

**IN THE SUPREME COURT OF FLORIDA**

**IN RE: CONSIDERED AMENDMENT  
TO FLORIDA RULES OF APPELLATE  
PROCEDURE 9.310**

**Case No.: SC07-299**

**APPELLATE COURT RULES COMMITTEE  
MINORITY'S RESPONSE TO COMMENTS**

Pursuant to this Court's order of March 9, 2007, proponents of the minority position of the Florida Appellate Court Rules Committee ("ACRC") hereby respond to the three comments filed in this rule proceeding.

**Introduction**

The issue before this Court is whether to amend Rule 9.310, *Fla. R. App. P.*, to make it consonant with section 45.045, Florida Statutes (2006). A minority of the ACRC voted in favor of an amendment.

Three comments to the ACRC report were filed. Two groups of trial lawyers, the Florida Justice Association (FJA) and the Miami-Dade Justice Association (MDJA) (collectively the "Trial Lawyers") argue that no amendment is necessary. Indeed, they argue that any amendment allowing the trial court to exercise discretion in setting the amount of the supersedeas bond would not sufficiently protect a plaintiff's right to recovery. The Trial Lawyers also argue that section 45.045 is unconstitutional and, therefore, can be ignored by the Court in favor of the status quo.

As we show below, the Trial Lawyers overlook that the proposed amendment is necessary to resolve a serious problem that the appellate rules currently do not address; that is, how to balance the interests of the parties to an appeal when the defendant cannot obtain a supersedeas bond. The district courts of appeal are in conflict on this issue. The proposed amendment resolves this conflict.

Equally important, the conflict is resolved in a way that is fundamentally fair. As we discuss below, the amendment strikes a reasonable balance among all of the interested parties to an appeal from a case in which a money judgment has been entered but the posting of a supersedeas bond is, for all practical purposes, impossible.

Whether section 45.045 is constitutional is academic. If the Court agrees that the statute strikes a fair balance of the interests in play, adopting a rule consonant with the statute moots the constitutional question.

The third comment, filed by Paul L. Nettleton, suggests a minor amendment to the proposed rule. The proposed amendment would permit a defendant with some insurance coverage to move for a reduction of the bond amount, as long as the bond is not reduced below the amount of defendant's insurance coverage. The minority position proponents agree that Nettleton's suggestion is consistent with the proposed rule and section 45.045 and support the amendment for the reasons articulated in Nettleton's comment.

## Discussion

The Trial Lawyers argue that there is no reason to amend rule 9.310 because there is no problem requiring resolution (FJA Comment at 8). In their view, the current rule already strikes an appropriate balance between the parties' interests by absolutely requiring a supersedeas bond once a judgment is entered by the lower tribunal. *Id.* at 3. Thus, according to the Trial Lawyers, any amendment to rule 9.310 that affords discretion to a trial court in the matter of the stay of a money judgment would unfairly prejudice a plaintiff's right to recover. *Id.* at 6.

Not so. There are at least three serious problems that the proposed rule resolves, each of which we address in turn.

### **1. The Rule on Stays Pending Appeal Imposes a Strait-Jacket Unnecessarily Preventing the Trial Court's Exercise of Discretion.**

The current rule as interpreted by the Third and Fourth District Courts of Appeal imposes a proverbial "strait-jacket" on the trial court. These courts read rule 9.310 as prohibiting a trial court from exercising its traditional equitable powers in fashioning a stay pending appeal, no matter the circumstances. The proposed amendment recognizes that, in virtually all cases, a bond will still be required. But the amendment is also designed to permit a trial court to exercise its traditional equitable powers in those unusual situations in which a defendant demonstrates that it is impossible to obtain a supersedeas bond without a substantial, and perhaps irreparable, financial disruption. How otherwise are the

interests of the parties to be balanced in those unusual cases, when the current rule has been interpreted to give the trial court *no* discretion to forge an equitable solution that best protects all the interests presented?

Contrary to the Trial Lawyers' comment (*id.* at 9), there *is* evidence that the lack of discretion poses a serious problem. For example, in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) this Court affirmed the Third District's reversal of a judgment against various tobacco companies. The defendants faced a \$145 *billion* judgment and would have been required to post a \$150 billion supersedeas bond to obtain a stay pending appeal under the Third District's interpretation of rule 9.310. As observed by another court considering a similar situation, there is likely not enough bonding power in the world to supersede such a judgment.<sup>1</sup> Thus, following the Trial Lawyers' logic, defendants' only realistic option to avoid liquidation during the course of the *meritorious* appeal would have been bankruptcy — a drastic alternative with enormous repercussions to the defendants' employees and other creditors. Because rule 9.310, as interpreted in the Third District, offered no solution outside of bankruptcy or liquidation, the legislature was forced to intervene and the result was a special statute — section 768.733, Florida Statutes — which limited the bond to \$100 million.

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<sup>1</sup> *Texaco, Inc v. Pennzoil Co.*, 784 F.2d 1133, 1138 (2d Cir. 1986) (estimating that worldwide surety bond capacity ranged from \$1 billion to \$1.5 billion at the time), *rev'd on other grounds*, 481 U.S. 1 (1987).

Not every case, of course, can be addressed by a tailor-made statute.

Requiring parties to seek individual statutory relief is not good public policy. A better alternative, as reflected by the proposed amendment, is to adopt a rule that affords a trial court the discretion to fashion appropriate relief in such circumstances that protects all of the parties.

The famous \$11 billion verdict against Texaco in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987) also illustrates this point. Texas state courts, like some Florida courts, construed their rules to afford no discretion to trial courts to stay the judgment on any terms except a supersedeas bond in the full amount of the judgment plus interest. To avoid liquidation or bankruptcy and to vindicate its right to appeal, Texaco was forced into federal court. There, it successfully argued that the Texas rule unconstitutionally denied Texaco's right to due process because there was no realistic way that Texaco could achieve a stay when the bond required it to do the impossible, namely, post an \$11 billion bond.<sup>2</sup>

These decisions illustrate that, absent a special statute, the only reasonable alternative for a defendant facing an enormous judgment is liquidation or bankruptcy — or perhaps litigation over constitutional issues of due process. As

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<sup>2</sup> The Supreme Court ultimately reversed on the grounds that the constitutional challenge should have been brought in Texas State Court. *See* Paul Nettleton Comment at 15 n.2.

federal courts addressing these issues have determined, however, bankruptcy helps *no one*, least of all the plaintiff who now becomes an unsecured creditor. *See, e.g., Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 786 F.2d 794, 795, 799 (7th Cir. 1986). Federal cases recognize that there are interests at stake beyond the plaintiffs' right to recover. *Id.* The disruption that bankruptcy imposes on the business and its employees and creditors has negative ramifications far beyond the litigation between the plaintiff and the defendant.

Most importantly, these cases recognize that a plaintiff's rights can be vindicated in ways that do not impose the hardships of liquidation, insolvency, or bankruptcy on a defendant and its creditors and employees. For example, in *Olympia*, the defendants filed a motion for stay urging the district court to allow alternative security because they could not post a \$36 million bond. The district court granted a stay conditioned on the appellants posting \$10 million in cash, \$10 million in accounts receivable, and a security interest in some of the company's physical assets. The Seventh Circuit affirmed, noting that this solution, fashioned through the exercise of the district court's sound discretion, avoided bankruptcy and thereby protected plaintiff and defendant alike. According to the Court, it would not "criticize the district judge for his unwillingness to risk throwing [the defendant] into bankruptcy merely to increase (maybe) the probability that [the

plaintiff] can collect all of its judgment if the judgment is affirmed.” *Olympia*, 786 F.2d at 799.

Nor is the problem caused by prohibiting the exercise of discretion limited to mega-judgments against large companies. The same interests are at stake when a small business is hit for a judgment that is beyond its ability to supersede. Should a defendant family-owned business be forced into bankruptcy or liquidation to preserve its right to appeal? If so, as the Seventh Circuit observed in *Olympia*, how has bankruptcy assisted a plaintiff, who is now merely an unsecured creditor in the ensuing bankruptcy? What protection is afforded by requiring a bond when a bond cannot be posted? A trial judge should not be prohibited from fashioning a remedy that considers all of these interests.

To be clear, the proposed amendment does not concern itself with the routine appeal in which the defendant is able to obtain a supersedeas bond or for some reason chooses not to. In this vast majority of cases, the judgment defendant will not be able to satisfy the good cause standard in the proposed rule. In these cases, it would be an abuse of discretion to reduce the amount of the bond or to substitute other security for the bond. Rather, the amendment is aimed at granting the court discretion in those cases in which a bond is not likely to be posted because it is impossible to obtain and the only realistic alternative for the defendant who wishes to exercise its constitutional right to appeal is bankruptcy. In these

cases, the plaintiff is not giving up the right to be secured, because security would never be, and could never be, posted. The amendment to the rule simply allows a court to exercise its traditional equitable powers to fashion a remedy that preserves the status quo and ensures that the plaintiff's right to collect is not impaired by the appeal and that the defendant is not driven unnecessarily into bankruptcy if there is a reasonable alternative.

The Trial Lawyers incorrectly complain that the proposed amendment offers no standards other than the requirement that good cause be shown; thus, one cannot be sure that trial courts will confine their exercise of discretion to appropriate cases like *Engle*, *Pennzoil*, or *Olympia*. (FJA Comment at 10). Florida trial courts do not act in a vacuum. Federal district court judges have long exercised their discretion and equitable powers to set the terms of the stay in accordance with the balance of the equities between the parties and a substantial body of caselaw has developed that provides a time-tested roadmap for Florida courts. *See* Mullins and Escobar, *Staying a Money Judgment in Federal Court Without Posting a Supersedeas Bond*, 77 Fla. B.J. 45 (Dec. 2003) (collecting federal cases and discussing standards developed by federal courts in exercising their discretion). As these cases make clear, it is the rare case in which a court will

not require a defendant to post a supersedeas bond in the full amount of the judgment plus interest.<sup>3</sup>

The Trial Lawyers' comments also overlook that trial courts are relied on to make similar difficult calls every day. As to any stay other than a money judgment, trial courts are required to, and regularly do, weigh the equities and fashion relief that best balances the interests of all parties. Trial courts, for example, routinely make these same sorts of decisions in injunction cases. In fact, the decision to stay a case or to impose provisional relief is the quintessential function of a trial court. The very court that is entrusted to make the initial decision on the merits should also be entrusted to properly balance the interests of the parties in setting the terms of the stay. It is illogical to entrust a court with the merits and then lace the same court into a strait-jacket that prevents the full exercise of discretion in hard cases. Sometimes discretion is required to balance the interests of a plaintiff's recovery against a defendant's constitutional right to appeal.

## **2. The Proposed Amendment Resolves Conflict Among the District Courts of Appeal.**

A second problem that the amendment seeks to resolve is a conflict among the district courts of appeal. The Second District has interpreted rule 9.310 to

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<sup>3</sup> Some federal decisions suggest that it might be appropriate for a district court to dispense with a surety bond in situations in which the defendant is clearly capable of satisfying the judgment. The minority agrees with the comments that, in light of recent litigation involving *Arthur Anderson* and the *Enron companies*, courts will likely be very circumspect in dispensing with bonds on these grounds.

permit the trial judge limited discretion to grant a stay without requiring a bond in the full amount of the judgment. *See Platt v. Russek*, 921 So. 2d 5, 8 (Fla. 2d DCA 2004). The Third and Fourth Districts, on the other hand, have ruled that the trial court has no discretion, regardless of the circumstances, to reduce or dispense with the bond. *Campbell v. Jones*, 648 So.2d 208, 209 (Fla. 3d DCA 1994); *Taplin v. Salamone*, 422 So. 2d 92, 93 (Fla. 4th DCA 1982).

This conflict should be resolved. A conflict that affects a right so fundamental as the right to take an appeal and the standards for obtaining a stay should be consistent throughout the state. The Trial Lawyers themselves recognize that this Court would be wise to adopt an amendment that resolves the conflict, one way or the other. *See FJA Comment at 12-13.*

### **3. The Proposed Amendment Moots the Conflict Between the Rule and the New Statute.**

The third problem resolved by the proposed rule is the conflict between the current rule and newly enacted section 45.045. The Trial Lawyers' solution is simplistic: the Court should ignore the statute as an unconstitutional intrusion into matters of procedure. But constitutional or not, the new statute is an expression of the will of the people on the issue of how best to balance the interests of plaintiffs and defendants — a view that is consistent with federal court precedent and the Second District. The new statute continues to protect judgments obtained by plaintiffs while recognizing and protecting a defendant's constitutional right to

appeal in those circumstances in which it is impossible for the defendant to obtain the requisite supersedeas bond. This expression of the people's will is entitled to careful consideration and deference, instead of simply being ignored as an unconstitutional intrusion into matters of procedure.

The real issue is not whether the terms of the stay are substantive or procedural. As discussed in one of the research memoranda by an ACRC member accompanying the report of the ACRC to this Court, there is a good argument that the legislature has the power to strike a substantive balance in section 45.045 to ensure that a defendant's constitutional right to appeal is, in practical terms, a meaningful one.<sup>4</sup> The larger question is whether the courts should be permitted to exercise equitable discretion to balance the interests of the parties in circumstances in which a bond cannot be posted and the alternative is irreparable harm to a defendant, its employees, and other third parties. If the answer to that question is "yes," the issue before this Court is whether it should defer to the legislature's balancing of the respective interests of the plaintiff, the defendant, the defendant's employees, and other third parties.

Stated differently, the conflict between the rule and the statute can be avoided by adopting a proposed rule consonant with the statute. Thus, the

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<sup>4</sup> Amended and Supplemental Memorandum by Dorothy Easley, Civil Rules Subcommittee Member (July 30, 2006). Found at Appendix C, pp. 20-51, ACRC Out-of-Cycle Report on Considered Amendment to Rule 9.310.

constitutional question becomes academic, and the focus of the parties litigating over the terms of a stay can be the equities in the particular case.

It also merits underscoring that, even if section 45.045 is ignored as unconstitutional or the decision on constitutionality is left to the litigation process, this Court is still faced with a conflict among the district courts concerning the proper interpretation of rule 9.310. This conflict should be resolved sooner rather than later, and this rule-making proceeding provides an appropriate vehicle for settling the issue.

The Trial Lawyers also argue, incorrectly, that the amendment will encourage frivolous appeals. The *Olympia* case plainly demonstrates that the amendment does not relieve defendants from the responsibility to secure a plaintiff's recovery. And, as *Engle* demonstrates, the appeal that is foreclosed by the inability to post a bond may well be meritorious. There are already other mechanisms in place to discourage frivolous appeals.

Likewise, the suggestion that the statute will provide more time for defendants to hide assets is without support. The amendment expressly imposes on the defendant the obligation to secure the judgment to the extent possible. Equally important, the amendment contains procedures to uncover and penalize defendants who attempt to conceal assets. *See, e.g.*, section 57.105, Florida Statutes.

The Trial Lawyers' comments suggest that the 45-7 vote of the ACRC is an indication of the ACRC's overwhelming disapproval of the proposed amendment. This overlooks that the vote of the people of Florida through their legislators is to the contrary. Equally important, however, is that the 45-7 vote overstates the ACRC's opposition to the amendment. As reflected in the submission of the majority and the comments and the minutes of the ACRC meeting, there were many varied reasons for opposition to this particular amendment. True, some members thought that section 45.045 was unconstitutional and that the Court should ignore an unconstitutional rule. Others, however, thought that section 45.045 was inartfully worded and that the ACRC should not follow the form of the statute. And others thought that this was an issue that should be resolved in litigation, instead of through the rule-making process. Others simply were opposed to the concept of granting discretion to trial judges in cases of money judgments. Most relevant here, others believed that the ACRC should not revisit whether to amend rule 9.310 when the ACRC had by a narrow margin recently rejected another amendment to the rule.

The ACRC has historically been evenly split on the issue of whether an amendment is necessary to deal with cases like *Engle*, *Pennzoil*, and *Olympia* when a bond is not possible. After the *Platt* decision created conflict with the Third and Fourth Districts, the Civil Rules Subcommittee of the ACRC presented a

proposed amendment to the ACRC that would have afforded a trial court the discretion to reduce the supersedeas bond in certain circumstances. The amendment was defeated by the narrowest of margins: *See* Appendix A, June 24, 2005, ACRC Minutes.

No one disputes that there are substantial and reasonable differences of opinion. Plaintiffs are concerned that trial judges will go too far in exercising their discretion. Defendants are concerned that, in the absence of an amendment, trial judges, at least in the Third and Fourth Districts, will have no discretion at all, regardless of the equities, regardless of the interests, regardless of who is hurt, and regardless of whether plaintiffs will benefit. But this sharp difference of opinion simply underscores the prudence of deference to the legislature's reasonable attempt to balance these interests in a way that protects all the parties to the case.

### **Conclusion**

For all the foregoing reasons, the ACRC Minority respectfully urges the Court to adopt the proposed amendment to Rule 9.310, *Fla. R. App. P.*, end the conflict among the District Courts of Appeal, and bring that rule into harmony with section 45.045, Florida Statutes. The minority position proponents agree with Paul Nettleton's proposed minor modification of the rule for the reasons expressed in his comments.

Dated: June \_\_\_\_\_, 2007

Respectfully submitted,

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*Representing the Minority Position of the ACRC*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this \_\_\_\_\_ day of June, 2007 to: **John Mills, Esq.,**

Incoming Vice Chair, Mills & Creed, P.A., 865 May Street, Jacksonville, FL 32204-3310, (representative of majority position), **Roy D. Wasson, Esq.**, 5901 SW 74th Street, Suite 205, Miami, Florida 33143, counsel for Florida Justice Association and Miami-Dade Justice Association, and **Paul L. Nettleton, Esq.**, and **Erin Kinney, Esq.**, Carlton Fields, P.A., 4000 International Place, 100 S.E. Second Street, Miami, Florida 33131-2114, counsel for Paul L. Nettleton.

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Attorney

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing complies with the typeface and font size, 14 point Times New Roman, proportionately spaced, as set forth in Rule 9.210, *Fla. R. App. P.*

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Joanna A. Mauer  
Fla. Bar No. 0763251  
Staff Liaison, Florida Appellate Court Rules Committee  
The Florida Bar

**APPENDIX A**

**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**

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**B. Civil Law Rules Subcommittee - Chair Steven L. Brannock**

Subcommittee Chair Steven L. Brannock presented a proposed rule change to Rule 9.310(b).

The Civil Rules Subcommittee studied at length whether Rule 9.310(b) should be revised to clarify that a trial judge has the discretion, in very limited circumstances, to grant a stay of a money judgment without requiring a bond in the full amount of the judgment. Although the language of the current rule appears to vest the trial court with such discretion, there is a conflict in the cases on the issue between the Second and Third District Courts of Appeal. In light of the conflict in the cases and the apparent ambiguity in the rule, the Civil Rules Subcommittee recommends an amendment to Rule 9.310(b) to resolve the conflict.

The issue had first come to the ACRC via a request by Arthur England, who was appealing a judgment that was guaranteed by the State of Florida. He had filed a motion to dispense with the bond, but the First District, relying on authority from the Third District, denied the request. The Subcommittee noted at that time that the

current language of the rule seemed to provide the trial judge discretion to dispense with the bond requirement. The Subcommittee proposed a simple change to Rule 9.310(b). The ACRC rejected the change by a narrow margin. Members raised concern that allowing the amendments would open “Pandora’s Box” and that no standards were set forth. Soon thereafter, Judge Altenbernd in Platt v. Russek, 2004 WL 784730 (Fla. 2d DCA Apr. 14, 2004), expressly disagreed with the Third District and held that the trial judge had discretion to stay a money judgment. In light of this conflict, the Chair referred the matter back to the Subcommittee. The Subcommittee has proposed a rule that tracks the Platt opinion and is intended to make protecting the judgment creditor paramount.

The proposed amendment was:

### **RULE 9.310. Stay Pending Review**

**(a) Application.** Except as provided by general law and in subdivision (b) of this rule, a party seeking to stay a final or non\_final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief. A stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both.

**(b) Exceptions.**

(1) *Money Judgments.* If the order is a judgment solely for the payment of money, a party may obtain an automatic stay of execution pending review, without the necessity of a motion or order, by

posting a good and sufficient bond equal to the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest. The lower tribunal retains the limited discretion upon motion and a showing of compelling circumstances to reduce the amount of the bond, dispense with the bond, or impose alternative conditions for stay of a money judgment. In exercising this limited discretion, the lower tribunal shall not take any action that will unduly prejudice the judgment creditor's ability to collect upon the judgment or prevent the judgment creditor from establishing liens or obtaining priority to collect upon the judgment. Multiple parties having common liability may file a single bond satisfying the above criteria.

Brannock made the motion and John Mills seconded the motion.

Vice Chair Barbara Egan asked how the rule protected the judgment creditor.

Brannock noted that the Rule provided that the discretionary stay was limited to compelling circumstances. The proposed rule is designed to protect the judgment creditor. It is in harmony with federal law that allows a discretionary stay in limited circumstances such as the big “mega” judgments that force a company into bankruptcy. The federal rule allows district judges the flexibility to balance the interests of the parties and to avoid forcing companies into bankruptcy, which often puts employees out of work unnecessarily.

Vice Chair Reiter noted that the trial judge's decision could be reviewed by the appellate court for an abuse of discretion. Valeria Hendricks asked whether the losing party in Platt had sought review in the Florida Supreme Court. Brannock replied that it had not.

Former Judge Rodolfo Sorondo noted that he had tremendous reservations about giving this discretion to trial judges. A paralegic plaintiff could risk no recovery while a defendant would not have to post a bond. In addition, the rule might cause the announcement of settlements, which can cost even the most invulnerable companies billions. It could cause the firing of tens of thousands of employees. People litigate for years and are entitled to an element of security. Paramount security for the judgment creditor can mean different things to different people. After years of litigation, it is over at final judgment.

Former Chief Judge Alan Schwartz noted that a plaintiff should be entitled to collect on a judgment unless the defendant posts a bond. If a defendant wants to correct the judgment, he should post a bond. This has not been a serious problem.

Randall Reder spoke in favor of the rule. The Subcommittee has been trying to push this for the last couple of years. It certainly should apply with respect to judgments entered against property. Once a certified copy is filed and recorded, a lien attaches to the property. A stay should be granted. A judgment creditor is protected. Otherwise you are forcing an owner to mortgage or sell the property.

Arthur England was seeking flexibility. Reder opined that we should have confidence in the trial bench when there is no risk to the creditor and felt that it was insulting not to believe that the trial judges were capable of addressing this matter. John Mills disagrees with Reder. A defendant does not have to post a bond to take an appeal. If a defendant wants to stop execution, he should post a bond. If he cannot, then we should not place the burden on the appellant. Until you obtain a judgment, you cannot get information on assets.

Secretary Mullins noted that we should ensure that there is a meaningful opportunity to appeal. In the normal case, the defendant will have to post a bond. This amendment is concerned with the “mega,” runaway jury verdicts. He gave the example of the tobacco case in which the defendants had to seek relief from the Florida Legislature.

Schwartz noted that the trial judge did not properly reduce the judgment in that case. Brannock responded that there should be consistency in the courts. This is one way for the Florida Supreme Court to resolve the conflict. The federal law is a guide to this rule. For example, the Olympia case in the 7<sup>th</sup> circuit involved a mega judgment. The judgment debtor was facing bankruptcy. The judge required a \$20 million bond and other securities. The corporation was able to stay in business. As Mullins had pointed out, the tobacco companies had to go to the Legislature. This rule would apply in very narrow circumstances.

Mills noted that if the ACRC wants the issue to go to the Supreme Court, the Committee should amend the rule to make it clear that a stay is only possible for a money judgment with supersedeas bond. If a judgment debtor files bankruptcy, it stays execution as a matter of federal law. That gives protection to all creditors.

Judge Ramirez is against the rule as it goes beyond the Platt decision. The court reversed the trial judge because he stayed without a bond. The court has to impose a lesser bond.

Judge Schwartz noted that the tobacco judgment was stayed because the parties agreed to settle the constitutional issue. They agreed to an 80 million dollar bond. Plaintiffs are not suicidal. They do not want to put the defendant in bankruptcy. They will take such steps so they can execute. If the defendant wants to stay the judgment, it will post the bond.

Brannock noted that Judge Altenbernd in Platt noted that a trial court would have the power to stay without posting a bond in extraordinary circumstances. He disagreed with the Third District on this point. Judge Ramirez noted that this was dicta.

Vice Chair Reiter noted that the courts are in conflict. The rule as written does not require a bond. It is an interpretation by the Third District.

Shannon Carlyle noted that, if this rule is an extreme measure, why were the federal factors not listed. Rule as written is not as narrow as the federal rule.

Brannock noted that the Subcommittee thought Judge Altenbernd's language was strong enough. Another approach would be to take the four federal factors. The Subcommittee chose Altenbernd's language.

Schwartz stated that the Supreme Court could resolve the conflict. The adverse party in Platt did not seek review. This Committee should not look for conflicts to resolve.

Jennifer Carroll noted that the problem is that subparagraphs (a) and (b) are not clear. That is why the Subcommittee is trying to make a rule that makes sense. The infirmity is that, under (a), the trial judge has discretion. If you have judgment solely for payment, you may seek stay by posting bond under (b). However, nothing in (b) says that it is exclusive. She gave a hypothetical. Suppose the parties are fighting over frozen funds. The judge decides the plaintiff wins. The defendant has to post a bond. But, what if a defendant cannot post? Why cannot the trial judge maintain the status quo? This is one of many examples. Under the language as written, why would not subparagraph (a) apply? The subcommittee was trying to put standards in subparagraph (b).

Judge Rick Polston stated that the parties could deal with this by going to the Florida Supreme Court.

Randall Reder noted that it is appropriate to bring this to the Florida Supreme Court in this manner. It is important. Historically, the trial judges always

had right to enter a stay. The bond was to remove that discretion for a money judgment. The Third District turned it into a requirement. That is illogical and wrong.

Kristy Gavin called the question. John Mills seconded. The call to question was approved.

The ACRC then voted on the proposed rule. It **FAILED, 22 in favor, 23 opposed.**