

MINUTES
APPELLATE COURT RULES COMMITTEE
Friday, June 25, 2004
Boca Raton, Florida
Boca Raton Resort & Club
Grand Ballroom A

III. STANDING SUBCOMMITTEE ISSUES AND REPORTS

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B. Civil Law Rules Subcommittee

Subcommittee Chair Steven L. Brannock presented two issues:

1. Direct appeals from orders granting or refusing to dissolve garnishments. 9.130(a)(3)(C)(ii)

Subcommittee Chair Steve Brannock presented the Subcommittee's single assigned project. Attorney Gregory Grossman, partner of Member Edward Mullins, had presented to Chair Leban the issue of a conflict among the District Courts of Appeal with respect to the appealability of orders dissolving or refusing to dissolve writ of garnishments..

The Subcommittee had created a work group chaired by Member Edward Mullins. Ad Hoc Member Greg Grossman prepared an extensive memorandum on the issue, which was included in the Subcommittee's Report.

The Subcommittee found that there was considerable case law on the issue going back many years. Yet, various cases permitting the appeal of garnishment orders did not discuss the jurisdiction of the appellate court.

Most specifically, there were two cases in conflict. In Ramseyer v. Williamson, 639 So. 2d 205 (Fla. 5th DCA 1994), the Fifth District Court of Appeal held that an

order denying a motion to dissolve a writ of garnishment is not an appealable, non-final order pursuant to Rule 9.130.

One year later, the Fourth District Court of Appeal came to the opposite conclusion in 5361 N. Dixie Highway v. Capital Bank, 658 So. 2d 1037 (Fla. 4th DCA 1995), in which the court held that an order denying a motion to dissolve a writ of garnishment was appealable pursuant to Rule 9.130(a)(3)(C)(ii) (order determining the immediate possession of property). The 5361 court noted that its decision was in conflict with the Ramseyer decision.

After 5361, Subcommittee Chair Brannock reported, other decisions allowed the appeal of orders addressing garnishments without discussing the jurisdiction issue.

In light of long history of cases implicitly allowing appeals of orders addressing garnishments but recognizing the conflict in authority, the Subcommittee proposed the following amendment to Rule 9.130(a)(3)(C)(ii) to clarify that orders dissolving or refusing to dissolve writs of garnishments are immediately appealable:

RULE 9.130(a)(3)(C)(ii)

....

the right to immediate possession of property, including but not limited to orders that grant, modify, dissolve or refuse to grant, modify or dissolve writs of replevin, garnishment, or attachment.

....

Proposed Comment

2004 Amendment. Rule 9.130(a)(3)(C)(ii) was amended to address a conflict in the case law concerning whether orders granting, modifying, dissolving, or refusing to grant, modify or dissolve garnishments are appealable under this subsection. Compare Ramseyer v. Williamson, 639 So. 2d 205 (Fla. 5th DCA 1994) (garnishment order not

appealable) with 5361 N. Dixie Highway v. Capital Bank, 658 So. 2d 1037 (Fla. 4th DCA 1995) (permitting appeal from garnishment order and acknowledging conflict). The amendment is not intended to limit the scope of matters covered under the rule. In that vein, replevin and attachment were included as examples of similar writs covered by this rule.

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Subcommittee Chair Brannock noted that the revised Rule would make it clear that orders involving garnishments are directly appealable to codify the well-settled practice of the courts and also to resolve the conflict between the 4th and 5th Districts. Subcommittee Chair Brannock noted that the proposed change specifically referenced attachments and replevin appeals, regarding which there is no conflict regarding the appealability, to avoid any confusion that might result if garnishment orders were mentioned alone and it was assumed that replevins and attachments were intentionally excluded.

Member Lucinda Ann Hofmann moved to accept the proposed change. Member Ed Guedes seconded the motion.

During the comment period, Member Judge Webster suggested that the word “subsection” in the comment should be changed to “subdivision” as that is the term used in the Rules. Chair Leban agreed and made the change, noting that the Committee was not required to vote on the comment. Member James Middleton noted the comment states that the amendment “is not intended to limit the scope of matters covered under the rule,” and suggested that the Subcommittee also did not intend to expand matters covered under the rule. He suggested an amendment to the comment to state after “to limit” or “to expand.” This suggestion was treated as a friendly amendment and accepted by Subcommittee Chair Brannock.

John Mills then moved to add a comma after the word “modify” in the second line of the rule. He also noted that a comma was needed in the same location in the comment. This friendly amendment was accepted.

Hearing no further discussion, Chair Leban brought the issue to a vote. The motion and the proposed rule amendment passed 39-0. Chair Leban thanked temporary Ad Hoc Member Greg Grossman for his assistance.

The final rule, as passed, is set forth below:

RULE 9.130(a)(3)(C)(ii)

.....

the right to immediate possession of property, including but not limited to orders that grant, modify, dissolve or refuse to grant, modify, or dissolve writs of replevin, garnishment, or attachment.

Proposed Comment

.....

Rule 9.130(a)(3)(C)(ii) was amended to address a conflict in the case law concerning whether orders granting, modifying, dissolving, or refusing to grant, modify, or dissolve garnishments are appealable under this subdivision. Compare Ramseyer v. Williamson, 639 So. 2d 205 (Fla. 5th DCA 1994) (garnishment order not appealable) with 5361 N. Dixie Highway v. Capital Bank, 658 So. 2d 1037 (Fla. 4th DCA 1995) (permitting appeal from garnishment order and acknowledging conflict). The amendment is not intended to limit or expand the scope of matters covered under the rule. In that vein, replevin and attachment were included as examples of similar writs covered by this rule.

**MINUTES
APPELLATE COURT RULES COMMITTEE
Friday, June 24, 2005
8:30 a.m. - 11:00 a.m.
Orlando World Center Marriott Grand II/III
Orlando, Florida**

III. STANDING SUBCOMMITTEE ISSUES AND REPORTS

D. Family Law Rules Subcommittee - Chair John Mills

1. Rule 9.130(a)(5).

Subcommittee Chair John Mills reported that, at the ACRC meeting in January, the full committee unanimously approved the Family Law Rules Subcommittee's proposed revision to Rule 9.130(a)(5) and accompanying proposed committee note to include Florida Rules of Juvenile Procedure 8.150 and 8.270 to make clear that motions pursuant to these rules are appealable. The proposed amendment was:

RULE 9.130(a)(5)

Orders entered on an authorized and timely motion for relief from judgment on motions filed under Florida Rule of Civil Procedure 1.540, Small Claims Rule 7.190, and Florida Family Law Rule of Procedure 12.540 are reviewable by the method prescribed by this rule.

2005 Amendment. Rule 9.130(a)(5) is intended to authorize appeals from orders entered on motions for relief from judgment that are specifically contemplated by a specific rule of procedure (e.g., the current versions of Florida Rule of Civil Procedure 1.540, Small Claims Rule 7.190, Florida Family Law Rule of Procedure 12.540, and Florida Rules of Juvenile Procedure 8.150 and 8.270.

Since the January meeting, the Supreme Court of Florida amended Rule 9.130(a)(5) as follows:

RULE 9.130(a)(5)

Orders entered on motions filed under Florida Rule of Civil Procedure 1.540, Small Claims Rule 7.190, Rule of

Juvenile Procedure 8.270, and Florida Family Law Rule of Procedure 12.540 are reviewable by the method prescribed by this rule.

The Court's opinion notes that Rule 8.270 was apparently left out of the original rule by mere oversight. The subcommittee discussed whether this change rendered the previous change moot and concluded that it did not. The change does require that the proposed rule be changed to reflect the newly amended rule. On behalf of the Subcommittee, Mills moved the full Committee to amend the Rule 9.130(a)(5) to the following:

RULE 9.130(a)(5)

Orders entered on an authorized and timely motion for relief from judgment ~~on motions filed under Florida Rule of Civil Procedure 1.540, Small Claims Rule 7.190, Rule of Juvenile Procedure 8.270, and Florida Family Law Rule of Procedure 12.540~~ are reviewable by the method prescribed by this rule.

2005 Amendment. Rule 9.130(a)(5) is intended to authorize appeals from orders entered on motions for relief from judgment that are specifically contemplated by a specific rule of procedure (e.g., the current versions of Florida Rule of Civil Procedure 1.540, Small Claims Rule 7.190, Florida Family Law Rule of Procedure 12.540, and Florida Rules of Juvenile Procedure 8.150 and 8.270).

Vice Chair Egan seconded the motion. There was no discussion. The motion **PASSED, 48 in favor, no opposed.**

The amendment is as follows

***** **RULE 9.130(a)(5)**

Orders entered on an authorized and timely motion for relief from judgment ~~on motions filed under Florida Rule~~

~~of Civil Procedure 1.540, Small Claims Rule 7.190, Rule of Juvenile Procedure 8.270, and Florida Family Law Rule of Procedure 12.540~~ are reviewable by the method prescribed by this rule.

2005 Amendment. Rule 9.130(a)(5) is intended to authorize appeals from orders entered on motions for relief from judgment that are specifically contemplated by a specific rule of procedure (e.g., the current versions of Florida Rule of Civil Procedure 1.540, Small Claims Rule 7.190, Florida Family Law Rule of Procedure 12.540, and Florida Rules of Juvenile Procedure 8.150 and 8.270).

**MINUTES
APPELLATE COURT RULES COMMITTEE
Friday, January 20, 2006
8:30 a.m. to 12:00 p.m.
Miami Downtown Hyatt
Miami, Florida**

III. STANDING SUBCOMMITTEE ISSUES AND REPORTS

A. Administrative Law Rules Subcommittee – Chair Robert Pritt

Chair Pritt reported that the Administrative Law Rules Subcommittee has been looking at possible inconsistency between Rule 9.310(b)(2) concerning automatic stays on appeal for public bodies and Section 120.68, Florida Statutes. While reviewing the Rule, the Florida Supreme Court issued *Mitchell v. State*, 2005 WL 215560, 30 Fla. L. Weekly S619 (Fla. Sept. 8, 2005). The Subcommittee is studying the decision to determine whether it moots the need for further analysis of Rule 9.310(b). The Subcommittee decided to forward the issue to the Administrative Law Section for their input.

Subcommittee member David Miller then reported on the status of the Administrative Law Section's review. The Section continues to study the Rule and is seeking input from other interested sections. The Subcommittee will await action by the Administrative Law Section and will report back at a later ACRC meeting. In the meantime, Miller noted that Administrative Law Judge Stampelos has written a memorandum containing history of the automatic stay rule which Miller will share with any interested ACRC member.

MINUTES
APPELLATE COURT RULES COMMITTEE
Friday, June 23, 2006
8:30 a.m. to 12:00 p.m.
Boca Raton Resort & Club
Boca Raton, Florida

B. Administrative Law Rules Subcommittee – Chair Robert Pritt

Chair Bob Pritt reported that the Subcommittee was continuing its consideration of a possible amendment to Rule 9.310(b)(2) to resolve an apparent inconsistency between the rule and Chapter 120, Florida Statutes. David Miller prepared a memorandum on the issue and Administrative Law Judge Stampelos has done a history on the rule and the statute. Pritt ceded the floor to Miller to provide a brief overview.

Miller noted that the Administrative Law Section has been asked for its input. The Subcommittee will continue to examine the issue and Miller asked anyone with an interest in the issue (or anyone wanting a copy of his memo and the memo by Judge Stampelos) to contact him at Davidmiller@Broadandcassel.com.

Miller noted that there definitely is a conflict as to whether the government gets a stay in certain circumstances. The Subcommittee believes that the Supreme Court would be interested in dealing with the conflict, whatever the ACRC recommends. The issue will be back.

C. Civil Law Rules Subcommittee – Chair Edward Guedes

Jennifer Carroll reported for the Civil Practice Subcommittee in Ed Guedes' absence. Guedes is out of the country. The Subcommittee was considering four issues.

The first issue was in response to an inquiry from the Supreme Court. The issue is whether Rule 9.130 should be amended to address whether a motion for rehearing as to an order granting or denying relief pursuant to Fla. R. Civ. P. 1.540 will toll the time for filing an appeal pursuant to Fla. R. App. P. 9.130. This issue was referred to the ACRC by the Supreme Court which noted that there were "preexisting conflicting decisions on this issue." Natalie Carlos prepared a research memorandum on the issue which revealed that the DCA's are actually not in conflict. All five DCA's have ruled that a motion for rehearing does not toll the time. The Fourth District's earlier decision creating the conflict subsequently had been discredited. Despite the unanimity, however, the Civil Subcommittee believes that the rule should be amended to eliminate any doubt on the issue and to make the lack of tolling clear for practitioners.

The Civil Subcommittee unanimously recommended the following amendment to Rule 9.130(a)(5) (along with an accompanying committee note):

**Rule 9.130. PROCEEDINGS TO REVIEW NON-FINAL
ORDER AND SPECIFIED FINAL ORDERS**

(a) Applicability.

* * *

(5) Orders entered on motions filed under Florida Rule of Civil Procedure 1.540, Small Claims Rule 7.190, Rule of Juvenile Procedure 8.270 and Florida Family Law Rule of Procedure 12.540 are reviewable by the method prescribed by this rule. Motions for rehearing directed to these orders will not toll the time for filing a notice of appeal.

Committee Note 2006:

Subdivision (a)(5) has been amended to add the following language: “Motions for rehearing directed to these orders will not toll the time for filing a notice of appeal.” This amendment recognizes the unique nature of the orders listed in this subdivision of the rule and codifies the consistent holdings of all of Florida’s district courts of appeal on this subject. This amendment makes clear that motions for rehearing directed to these particular types of orders are unauthorized and will not toll the time for filing a notice of appeal.

The motion was seconded and discussion ensued. Natalie Carlos reported on the findings of her research memorandum and recommended the amendment to the full Subcommittee. Bob Biasotti spoke in opposition to the amendment. The issue is controlled by the rendition rule and no amendment is necessary. Powers responded that it is actually the civil rules that tell us whether a motion is authorized or not. Dorothy Easley noted that the Subcommittee was initially concerned whether it was solving a non-existing problem. But, in light of the request by the Supreme Court for clarification, the Subcommittee decided that an amendment was appropriate.

The ACRC then passed the proposed amendment by a vote of 29-12. The Rule is amended as follows:

Rule 9.130. PROCEEDINGS TO REVIEW NON-FINAL ORDER AND SPECIFIED FINAL ORDERS

(a) Applicability.

* * *

(5) Orders entered on motions filed under Florida Rule of Civil Procedure 1.540, Small Claims Rule 7.190, Rule of Juvenile Procedure 8.270 and Florida Family Law Rule of Procedure 12.540 are reviewable by the method prescribed by this rule. Motions for rehearing directed to these orders will not toll the time for filing a notice of appeal.

Committee Note 2006:

Subdivision (a)(5) has been amended to add the following language: "Motions for rehearing directed to these orders will not toll the time for filing a notice of appeal." This amendment recognizes the unique nature of the orders listed in this subdivision of the rule and codifies the consistent holdings of all of Florida's district courts of appeal on this subject. This amendment makes clear that motions for rehearing directed to these particular types of orders are unauthorized and will not toll the time for filing a notice of appeal.

The fourth issue is whether Rule 9.130(a)(3)(C)(iv) should be amended to authorize appeals from non-final orders determining a party's right to an appraisal pursuant to an insurance policy. Carroll noted that the background to the issue appears in a memorandum drafted by Hinda Klein found at pages 91-96 of the ACRC meeting

materials. Briefly summarized, prior to 2002, the district courts found these orders to be appealable. But then the Florida Supreme Court decided *Allstate Ins. Co. v. Suarez*, 833 So. 2d 762 (Fla. 2002), which held that appraisal proceedings are not governed by the procedures of the Florida Arbitration Code. Subsequent appellant decisions held that appraisal proceedings are not appealable under 9.130. The Second District most recently determined that it did not have jurisdiction over an appraisal order, but noted that the Appellate Rules Committee should consider the advisability of an amendment to Rule 9.130 authorizing nonfinal appeals of orders that determine the entitlement of a party to an appraisal.

After studying the issue the Civil Rules Subcommittee recommends to the ACRC the following rule amendment and committee note:

Rule 9.130. PROCEEDINGS TO REVIEW NON-FINAL ORDER AND SPECIFIED FINAL ORDERS

(a) Applicability.

* * *

(3) Appeals to the district courts of appeal of non-final orders are limited to those that

* * *

C) determine

* * *

(iv) the entitlement of a party to an appraisal pursuant to an insurance policy or to arbitration.

Committee Note 2006:

Subdivision (a)(3)(C)(iv) has been amended to clarify that orders determining a party's entitlement to appraisal pursuant to an insurance policy are encompassed within the category of orders determining a party's entitlement to arbitration.

Discussion ensued. Hinda Klein briefly explained the results of her research. As part of her work, she did a search of the number of appeals from 1994-2002 arising from insurance appraisal proceedings and found there were very few; thus, adding a right to appeal will not unduly burden the court. She does not believe that the Supreme Court's *Allstate* opinion meant to limit the appealability of orders concerning appraisals. Because the legal effect of an appraisal order is the same as arbitration, the ACRC should clarify that appraisal orders are appealable.

Judge Polston supports the amendment but offered a suggestion for the committee note. Judge Polston suggested that the committee note read: Subdivision (a)(3)(C)(iv) has been amended to clarify that orders determining a party's entitlement to appraisal pursuant to an insurance policy are added to the category of orders determining a party's entitlement to arbitration (replacing the words "encompassed within" with the words "added to." Chair Reiter noted that the comment would be reviewed for accuracy before it is submitted.

Bob Biasotti expressed concerns about the language of the amendment. He moves that subsection (iv) be amended to read: "(iv) the entitlement of a party to arbitration or to an appraisal pursuant to an insurance policy. The motion to amend the language of the proposed amendment was seconded and discussion ensued.

Hendricks asked whether the Subcommittee considered putting the new rule as a new subsection instead of combining it with the existing subsection on arbitration.

Carroll responded that the Subcommittee did consider that approach but did not want to leave the impression that jurisdiction is being expanded. The Subcommittee believes that the proposal fits best within the arbitration provision.

Natalie Carlos responded to Biasotti's motion noting that the committee did not want arbitration to be linked inadvertently to the clause on insurance policies.

John Mills agreed with Bob suggesting that there is a grammar problem with the amendment as drafted. Dorothy Easley then responded that the committee had chosen to include the reference to appraisal in the arbitration subsection because historically the procedure has been treated like arbitration. The Subcommittee was memorializing historical practice.

Susan Wright then inquired what motion was on the floor. Chair Reiter responded that it was Biasotti's proposed amendment to the language of the Subcommittee's proposed amendment.

The ACRC then voted on Biasotti's proposed amendment which passed by a vote of 28-10.

The ACRC then voted on the proposed amendment to Rule 9.130(a)(3)(C)(iv) as amended. The proposal, as amended is as follows:

**Rule 9.130. PROCEEDINGS TO REVIEW NON-FINAL
ORDER AND SPECIFIED FINAL ORDERS**

(a) Applicability.

* * *

(3) Appeals to the district courts of appeal of non-final orders are limited to those that

* * *

C) determine

* * *

(iv) the entitlement of a party to arbitration or to an appraisal pursuant to an insurance policy.

The ACRC then voted on the proposal which carried 36-2. Chair Reiter indicated that the Committee Note will also be changed as suggested by Judge Polston.

The Rule is amended as follows:

Rule 9.130. PROCEEDINGS TO REVIEW NON-FINAL ORDER AND SPECIFIED FINAL ORDERS

(a) Applicability.

* * *

(3) Appeals to the district courts of appeal of non-final orders are limited to those that

* * *

C) determine

* * *

(iv) the entitlement of a party to arbitration or to an appraisal pursuant to an insurance policy.

Committee Note 2006:

Subdivision (a)(3)(C)(iv) has been amended to clarify that orders determining a party's entitlement to appraisal pursuant to an insurance policy are added to the category of orders determining a party's entitlement to arbitration.

G. General Rules Subcommittee – Chair John Mills

Chair John Mills reported that the Subcommittee has three matters on its agenda (a fourth concerning electronic service was spun off to the new Subcommittee on Electronic Filing and Service). The first matter concerns Rule 9.430 – Proceedings by Indigents and is a proposal by Nancy Isenberg, a staff attorney at the Fourth Judicial Circuit in Tallahassee. Isenberg inquired whether Rule 9.430 should be amended in light of recent statutory changes. A special subcommittee chaired by Brandon Vesely was formed to explore the issue and propose amendments to the rule to conform to the statutory changes, as well as the Supreme Court's creation of a new form application for determination of indigency status.

The Subcommittee proposes three sets of changes which Mills proposed could be considered as a group. The first set of changes reflects the new application form adopted by the Supreme Court. The Court now uses an application, not an affidavit. Thus, the committee proposes an amendment to the rule to make the rule consistent with the Supreme Court's forms.

The second set of changes makes a distinction between appeals and original proceedings. The Subcommittee recommends moving the original proceedings to a separate subparagraph (b). The proposal reflects that original proceedings are begun in the appellate court and contemplates that the review for indigency status will be done by the appellate court.

The third change is to require partial payments to be collected by the clerk of the lower tribunal rather than the District Court clerk.

The General Subcommittee proposes the following amendments to Rule 9.430:

Rule 9.430. Proceedings by Indigents

(a) Appeals Motion and Affidavit. A party who has the right to seek review by appeal without payment of costs shall, unless the court directs otherwise, file a signed application for determination of indigent status with the clerk of a motion in the lower tribunal, using an application form approved by the supreme court as found in rule 9.900(i). ~~with an affidavit showing the party's inability either to pay fees and costs or to give security therefor. For review by original proceedings under Rule 9.100, unless the court directs otherwise, the party shall file the motion and affidavit with the court. If the motion is granted, the party may proceed without further application to the court and without either the prepayment of fees or costs in the lower tribunal or court or the giving of security therefor. The clerk of the lower tribunal's R~~ Reasons for denying the application motion shall be stated in writing and are reviewable by the lower tribunal. Review of decisions by the lower tribunal shall be by motion filed in the court.

(b) Original Proceedings. A party who seeks review by an original proceeding under rule 9.100 without the payment of costs shall, unless the court directs otherwise, file with the court an application for determination of indigent status. The application shall contain substantially the same information as required by rule 9.900(i). If the motion is granted, the party may proceed without further application to the court.

(b) (c) Incarcerated Parties.

(1) *Presumptions.* In the absence of evidence to the contrary, an appellate court may, in its discretion, presume that

(A) assertions in an affidavit application for determination of indigent status filed by an incarcerated party under this rule are true, and

(B) in cases involving criminal or collateral criminal proceedings, an incarcerated party who has been declared indigent for purposes of proceedings in the lower tribunal remains indigent.

(2) *Non-Criminal Proceedings.* Except in cases involving criminal or collateral proceedings, ~~a motion and affidavit~~ an application for determination of indigent status filed under this rule by a person who has been convicted of a crime and is incarcerated for that crime or who is being held in custody pending extradition or sentencing shall contain substantially the same information as required by rule 9.900(i). The determination of whether the case involves an appeal from an original criminal or collateral proceeding depends on the substance of the issues raised and not on the form or title of the petition or complaint. In these non-criminal cases, ~~the court may~~ clerk of the lower tribunal shall require the party to make a partial prepayment of court costs or fees and to make continued partial payments until the full amount is paid.

Committee Notes

2006 Amendment. Subdivision (b) was created to differentiate the treatment of original proceedings from appeals under this rule. Each subdivision was further amended to comply with statutory amendments to section 27.52, Florida Statutes, the legislature's enactment of section 57.082, Florida Statutes, and the Florida Supreme Court opinion in In re Approval of Application for Determination of Indigent Status Forms for Use By Clerks, 910 So. 2d 194 (Fla. 2005).

Rule 9.900

~~(i) Prisoner's Motion and Affidavit to Proceed Without Prepayment of Court Costs and Fees~~ Applications for Determination of Indigent Status in Criminal and Civil Cases

[Delete current forms and replace with forms approved by Florida Supreme Court in In re Approval of Application for Determination of Indigent Status Forms for Use By Clerks, 910 So. 2d 194 (Fla. 2005).

Discussion ensued. Judge Monaco asked why the rule needed to reference the form approved by the Supreme Court. Tom Hall responded that the rule tracks the statutory language. Kehoe inquired why the form needed to be part of the rule. Kehoe expresses concerns that this will necessitate numerous future amendments. Mills responded that it makes the form immediately accessible to the clerk. Vesely noted that the form was already in the rules in its current form so the Subcommittee thought that the rule should track the same basic format.

Douglas Glade asked whether, according to the second to last sentence in subsection (a), the clerk makes the initial ruling. Mills responded yes, that the clerk of the lower court makes the decision which is reviewed by the appellate court by motion. Kehoe noted that clerks never give a reason for a denial. They just check a box that says no. Although trial judges used to give reasons, clerks generally just check the “no” box.

Beth Coleman asked whether the word “motion” in the last sentence of subsection (b) should be “application.” Mills responded that this was a typographical error. Chair Reiter pointed out that such errors can be fixed without a formal amendment process.

The ACRC adopted the proposed amendments unanimously, voting 40-0 in favor of the amendment. Rule 9.430 is amended as follows:

Rule 9.430. Proceedings by Indigents

(a) Appeals Motion and Affidavit. A party who has the right to seek review by appeal without payment of costs shall,

unless the court directs otherwise, file a signed application for determination of indigent status with the clerk of a motion in the lower tribunal, using an application form approved by the supreme court as found in rule 9.900(i), with an affidavit showing the party's inability either to pay fees and costs or to give security therefor. For review by original proceedings under Rule 9.100, unless the court directs otherwise, the party shall file the motion and affidavit with the court. If the motion is granted, the party may proceed without further application to the court and without either the prepayment of fees or costs in the lower tribunal or court or the giving of security therefor. The clerk of the lower tribunal's Reasons for denying the application motion shall be stated in writing and are reviewable by the lower tribunal. Review of decisions by the lower tribunal shall be by motion filed in the court.

(b) Original Proceedings. A party who seeks review by an original proceeding under rule 9.100 without the payment of costs shall, unless the court directs otherwise, file with the court an application for determination of indigent status. The application shall contain substantially the same information as required by rule 9.900(i). If the application is granted, the party may proceed without further application to the court.

(b) (c) Incarcerated Parties.

(1) *Presumptions.* In the absence of evidence to the contrary, an appellate court may, in its discretion, presume that

(A) assertions in an affidavit application for determination of indigent status filed by an incarcerated party under this rule are true, and

(B) in cases involving criminal or collateral criminal proceedings, an incarcerated party who has been declared indigent for purposes of proceedings in the lower tribunal remains indigent.

(2) *Non-Criminal Proceedings.* Except in cases involving criminal or collateral proceedings, a motion and affidavit an application for determination of indigent status filed under this rule by a person who has been convicted of a crime and is incarcerated for that crime or who is being held in custody pending extradition or sentencing shall contain substantially

the same information as required by rule 9.900(i). The determination of whether the case involves an appeal from an original criminal or collateral proceeding depends on the substance of the issues raised and not on the form or title of the petition or complaint. In these non-criminal cases, the ~~court may~~ clerk of the lower tribunal shall require the party to make a partial prepayment of court costs or fees and to make continued partial payments until the full amount is paid.

Committee Notes

2006 Amendment. Subdivision (b) was created to differentiate the treatment of original proceedings from appeals under this rule. Each subdivision was further amended to comply with statutory amendments to section 27.52, Florida Statutes, the legislature's enactment of section 57.082, Florida Statutes, and the Florida Supreme Court opinion in In re Approval of Application for Determination of Indigent Status Forms for Use By Clerks, 910 So. 2d 194 (Fla. 2005).

Rule 9.900

(i) Prisoner's Motion and Affidavit to Proceed Without Prepayment of Court Costs and Fees Applications for Determination of Indigent Status in Criminal and Civil Cases

[Delete current forms and replace with forms approved by Florida Supreme Court in In re Approval of Application for Determination of Indigent Status Forms for Use By Clerks, 910 So. 2d 194 (Fla. 2005).

The last issue concerns the page limitations in Rule 9.210 and was referred to the ACRC by Louis Rosenbloum. The question is whether certificates of service or compliance are included in the page limitations. In practice, the rule is clear. The consensus is that certificates are not counted. The rules do not specifically deal with the issue and some practitioners worry that these certificates do count. The General

Subcommittee moves the adoption of the following rule that makes clear that certificates are not included:

Rule 9.210a)(5)

The initial and answer briefs shall not exceed 50 pages in length; provided that if a cross-appeal has been filed, the reply brief shall not exceed 50 pages, not more than 15 of which shall be devoted to argument replying to the answer portion of the appellee/cross-appellant's brief. Cross-reply briefs shall not exceed 15 pages. Briefs on jurisdiction shall not exceed 10 pages. The tables of contents and the citations of authorities and the certificates of service and compliance shall be excluded from the computation. Longer briefs may be permitted by the court.

Mills noted that the vote of the Subcommittee was 9-3 with the three dissenting voices suggesting minor modifications of the language.

The proposed amendment was passed unanimously, 40-0. Accordingly, Rule 9.210 (5) is amended as follows:

Rule 9.210a)(5)

The initial and answer briefs shall not exceed 50 pages in length; provided that if a cross-appeal has been filed, the reply brief shall not exceed 50 pages, not more than 15 of which shall be devoted to argument replying to the answer portion of the appellee/cross-appellant's brief. Cross-reply briefs shall not exceed 15 pages. Briefs on jurisdiction shall not exceed 10 pages. The tables of contents and the citations of authorities and the certificates of service and compliance shall be excluded from the computation. Longer briefs may be permitted by the court.

**MINUTES
APPELLATE COURT RULES COMMITTEE
FRIDAY, SEPTEMBER 15, 2006
8:30 am to 12:00 pm
TAMPA AIRPORT MARRIOTT HOTEL
Tampa, Florida**

I. STANDING SUBCOMMITTEE ISSUES AND REPORTS

a. Administrative Law Practice

Subcommittee Chair David Miller presented the issue of whether Rule 9.310(b)(2) should be amended to eliminate an inconsistency in the Administrative Procedure Act, and summarized the memoranda that have been drafted on the issue. He explained that the Rule conflicts with the Administrative Procedure Act by allowing an automatic stay when the government seeks review of an administrative agency's decision. The memoranda cite to cases interpreting Rule 9.310(b)(2) that hold either that the Rule supersedes the Act, or hold that Rule 9.310(b)(2) is in conformity with Act. The issue arises occasionally, especially in cases relating to land use and permitting, personnel and challenges to agency rules.

The subcommittee unanimously decided to amend Rule 9.310(b)(2) as follows, and to present the amendment to the full committee for a vote:

RULE 9.310. STAY PENDING REVIEW

(b) Exceptions.

(2) Public Bodies; Public Officers. The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases or in administrative actions pursuant to the Administrative Procedure Act, when the state, any public officer in an official capacity, board, commission, or other public body seeks

review; provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.

Chair Mullins presented the issue to a vote. John Mills explained that the Legislature got it right and supports amending the Rule. The vote carried 48 -- 0.

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g. Record on Appeal Subcommittee

Subcommittee Chair Robert Biasotti reported that it is reviewing the Rules in response to the Florida Supreme Court’s Report on Privacy and Court Records to avoid the unnecessary filing of personal information. He noted that the subcommittee’s response needs to be done between now and the January meeting so there is a lot to be done.

**MINUTES
APPELLATE COURT RULES COMMITTEE
FRIDAY, January 19, 2007
8:30 am to 12:00 pm
Hyatt Regency Hotel
Miami, Florida**

II. STANDING SUBCOMMITTEE ISSUES AND REPORTS

a. Civil Practice Subcommittee

On the first issue, Carroll reported that there was an ongoing study from the Florida Supreme Court on the Rule 9.130 issues, and that she had contacted Tom Hall who did not know what was happening with the study.

Thomas Young reported that he knew about the study because of his position with the guardian ad litem program. He believed the study only pertained to whether orders in dependency and termination of parental rights cases should be appealable as nonfinal orders under Rule 9.130. Chair Mullins read from *In re Amendments to the Florida Rules of Appellate Procedure*, 941 So. 2d. 352 (Fla. 2000), in which the Court stated it would not adopt any amendments to Rule 9.130 before its internal study is concluded. Chair Mullins believed that statement indicated that the Committee should not address the issue until the study is completed.

Tom Hall joined the meeting and reported that the Committee may propose to the Court amendments to Rule 9.130 other than in connection with appellate timeframes and delays on determination of parental rights cases and dependency cases. He also indicated that there is also a shortage of funds to provide transcripts to indigent appellants and they are looking into that problem.

Chair Mullins inquired whether ACRC should resubmit its recommended changes to Rule 9.130 that do not address the limited issues in the court study. He recommended that the ACRC look at re-submitting the proposed changes that it had submitted as part of the regular cycle, particularly those change that are not relevant to the Court study, after the study was completed.

John Mills added that there seems to be some disconnect between what the ACRC is doing and the Court study because Rule 9.130 is really limited to non-final orders. Thomas Young noted that that 1/3 of appeals involve non-final orders. Mullins added that there were three aspects to Rule 9.130's changes and recommended that a later Chair resubmit the recommended changes that are not related to the study at the appropriate time.

Carroll inquired what to do if a recommendation comes in regarding changes to Rule 9.130. Mullins instructed her to address the issue now that we had clarification as to the limited nature of the Supreme Court's study.

b. General Practice Subcommittee

The Subcommittee also reviewed whether Rule 9.330(d) should be amended in light of Jackson v. State, 926 So. 2d 1262 (Fla. 2006). The Supreme Court had requested that the ACRC look at whether the Rules should be amended to prohibit motions for rehearing from dismissals of an attempt to invoke the Court's mandatory jurisdiction under Rule 9.030(a)(1)(A)(ii), when the appeal seeks review of a district court decision without opinion. The Subcommittee voted unanimously to recommend the following rule to the full Committee:

Rule 9.330

(d) Exception; Review of District Court Decisions. No motion for rehearing or clarification may be filed in the supreme court ~~addressed to~~ addressing:

- (1) The dismissal of an appeal that attempts to invoke the court's mandatory jurisdiction under Rule 9.030(a)(1)(A)(ii) where the appeal seeks review of a district court decision without opinion, or;
- (2) † The grant or denial of a request for the court to exercise its discretion to review a decision described in rule ~~9.120~~ 9.030(a)(2)(A), or;
- (3) † The dismissal of a petition for an extraordinary writ described in rule ~~9.100(a)~~ 9.030(a)(3) when such writ is used to seek review of a district court decision without opinion.

Committee Notes

_____ **Amendment.** Subdivision (d) has been amended to reflect the holding in *Jackson v. State*, 926 so. 2d 1262 (Fla. 2006).

At the request of Chair Mullins, Mills explained the renumbering of the Rule cites in the proposed amendment.

The Subcommittee's recommendation came before the full Committee. No objections or comments were raised, and the proposed amendment passed unanimously with 39 votes.

The Subcommittee also is reviewing whether to amend the amicus rule to authorize a potential amicus to file a notice of intent at the jurisdictional stage to indicate that it will be seeking to file an amicus brief. This proposal comes from the Florida Supreme Court. Sylvia Walbolt had drafted an article on the issue. The Subcommittee will reconvene to discuss the issue and determine whether to propose a rule amendment to the full committee.

g. Record on Appeal Subcommittee – Robert Biasotti

Robert Biasotti reported that the Subcommittee is proposing the following new appellate Rule 9.050 for a vote by the full Committee:

Rule 9.050. Maintaining Privacy of Personal Data

Unless otherwise required by another rule or permitted by leave of court, the following personal data shall be excluded from or redacted in all briefs, petitions, replies, motions, and responses filed with the court.

a. **Names of Minor Children.** If a minor child must be referred to, only the initials of that child shall be used. For purposes of this rule, a minor child is any person under the age of eighteen years, unless otherwise provided by statute or court order.

b. **Dates of Birth.** If an individual’s date of birth must be referred to, only the year shall be used.

c. **Personal Identifying Numbers.** Personal identifying numbers include all numbers used to identify a specific person for governmental or business purposes, including but not limited to, social security numbers, drivers license numbers, passport numbers, telephone numbers, e-mail addresses, computer user names, passwords, and all financial, bank, brokerage, and credit card account numbers. If one of these personal identifying numbers must be referred to, it shall be redacted to the extent possible to protect the privacy of the referenced person.

d. **Home Addresses.** If a home address must be referred to, only the city and state shall be used.

Committee Note

2007 Amendment. This rule was added to protect personal privacy and other legitimate interests, such as the prevention of

identity theft, with the advent of appellate court records being made electronically available on a wide scale. The amendment recognizes that the listed information must sometimes be referred to, but provides that when it is, the information shall be redacted in such a way as to protect the privacy of the referenced person. For example, if a particular credit card account number must be disclosed to distinguish among multiple accounts, the last four digits of the account number may be sufficient to uniquely identify the account at issue. In some contexts, no redaction would be possible, such as the identifying information of an attorney or pro se litigant, required to be provided by Florida Rule of Judicial Administration 2.060(c), (d).

Since publication of the proposed amendment in the agenda, Biasotti recommended a change to subsection C of the proposed Rule, to state “if one of these personal identifying numbers....” to “if a personal identifying number.” Without objections, the proposal was accepted as a modification of the recommendation.

Biasotti added that the Subcommittee contacted its counter-part subcommittees on the other Florida Rules committees who were addressing the privacy report and analyzing similar proposals.

An issue came up with the Subcommittee as to whether the rules should address the “scrubbing” of the files and records of the lower tribunals before those files become part of an appellate record or appendix. Since the electronic filing procedure for appellate records has not been completed, Biasotti noted it was difficult to resolve that issue. For that reason, the Subcommittee does not recommend an appellate rule that would require “scrubbing” of the records of the lower tribunals.

In terms of fashioning the rule, the Subcommittee was guided by the Family Law rule and the Eleventh Circuit rule proposals.

Biasotti further explained that the Subcommittee included the term “including but not limited to” in the definition of “Personal Identifying Numbers” in case the drafter of an appellate document feels other information should be redacted for privacy reasons. The Subcommittee did not get into the extent of a redaction (for example, how many digits of a social security number or a driver’s license number should be redacted).

With regard to the introduction and adding “unless otherwise required by another rule or leave of court,” the Subcommittee wanted to account for the possibility that other Florida rules committees may adopt additional, more specific rules regarding privacy concerns, and to avoid any conflicts with those rules.

Chair Mullins expressed his appreciation of the hard work of the Subcommittee on proposing the new rule, and asked the Committee first if there were any typographical errors in the Rule.

David Miller expressed his concern that the Committee Note says that it is a 2007 Amendment when it would be an adoption of a new Rule, and that the introduction sentence is too broad by stating “unless otherwise required by another rule” because litigators will not know where to look.

Chair Mullins responded that the Committee does not vote on Committee Notes and recommended to leave the Committee Note language as “Amendment.” The Bar will determine if the appropriate term should be “Adopted” or “Amendment.”

Stanford Soloman questioned the necessity of using the word “otherwise” in the introduction, and suggested to delete the word “all” in front of “numbers” and to strike “financial.” Chair Mullins accepted the recommendation to strike the term “all” as a typographical error, and made a motion to accept the typographical changes to the proposal as amended. No objections.

Chair Mullins asked for any objections to adopting a new rule generally. No objections were raised.

Chair Mullins asked whether there were any substantive comments to the new Rule.

Soloman asked whether the proposal affects the appendix rules. Biasotti responded that it did not, and that the Subcommittee specifically had addressed that issue.

Soloman made a motion to amend the proposal to make clear that the redaction rule does not apply to appendices. James Daniel seconded the motion.

With respect to that amendment, Paul Nettleton pointed out that the rule is already clear that it does not include appendices because the introduction clarifies that it applies only to briefs, petitions, replies etc. Jaime Moses suggested that the rule should clarify that appendices are not included. Soloman recommended that language be added at the end of the introduction saying “not included in appendices.”

John Mills argued that if the Committee specifically excluded appendices, he was concerned that other documents would not fall within the ambit of the rule.

Chair Mullins asked for proposed language to exclude appendices such that the Committee would have an amendment on which to vote.

Maria McGuinness offered to add an introduction as subsection (a), to change the subsection paragraphs to numbers, and to add a new subsection (b) with language to exclude appendices.

David Gemmer argued that attachments also should be added as an exclusion.

Susan Wright voiced her concern against the amendment because an appendix is part of the record.

Tom Hall added that the biggest problem is in attachments to motions and not appendices. Denise Powers recommended the following language: “this rule applies to attachments, but does not apply to content describe in rules 9.200 and 9.220.”

David Gemmer responded that there is a proposal to change 9.220 already and that we may be in conflict with that. Chair Mullins responded that that was only a proposal for now and the Committee should not be concerned with that.

The following amendment to the proposed rule was presented to the Committee: Add Subsection (a) to introduction, change the subsection paragraphs to numbers, and add language “and attachment thereto” after the word “responses” in the introduction. McGuinness moved to amend the proposal as stated. Soloman seconded the motion.

Biasotti argued against the proposed amendment, noting that the subcommittee addressed the issue at length in conjunction with amendments to

9.200 for electronic filing. He did not think it made sense for the Committee to mandate what to redact from the lower tribunal's original records without more guidance from the Supreme Court in connection with the preparation of an electronic record. The focus of the subcommittee's effort was to require redaction of original appellate documents that were within the control of the party. He opposed any rule that mandates litigants to change the lower tribunal record.

Jennifer Carroll questioned the difference between an attachment and an appendix since attachments need to be part of the record. Tom Hall clarified that attachments do not need to be part of the record. Mr. Hall cited as an example that litigants in the supreme court routinely attach copies of airline tickets to motions for extensions, where the attachment includes the movant's home address and credit card number.

Michael Korn was concerned because the rule is undermined by excluding the appendix. Biasotti responded that appendices are not available online, only briefs and motions, etc., which is why appendices are not to be redacted. He added that this issue is on review on an accelerated basis by an administrative order of the Supreme Court and that it ultimately needed to be addressed after that review is completed.

Powers asked whether the purpose of the Rule was to address what is available now versus what would be available in the future.

Dorothy Easley added that the subcommittee recognized that this was important, and that the Supreme Court was also addressing this precise issue and that the Committee should not craft rules for a system that is not even online yet and

no one understands yet. She was concerned that, if we start tweaking with rules that are not concrete yet – we would be doing more damage than good.

Mills clarified that we are only excluding appendices, nothing more, and that attachments also must be excluded. John Crabtree requested a new amendment.

Mullins indicated that the former subsection d regarding home addresses could be incorporated into the new paragraph 3 definition for “Personal Data.” The same argument was made with respect to the former subsection b, “Dates of Birth.”

Maria McGuiness withdrew her motion for amendment on the table, and requested new language for new Paragraph B stating, “this rule does not require redaction of personal data from the record or appendices.”

McGuiness’s proposed amendment to the rule was passed by the Committee.

The term “personal identifying numbers” was also criticized for not being consistent with the title which referred to “personal data.” It was changed by acclamation.

The proposal submitted to full committee. The following new rule as amended passed 37-2.

Rule 9.050. Maintaining Privacy of Personal Data

(a) Unless otherwise required by another rule or permitted by leave of court, the following personal data shall be excluded from or redacted in all briefs, petitions, replies, motions, notices, and responses and attachments thereto filed with the court:

(1) Names of Minor Children. If a minor child must be referred to, either a generic reference or the initials of that child shall be used. For purposes of this rule, a minor child

is any person under the age of eighteen years, unless otherwise provided by statute or court order.

(2) Personal Identifying Data. Personal identifying data include data used to identify a specific person for governmental or business purposes, including but not limited to, dates of birth, home addresses, social security numbers, driver's license numbers, passport numbers, telephone numbers, email addresses, computer user names, passwords, and all financial, bank, brokerage, and credit card account numbers. If personal identifying data must be referred to, it shall be redacted to the extent possible to protect the privacy of the referenced person.

(b) This rule does not require redaction of personal data from the record or appendices.

Committee Note

2007 Amendment. This rule was added to protect personal privacy and other legitimate interests, such as the prevention of identity theft, with the advent of appellate court records being made electronically available on a wide scale. The amendment recognizes that the listed information must sometimes be referred to, but provides that when it is, the information shall be redacted in such a way as to protect the privacy of the referenced person. For example, if a particular credit card account number must be disclosed to distinguish among multiple accounts, the last four digits of the account number may be sufficient to uniquely identify the account at issue. In some contexts, no redaction would be possible, such as the identifying information of an attorney or pro se litigant, required to be provided by Florida Rule of Judicial Administration 2.060(c), (d).

**MINUTES
APPELLATE COURT RULES COMMITTEE
FRIDAY, JUNE 29, 2007
8:30 A.M. TO 10:00
ORLANDO WORLD CENTER MARRIOTT**

E. General Practice Subcommittee – Chair, John Mills

Subcommittee Chair John Mills reported that the subcommittee reviewed two issues: (1) a referral from the Florida Supreme Court regarding a proposed amendment to the rules to allow potential *amici* to file a notice of intent to file an *amicus* brief on the merits in a proceeding when a district court has certified a question of great public importance and (2) a proposal by ACRC member David Miller regarding whether the oral argument rule should be amended to address the use of visual aids.

As to the first issue, the Florida Supreme Court asked the ACRC to propose an amendment to the appellate rules to based on an article by appellate lawyers Sylvia Walbolt and Joe Lang that suggested that the rules be amended to allow potential *amici* to file a notice of their intent to file an *amicus* brief on the merits in case in which a district court has certified one or more questions of great public importance. The subcommittee considered and proposed an amendment to Rule 9.370 to address the Court’s request. Subcommittee Chair Mills added that the Florida Supreme Court indicated that the Court is willing to accept a Notice of Intent to File *Amicus* Brief, but such a Notice is not required. If the Florida Supreme Court takes jurisdiction, *amici* can still seek permission to submit an amicus brief. So that is the reason behind the committee note that follows the proposed rule amendment. The subcommittee voted to propose the following amendment as a new subsection to Rule 9.370 be approved by the full committee as follows:

RULE 9.370. AMICUS CURIAE

. . . .

(d) Notice of Intent to File Amicus Brief in Supreme Court. When a party has invoked the discretionary jurisdiction of the supreme court, an amicus curiae may file a notice with the court indicating its intent to seek leave

to file an amicus brief on the merits should the court accept jurisdiction. The notice shall state briefly why the case is of interest to the amicus curiae, but shall not contain argument. The body of the notice shall not exceed one page.

Committee Notes

____ **Amendment.** Subdivision (d) was added to establish a procedure for an amicus curiae to expeditiously inform the supreme court of its intent to seek leave to file an amicus brief on the merits should the court accept jurisdiction. This rule imposes no obligation upon the supreme court to delay its determination of jurisdiction. Thus, an amicus curiae should file its notice as soon as possible after the filing of the notice to invoke discretionary jurisdiction of supreme court. The filing of a notice under subdivision (d) is optional and shall not relieve an amicus curiae from compliance with the provisions of subdivision (a) of this rule if the court accepts jurisdiction.

Chair Mullins accepted the subcommittee’s proposed amendment and opened the floor for discussion, first as to any stylistic changes. Paul Nettleton suggested that the following language was lacking and needed more: “When a party has invoked the discretionary jurisdiction of the supreme court. . . .”. Subcommittee Chair Mills responded that we need to treat the Rule as one being where, you are an amicus if you want to be. Porsche Schantz expressed concern that this rule would apply to all discretionary proceedings. Subcommittee Chair Mills responded that this was intentional, and referred the ACRC back to page 91 of the meeting materials for more detailed explanations.

Chair Mullins invited further comments regarding language, to which there were none, and set the motion for the proposed rule amendment language as set forth above and on page 91 of the meeting packet materials for a vote. The motion passed unanimously, with 40 in favor-1 against the amendment.

**MINUTES
APPELLATE COURT RULES COMMITTEE
FRIDAY, SEPTEMBER 7, 2007
9:00 A.M. TO 11:00A.M.
TAMPA AIRPORT MARRIOTT HOTEL**

III. STANDING SUBCOMMITTEE ISSUES AND REPORTS

A. Administrative Law Practice Subcommittee – Chair E. Jonathan Whitney

1. Administrative Law Practice Subcommittee Report. (*See Meeting Materials Packet at pp. 57-58.*)
2. Original Administrative Law Practice Subcommittee Report recommending an amendment to Fla. R. App. P. 9.310(b)(2). (*See Meeting Materials Packet at p. 59.*)
3. Comment of the City, County and Local Government Law Section. (*See Meeting Materials Packet at pp. 60-91.*)
4. Comment of the Florida League of Cities, Inc. (*See Meeting Materials Packet at pp. 92-93.*)
5. Comment of the Florida Ass’n of County Attorneys. (*See Meeting Materials Packet at pp. 94-95.*)
6. Comment of the Law Firm of de la Parte & Gilbert. (*See Meeting Materials Packet at pp. 96-111.*)
7. Response to comments by the subcommittee. (*See Meeting Materials Packet at pp. 112-117.*)
8. Response to comments by the ACRC Chair. (*See Meeting Materials Packet at p. 118.*)

Subcommittee Chair E. Jonathan Whitney reported that the Subcommittee had one issue before it: the proposed amendment to Rule 9.310(b)(2) concerning the application of the automatic stay to APA actions. The Subcommittee had unanimously recommended a proposed amendment to the Rule, and the full Committee unanimously voted in favor of that amendment (48-0) on September 15, 2006. The proposed Rule was included in the cycle report and was published for comment on July 1, 2007. The Subcommittee Chair Whitney reported that the City, County and Local Government

Law Section, the Florida League of Cities, Inc., the Florida Association of County Attorneys, and the law firm of de la Parte & Gilbert, P.A., all submitted comments on the propose amendment. Former Subcommittee Chair David Miller prepared a response to those comments.

The Subcommittee Chair Whitney reported that, after consideration of the comments received, the Subcommittee recommended to adhere to the previous action proposing a change to the Rule. Under the Rules of Judicial Administration, Chair Brannock posited that, if we receive comments, then the correct procedure was to goes back the ACRC and reconsider our vote and require a 2/3 vote. Chair Brannock stated that, if there is a motion to reconsider, then that motion must pass by a 2/3 vote. If no motion to reconsider passes, then the ACRC then will move on.

Pursuant to that procedure, Subcommittee Chair Whitney introduced the Rule along with background on the Rule. Subcommittee Chair Whitney recognized several of the attorneys representing organizations that had submitted memoranda on the issue, which discussed the reasons why the ACRC should reconsider the Rule amendment: David Caldevilla, of the law firm of de la Parte & Gilbert, P.A., and Elizabeth Hernandez, Chair of the City, County and Local Government Law Section.

9. Discussion.

David Miller, now-Civil Practice Subcommittee Chair and former Chair of the Administrative Practice Subcommittee last year, explained that the Administrative Practice Subcommittee debated and studied this issue for about two years before bringing it to the full ACRC. Subcommittee Chair Miller anticipated the controversial nature of this proposed Rule amendment and wrote a lengthy

memorandum, which was included on page 79 of the Meeting Materials.

Subcommittee Chair Miller explained that the reason for this proposed amendment is that there appears to be an inconsistency between, on one hand, Rules 9.310(b)(2) and 9.190(e)(1), Fla. R. App. P, which provide an automatic stay in cases where a public officer or body takes an appeal, and, on the other hand, and § 120.68(3) and § 120.56(4)(d), Florida Statutes, which text are included in the Meeting Materials packet at pages 79-80, that provide that a final administrative decision is to be given effect during appellate review, unless the administrative tribunal or a reviewing court holds otherwise. Subcommittee Chair Miller explained that this issue might arise in various contexts where a public officer or body is a party to an action before an administrative tribunal and then appeals an adverse ruling. Examples of that situation might include land use permitting and comprehensive planning cases; personnel cases reviewed by an independent tribunal; and challenges to state agency un-adopted rules, in which DOAH issues final administrative orders. In keeping with that history, the First District Court of Appeal gave effect to the rule, over the Administrative Procedure Act in *City of Jacksonville v PERC*, 359 So. 2d 578 (Fla. 1st DCA 1978). There appears to be no case law to the contrary since this ruling.

Subcommittee Chair Miller explained that there may be reasons to amend the rule to accommodate the APA statutes. In *Duval Cty Sch Bd v. Florida PERC*, 346 So. 2d 1087 (Fla. 1st DCA 1977), for example, the First District held that the stay was a substantive issue and thus the statute controlled. The First District understood that the automatic stay in Rule 5.12 was adopted to protect the public treasury from paying an appeal bond premium, and this purpose would not apply in cases that did not involve a

money judgment.

However, the Florida Supreme Court then adopted new appellate rules, including Rule 9.310. The new Rule included committee notes that stated that the intent was to overrule the *Lewis v. Career Service Comm'n*, 332 So. 2d 371, 372 (Fla. 1st DCA 1976). See *In re Proposed Florida Appellate Rules*, 351 So. 2d 981, 1009-10 (Fla. 1977). This committee notes persuaded the First District to give effect to the new Rule, over the APA statute, in *City of Jacksonville v. PERC*, 359 So. 2d 578, also cited in the Meeting Materials. In addition, the Florida Supreme Court overruled the First District *Wait*, 353 So. 2d 1265, decision, which applied the statute; instead, the Florida Supreme Court in its *Wait*, 372 So. 2d 420, decision applied the rule. The Florida Supreme Court, in overruling the First District, held in *Wait*, 372 So. 2d 420, that an automatic stay was a procedural issue within the Court's rulemaking powers, and that the statute under review there, which provided that an appeal did not automatically stay an order to disclose public records, was an unconstitutional invasion of the Court's rulemaking power.

The current rule provides that, when the government takes an appeal, the government is entitled to an automatic stay. The reason the ACRC took this issue was because the ACRC was under the directive of the Florida Supreme Court to report to the Court whether there was an inconsistency between the statute and Rules, so that the Florida Supreme Court could, thereafter, decide whether to amend the Rules to remedy any inconsistency that might be identified.

Subcommittee Chair Miller continued that there are policy arguments on both sides of issue and the ACRC recognizes that. There is legislative policy issue presented

here, and the Florida Supreme Court, through its recent jurisprudence, has made clear that the Court does not like conflicts between statutes and rules and that the Court wants to address those conflicts. For these reasons, the Administrative Practice Subcommittee recommended this rule change be considered. Subcommittee Chair Miller directed the ACRC members to the memoranda in the Meeting Materials packet the further discusses the jurisprudence on this issue.

Subcommittee Chair Miller added that, by way of further history, the ACRC approved the proposed change unanimously last September. That issue then went to the Board of Governors about one month ago, and the Board heard the proposed changes and reviewed the materials from the parties, as well as materials from the Counties and League of Cities. The Board authorized the ACRC to present this proposed change to the Florida Supreme Court.

Subcommittee Chair Miller added that, in response to the argument that there is no conflict because the appellate rules and the statute have both co-existed on books for many years and the legislature is presumed to have acquiesced in that conflict and deferred to rules, and the First District had repeatedly held that subsection 3 of § 120.68 does apply to a stay of government appeals. Then, the Florida Supreme Court adopted Rule 9.310(b)(2), which does provide for an automatic stay. The next First District decision then recognized the inconsistency and deferred to the appellate rules.

Subcommittee Chair Miller acknowledged that the inconsistency has been on the books for a long time, but added that we are obligated to bring the inconsistency to the Florida Supreme Court to decide whether the Court wishes to reconcile conflicts. We on the ACRC are not a policy-making body. The Florida Supreme Court decides

policy. There is a conflict between the statute, and subsection 3 of § 120.68 is key to that conflict against these rules, which provide for a stay. The Florida Supreme Court is the appropriate body to decide this conflict. There are policy questions that the Court will have to decide. Our responsibility is to bring forth the inconsistency. No one has to agree with us on how that should be decided. But the Florida Supreme Court ought to hear it and reconcile it as the Court deems appropriate.

Elizabeth Hernandez, Chair of the City, County and Local Government Law Section of The Florida Bar, thanked the ACRC for allowing her to present her position in her capacity as representative of the Section and as City Attorney for Coral Gables. Chair Hernandez responded with a formal request to the ACRC that the ACRC remove this recommendation, to allow, instead, further study and to involve the Local Governments Association in that study. Chair Hernandez expressed concerns over significant issues that still needed to be studied and discussed before the proposed amendment moves forward. Those issues include concerns that the remedy is overbroad. Local governments represent health and welfare issues beyond those discussed in the ACRC materials. The proposed amendment would significantly impact environmental resources, for example, which is another reason why stays are at issue. Chair Hernandez then thanked the ACRC for the ACRC's courtesy and for the opportunity to appear. Chair Hernandez requested that the floor be turned over to David Caldevilla to discuss more of the specific issues raised in this proposed amendment.

David Caldevilla, of the law firm of de la Parte & Gilbert, P.A., stated that he was here on behalf of his client, Charlotte County. Mr. Caldevilla referred to the First

District cases that Subcommittee Chair Miller referred to and posited that the Florida Supreme Court had addressed that conflict by, promptly after the *Lewis v. Career Services* decision, recognizing *Lewis* and totally revising the appellate rules soon after *Lewis* was decided. Rule 9.010 expressly provides that it “shall govern all proceedings commenced on or after [March 1, 1978] in the supreme court, the district courts of appeal, and the circuit courts. . . .” The Florida Supreme Court was expressly putting an automatic stay in place for local governments and, by so doing, the Florida Supreme Court addressed and removed any conflicts.

Mr. Caldevilla stated that the *City of Jacksonville Beach v. PERC* decision, in the Meeting Materials packet at p. 100, illustrated this resolution. In the *City of Jacksonville Beach v. PERC* decision, the First District issued that decision soon after the newly revised Florida Rules of Appellate Procedure were adopted. The First District held that, to extent that there is conflict between Rule 9.310(b)(2) and § 120.68(3), the Rule must prevail because any statutory attempt to modify that Rule would be unconstitutional. The legislature, thereafter, repeatedly reenacted §120.68 without changing it.

Mr. Caldevilla posited that the ACRC is attempting to fix a problem that does not exist. Mr. Caldevilla set forth that the Florida Legislature has always had the power to repeal the automatic stay provision of Rule 9.310(b)(2), under article V of the Florida Constitution. Instead, the legislature has repeatedly reenacted this statute and, by so doing, is presumed to have accepted that the courts’ construction of it unless that construction is clearly contrary that which the legislature has placed upon the statute. The long-standing rule is that, once a court has construed a statutory provision, later

reenactments of that provision may be considered legislative approval of the judicial interpretation. Mr. Caldevilla added that, since the *City of Jacksonville Beach* case was published in 1978, the Florida Legislature has amended § 120.68 numerous times, but the legislature has never amended the stay provision of § 120.68(3). The Florida Supreme Court has, likewise, not modified Rule 9.310(b)(2) to eliminate the automatic stay afforded governmental entities appealing agency orders. It must be presumed, therefore, that the Legislature and the Supreme Court both agree with this longstanding judicial interpretation of Section 120.68(3) and Rule 9.310(b)(2). Mr. Caldevilla referred the ACRC to the Meeting Materials packet at pages 102-04 where he details these principles. Mr. Caldevilla also referenced, as further example, the *Wait v Florida Power & Light Co*, 372 So. 2d 420 (Fla. 1979), decision, set forth in his materials for the ACRC Meeting Materials Packet, and the Florida Supreme Court holding that a similar portion of § 119.11(2), which provided that a government's appeal of an order compelling production of public records "shall not operate as an automatic stay," unconstitutionally invaded the Court's rule-making power.

Mr. Caldevilla also noted that § 120.68 is the appeal statute and it provides that the Florida Rules of Appellate Procedure shall govern. So there is no conflict when we look at the entire statutory scheme and the statutes and rules in *pari materia*. The ACRC, by attempting to correct a perceived inconsistency, is crafting in a conflict between the appellate rule 9.310, this statute and this particular Rule 9.190. There is no other possible conflict here, because all other administrative appeals are by certiorari and there is no automatic stay by certiorari. Because of the inconsistency that the

proposed amendment would create, Mr. Caldevilla requested that the ACRC withdraw its proposed amendment to Rule 9.310.

Subcommittee Chair Miller replied that the proposed amendment is not designed to deny automatic stays, but to make those stays decided on case by case basis. In other contexts, there will be stays where needed and where resources are in danger. There was no clear intent to overrule the *Lewis* decision, and the committee note on that is ambiguous in that regard. Subcommittee Chair Miller also referred the ACRC to pages 84-86 of Meeting Minutes packet, where he discusses that in other contexts and courts defer to legislature. As to Rule 9.190, that objection is not in Mr. Caldevilla's written objections and materials and Subcommittee Chair Miller was hearing that objection for first time today. Subcommittee Chair Miller further responded that would have to recommend that, to the extent the amendment to Rule 9.310 goes forward, we also move to amend Rule 9.190 to conform. That, however, is a more technical objection, than an objection to the substance of the proposed rule amendment. Chair Brannock recognized the motion to amend Rule 9.310.

Subcommittee Chair Whitney made a motion to reconsider because the Administrative Law, Government Lawyer and Environmental Law Sections should be given an opportunity to provide input on the proposed amendment to Rule 9.310(b), and they had not had sufficient opportunity to do so, and that would give the Florida Supreme Court a more complete rule amendment package when the proposed amendment was submitted to the Court. Kristy Gavin seconded Subcommittee Chair Whitney's motion. Gavin further added the clarification and there is another

administrative procedure that does have an automatic stay, and that is in the workers compensation rules, where there is an automatic stay for some actions.

Subcommittee Chair Miller responded that we do not intend the proposed rule amendment to affect any other statute. If there were an automatic stay for workers compensation appeals, then the general provisions of the Administrative Procedure Act would presumably defer to the more specific statute. Subcommittee Chair Miller further added that the proposed rule amendment would not affect the workers compensation rules if they are not governed by § 120.68(3).

Kim Ashby asked Subcommittee Chair Whitney if he was on the Administrative Law Subcommittee last year, which Subcommittee Chair Whitney replied that he was and his only point from his motion was that the ACRC should seek out more input from other sections for comments before advancing this proposed amendment.

Vice Chair John Mills commented that we are calling this a motion for reconsideration, but this is not reconsideration as our IOPs define it, and we are required under the Rules of Judicial Administration to give us full consideration to comments. We are responding to comments and we have an obligation to act in light of the comments we have received. Chair Brannock responded that the Rules of Judicial Administration do set forth that we are under reconsideration, which is why we need a 2/3 vote. Subcommittee Chair Miller added that we have a record now, we have conflict and we need to send this to the Florida Supreme Court.

Vice Chair John Mills added that, in response to the Motion, an appeal from a circuit court decision is a regular appeal and that is not under the APA. So he did not see a significant conflict as one of the commentators suggested.

10. Submission to full Committee Vote.

Chair Brannock submitted the motion to reconsider for full Committee vote and the failed, with 3 votes in favor and 46 votes against the motion. Chair Brannock thanked all that participated in the briefing and commenting on these important issues.

Michael Korn asked if the ACRC was going to submit a cycle report regarding an inconsistency in Rule 9.110(e)(1) and whether the Subcommittee would submit a recommendation to the ACRC full Committee at the January 2008 meeting. Chair Brannock responded that, if the conflict was technical and non-substantive then an amendment is not needed. Our report is due February 1, 2008. Chair Brannock asked the Administrative Law Subcommittee to look at that issue and provide a recommendation. Chair Brannock expressed his appreciation to the Administrative Law Subcommittee and to all those who commented for creating such a full, robust record to aid the Florida Supreme Court's review of the proposed Rule 9.310 amendment.

G. Record on Appeal Rules Subcommittee –Chair Sandy Solomon

Subcommittee Chair Sandy Solomon reported that, at the ACRC January 2007 meeting in Miami, the ACRC approved an amendment to Rule 9.050 concerning privacy and court records. The amendment to the rule addressed the use of personal and private information in briefs, petitions, replies, motions, and responses. The amendment was passed by a 35-2 vote. The amendment has been included in the 2008 Cycle report, which was published for comment on July 1, 2007. One comment was received from attorney, Carol Jean LoCicero representing Florida media interests. The Subcommittee met, considered the comment and presented for discussion a proposed amendment to

the previous revision to Rule 9.050.

Chair Brannock recognized the motion to amend, and noted that such an amendment would require a 2/3 vote on this issue to reconsider the language and, if so, then a majority vote on the actual terms of this proposal. Subcommittee Chair Solomon expressed some concerns to Chair Brannock about the need for a procedure to treat this as a motion to amend, because subsection 6 of Rule 2.140 of the Rules of Judicial Administration sets forth that this is merely a response to a comment, not a reconsideration of the Rule 9.050's language itself. Subcommittee Chair Solomon further stated that the Subcommittee met and discussed this issue at length. Subcommittee Chair Solomon referred to the Meeting Materials Packet, particularly pages 126-30, wherein Robert Biasotti distinguished between what comes up in the original record versus the original filing in the appellate court.

Subcommittee Chair Solomon explained that the Subcommittee elected not to deal with the issues surrounding the record below, but only the original filings and those appendixes that are newly attached in the appellate court. The Rule that the ACRC adopted and published for comment appeared on page 129 of the Meeting Materials Packet, as well as page 132 of the Packet, which references our use of the term "redaction". Subcommittee Chair Solomon further reported that the Subcommittee never intended to address serious constitutional concerns regarding what happens during the process of creating the record below. However, while the Subcommittee did not find significant merit to the comments received, to avoid this controversy entirely that has been created by the use of word "redaction", the Subcommittee voted to clarify that our intent is to "not include in the record", rather than to "redacted" from the

record. As such, the proposed modification to Rule 9.050 appears on page 135 of the Meeting Materials Packet: deleting “be excluded from or redacted in all” and removing “redacted” from the committee note.

Chair Brannock noted that the ACRC does not vote on committee notes so the ACRC can make that change in the committee note. Chair Brannock accepted the Subcommittee’s proposal to amend Rule 9.050, which John Mills seconded, and opened the floor for discussion.

Vice Chair Mills noted that, if we are not including a document or parts of document, but the document is being attached, then “not including” does not cover redaction or its intent. Ed Mullins commented that the ACRC does not need to invite a problem that the ACRC does not intend, as we are not redacting. Ed Mullins further expressed his full support for this Rule, as a narrow way to address privacy rights and balance those against our respect for First Amendment rights. The proposed Rule and its amendment, Mullins added, are narrowly tailored meet Carol LoCicero’s objection.

Stephanie Kolman noted that there remained a minor inconsistency in the committee note, because the comment still included “redaction”, thus, redaction might be inferred. Chair Brannock responded that the ACRC does not vote on comments so the ACRC can make that change. Vice Chair Mills noted that he would work with Subcommittee Chair Solomon regarding the language change to that committee note.

Kristy Gavin questioned the use of appendixes and how redaction could be used, if at all, to address problematic documents in an appendix to a petition that are filed in the appellate court. Chair Brannock responded that this rule is not limited to e-filing, but also addresses paper filings in the appellate court.

Ed Mullins further responded that redactions could not be made from the record or appendixes, but to circumvent the e-filing problem, there is still the risk that appellate documents we create are subject to automatic search engines. This Rule has no impact on the record, but is designed to impact the appellate briefs, petitions and attachments to those appellate documents that we create and file into the appellate record. Vice Chair Mills added that he did not see constitutional issues raised by this rule, because the constitutional issues arise in a different context where documents are filed and the public cannot see them at all. Here, these are documents that we, as practitioners, create. The court has the record; it does not need to see this information in our appellate briefs; therefore the public does not either. Denise Powers agreed with Vice Chair Mills' assessment. Ed Mullins further explained that we are not marking out information; we are, by Rule 9.050, simply not including it in what we file in the appellate forum.

Chair Brannock called the vote on the motion to reconsider and adopt the new Rule 9.050 with the new proposed language, which motion carried, with Steve Wisotsky abstaining, 41 in favor, 8 opposed.

