

IN THE SUPREME COURT OF FLORIDA

**IN RE: CONSIDERED AMENDMENT TO FLORIDA
RULES OF APPELLATE PROCEDURE**

9.310

Case No.: SC07-299

**OUT-OF-CYCLE REPORT OF THE
APPELLATE COURT RULES COMMITTEE**

Edward Maurice Mullins, Chair, Florida Appellate Court Rules Committee (“ACRC”), and John F. Harkness, Jr., Executive Director, The Florida Bar, submit this out-of-cycle report of the ACRC under *Fla. R. Jud. Admin.* 2.140(f).

In June 2006 the ACRC was asked by the Florida Supreme Court to analyze the need to amend *Fla. R. App. P.* 9.310 in light the passage of section 45.045, Florida Statutes (2006). The ACRC voted not to propose a new rule, or an amendment to rule 9.310, by a vote of 45-7. The ACRC conveyed its response via a letter to the Court dated February 1, 2007. Subsequently, the Court requested that the contents of that letter be put in a Report format. Because the ACRC voted not to amend the rule, the style of this proceeding is to a “considered amendment” proposal. A copy of the rule proposal considered, but rejected by the ACRC, is attached in full-page legislative format as Appendix A and in two-column format as Appendix B.

DISCUSSION

On receipt of the Court's request, the ACRC's Executive Committee directed the Civil Rules Subcommittee (CRSC) to address the following issues:

1. Constitutionality of section 45.045, Florida Statutes;
2. Whether a rule change is needed;
3. Regardless of whether a rule change is needed, to recommend amended language.

The Executive Committee examined the constitutionality of section 45.045 because some members of the ACRC thought that information would be helpful to them in their decision. The Executive Committee also asked the CRSC to propose a suggested rule no matter the ultimate vote of the CRSC so that the ACRC and the Court would have the benefit of the CRSC's work product.

The CRSC worked throughout the summer of 2006 on these issues. Subcommittee members Dorothy Easley and Patrice Talisman provided memoranda addressing both the constitutionality and unconstitutionality of the statute as a point/counterpoint. The CRSC thought that this approach would more fully and objectively assist the Court in its review of this issue. Copies of these memoranda are included as Appendix C, pp. 17-62. The

author of the “constitutional” memorandum (Appendix C, pp. 17-51), Dorothy Easley, posited that section 45.045 does not create or modify a procedural rule of court and is not constitutionally infirm. While section 45.045 contains procedural components, the statute primarily creates substantive rights of appeal.

The author of the “unconstitutional” memorandum (Appendix C, pp. 52-62), Patrice Talisman, postulated that the provisions of section 45.045 are procedural and thus within the exclusive jurisdiction of the Florida Supreme Court. She argued that the legislature may not amend rule 9.310 by statute, which is what it has tried to do in section 45.045. She concluded that the statute is unconstitutional in its entirety. The memoranda were prepared as position pieces at the request of the Executive Committee. Neither the CRSC nor the ACRC ultimately took a position on whether section 45.045 is constitutional. The statute is reproduced as Appendix E, pp. 91-92.

Regarding the issue of whether a rule change is needed, the CRSC evenly split (5/5 vote). *See* Appendix C, CRSC Report, pp. 17-18. The members who opposed recommending a rule change reasoned that the statute is unconstitutional and no rule change is needed. The members who favored a rule amendment did so because they thought that: (1) there exists a conflict among the District Courts of Appeal and that conflict should be

resolved; (2) trial judges should be given discretion to set the bond under limited circumstances; and (3) the rule and statute should be consistent.

These members also thought a proposed rule amendment would be helpful to the Court.

At the Chair's request, the CRSC finalized a proposed amendment to rule 9.310. *See* Appendix C, pp. 63-64. The first proposed amendment as well as the minutes of all the CRSC's meetings in which they discussed this issue are attached as Appendix C, pp. 65-79.

At the ACRC's General Meeting on September 15, 2006, the Chair presented the following two issues to the full committee for a vote:

1. Should rule 9.310 be amended in light of section 45.045?
2. If so, should rule 9.310 be amended in the form as suggested by the subcommittee?

After considerable discussion, the ACRC voted that rule 9.310 should not be amended in light of section 45.045, with 45 members voting not to amend and 7 voting to amend. Many of the ACRC's majority thought that the statute was in fact substantive and that it was not the Committee's prerogative to amend the rule simply to comport with the statute. It was thought that the constitutionality of the statute would be addressed by the courts. Some expressed the thought that the statute was not well written and

they did not want to submit a rule that was in conformity. *See* ACRC Minutes, September 15, 2006, Appendix D, pp. 80-89. It should be noted that, prior to the passage of the statute, the ACRC twice had rejected an amendment to the rule to provide a trial court discretion to allow a lesser bond to supersede a judgment, the last time based on the conflict on the issue among the Districts.

In view of this vote, no further action was taken on the second issue. However, as noted, the Chair indicated that he would send to the Court the full work product of the CRSC for the Court's consideration.

Dated: _____

Respectfully submitted

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