

## IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO THE  
FLORIDA RULES OF JUDICIAL  
ADMINISTRATION AND THE  
FLORIDA RULES OF APPELLATE  
PROCEDURE**

**Case No.: SC13-1670**

### **JOINT SUPPLEMENTAL REPORT OF THE RULES OF JUDICIAL ADMINISTRATION COMMITTEE AND THE APPELLATE COURT RULES COMMITTEE**

The Honorable Jon B. Morgan, Chair, Rules of Judicial Administration Committee (“RJA”), Eduardo I. Sanchez, Chair, Appellate Court Rules Committee (“ACRC”), and John F. Harkness, Jr., Executive Director, The Florida Bar, file this joint supplemental report, addressing the proposed amendments to Florida Rules of Judicial Administration 2.205(b)(5) and 2.210(b)(4), and Florida Rule of Appellate Procedure 9.340(a). More specifically, in accordance with the Court’s instructions, this joint supplemental report discusses both the dissenting views expressed by Appellate Court Rules Committee members who dissented from the foregoing jointly-proposed amendments and the Committees’ position on those views and concerns. RJA voted 26-0-1 in favor of this joint supplemental report. ACRC voted 42-0 in favor of this joint supplemental report.

#### **Dissenting Views Of Committee Members<sup>\*</sup> And The Committee’s Position On Such Dissenting Views**

##### **A. The Procedural Versus Substantive Concern**

The primary reason for dissent was the belief that the Legislature’s statutory change was or may have been procedural in nature, rather than substantive, and therefore outside the Legislature’s purview. Related questions were also raised as to whether the ACRC should address a subject that at least potentially involved a

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<sup>\*</sup> This Supplemental Memorandum only discusses the dissenting views expressed by dissenting ACRC members; no members of the RJA dissented from the proposed amendments.

procedural change by the Legislature and, under those circumstances, recommend adoption of a proposed rule amendment implementing the legislative enactment.

Recognizing that a constitutional separation of powers issue was implicated by the legislative enactment, the Committee concluded that it was unnecessary to resolve or directly address that issue. Rather, the Committee concluded that presenting the Supreme Court with a proposed rule amendment would allow the Court to decide whether to adopt the amendment, which would moot the substantive/procedural issue, or reject the amendment, which could permit any affected party to later argue that the legislative provision is unconstitutional. The Committee concluded that providing the Supreme Court with the opportunity to address this issue is preferable to leaving litigants who might be affected by sections 43.44 and 43.43, Florida Statutes, in unnecessary limbo.

The Committee, however, did not recommend the proposed amendments simply because it felt constrained to propose rule amendments that mirrored or implemented the legislative enactments. Rather, the Committee recommended the proposed amendments because it concluded that the amendments were sound and an improvement over the previously existing mandate-recall scheme tied to terms of court.

Before section 43.43, Florida Statutes, repealed terms of court (subject to Florida Supreme Court reinstatement), the time period to seek recall of the mandate was the expiration of the term in which the mandate was issued. Now, the time period in section 43.44, Florida Statutes, is 120 days after the mandate is issued. The 120-day period is far less arbitrary than the periods tied to the expiration of the term of court, which could be as long as 179 days, if the mandate was issued on the first day of the term, or as short as several hours, if the mandate was issued on the last day of the term. Moreover, unlike the fluctuating time periods tied to the terms of court, the period for recalling a mandate under the proposed amendments would be consistent and uniform for all litigants. The amendments would thus also lead to less confusion about the applicable deadlines.

**B. *Concern Regarding Effect on Adoptions  
Following Terminations of Parental Rights***

At least one dissenting ACRC member expressed concern over the uncertain effect that the recall of a mandate on an order terminating parental rights might have on an adoption. Because this same issue already existed before section 43.43,

Florida Statutes, repealed terms of court, the Committee was not persuaded that the proposed rule amendment would give rise to any new concern or adverse effect.

**C. The Concern About the Court's All Writs Jurisdiction**

ACRC members also raised concerns that the Court's all writs jurisdiction might be impeded by the statutory change and proposed rule amendment.

The Committee concluded that this concern was unwarranted, and that the Court's all writs jurisdiction should not be impeded by the proposed rule amendments. 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).

**D. The Concerns About Potential Injustices and Creating Perceptions That the Judicial System Is Unjust**

Dissenting ACRC members expressed concern that the proposed rules' timeline might lead to injustices, and that a rule should not be drafted in a manner that erroneously creates an impression that the courts favor a defined timeline over justice.

The Appellate Court Rules Committee concluded that these concerns were unwarranted because the judicial system is sufficiently flexible to address potential injustices. *See, e.g., Joseph v. State*, 447 So. 2d 243, 246-247 (Fla. 3d DCA 1983) ("[O]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)).

When prior time-to-recall-mandate issues have created an injustice, Florida's courts have found a remedy, and that precedent should still apply and provide a remedial safety valve if a similar injustice should arise under the proposed

amendments. In criminal cases, remedies, such as habeas corpus and collateral relief pursuant to rule 3.850, remain available if needed to correct an injustice notwithstanding the fact that the applicable mandate cannot be withdrawn. The Appellate Court Rules Committee concluded that this should be no different whether a mandate was no longer subject to recall because of the expiration of the term of court in the past or because of the expiration of the 120-day period currently reflected in section 43.44, Florida Statutes, and the proposed amended rules. Indeed, defined deadlines exist under both the proposed amendments and alternatives where recall of the mandate is tied to the expiration of the term of court; the primary differences are simply the manner in which those deadlines are calculated and the length of time before those deadlines are reached.

### **Conclusion**

Although the Committees recognize that some litigants may confront problems as a result of the 120-day limit in the new amendments, the Committees have concluded that litigants should confront fewer such problems under the new amendments than under the preceding rules or under a new scheme where recall of the mandate would be similarly tied to terms of court.

In sum, after examining the noteworthy concerns expressed by the dissenting ACRC members, the Committees have concluded that the proposed amendments are sound and both fairer and more beneficial to litigants than alternatives in which the recalls of mandates are linked to terms of court.

Respectfully submitted on March 21, 2014.

/s/ Jon B. Morgan

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The Honorable Jon B. Morgan, Chair  
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### **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was furnished by e-mail, on March 21, 2014, to:

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### **CERTIFICATION OF COMPLIANCE**

I certify that this report was prepared in compliance with the font requirements of Florida Rule. Appellate Procedure 9.210(a)(2).

/s/ Heather S. Telfer

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