to Rule 9.340(a), and whether any additional changes may be necessary.

II. Summary of the Issues:

The issues considered by the ad hoc subcommittee were whether the proposed amendment to Rule 9.340(a) required modification in light of the comments and issues raised at the June 28, 2013 ACRC meeting.

III. Majority Position:

The ad hoc subcommittee considered Mr. Kuntz’s comments, as well as other concerns raised at the ACRC meeting. The ad hoc subcommittee felt that the Florida Supreme Court should have the opportunity to consider whether it should adopt the proposed amendment. The ad hoc subcommittee also agreed with Kristin Norse’s analysis, with respect to whether this statutory change (and proposed rule amendment) may affect the Florida Supreme Court’s *all writs* jurisdiction, that the Court should be permitted the opportunity to determine whether *all writs* jurisdiction or similar remedies should continue to allow parties that avenue for relief.

Betty Wheeler proposed a minor change to its proposed amendment, to change ~~its~~” in the previous proposal to change the first ~~its~~” to ~~the~~” to avoid confusion. The ad hoc subcommittee approved this change unanimously.

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