APPENDIX E
January 21, 2004

Honorable Mark K. Leban
Chairman, Appellate Rules Committee
Courthouse Center
175 NW 1st Avenue, Ste. 2322
Miami, Florida 33128

Re: Interlocutory Appeals of Orders Denying Motions to Dissolve Writs of Garnishment

Dear Judge Leban:

My partner, Ed Mullins, who sits on your committee, suggested I write to you as committee chair regarding an issue that arose in a matter we handled recently. The matter has been fully resolved by settlement; however, the legal issue involved is one we think ought to be addressed.

Our client, who was not the judgment debtor, moved to dissolve a post-judgment writ of garnishment because it claimed an interest in the fund that was the subject of the writ. The trial court denied the motion and we filed an interlocutory appeal. The 3rd DCA panel, speaking through Chief Judge Schwartz, dismissed the appeal on the basis that it did not have jurisdiction because the order was a non-final order not subject to interlocutory review, citing Ramseyer v. Williamson, 639 So. 2d 205 (Fla. 5th DCA 1994). We moved for rehearing citing cases from other DCAs holding that the order was an appealable non-final order and citing cases in which such orders were, in fact, the subject of substantive opinions with no discussion suggesting any issue of appellate jurisdiction. The 3rd DCA panel, again speaking through Chief Judge Schwartz, granted the motion for rehearing (without discussion) and the case was scheduled for oral argument when it settled. Since there is a lack of uniformity among the DCAs on the subject, it seems to us that your committee could bring clarity to the issue.

For your reference we attach a non-exhaustive list of citations that we feel are relevant to the discussion of the current state of the law on whether such orders can be automatically appealed under the current (and former) appellate rules.
We cannot see any meaningful appellate policy distinction between permitting rulings that pertain to the granting or denial of injunctive relief or that determine the right to immediate possession of property to be appealed on an interlocutory basis, see F.R.A.P. 9.130(a)(3)(B) and (a)(3)(C)(ii), on the one hand, and not permitting rulings that grant, deny, dissolve or refuse to dissolve writs of garnishment (whether prejudgment or post-judgment) to be appealed on the other. As you might realize, the issuance, refusal to issue, dissolution and/or refusal to dissolve a garnishment writ can have a dramatic impact on the position of the parties in litigation and, as it was in our matter, third parties allegedly affected thereby. In many respects an issued and delivered garnishment writ acts much like an injunction as it prevents the party from collecting the debt or obtaining possession of personal property held by the garnishee; however, such writ is even more potent than an injunction because the service “creates a lien” on the debt owed or property held by the garnishee. See Fla. Stat. §77.06.

Thus, the granting, refusal to grant, dissolving, or refusal to dissolve garnishment writs all directly impact an actual or inchoate property interest on the debt or the property held by the garnishee. Having appellate access to these types of decisions on writs of garnishment seems in keeping with the policy goals of having interlocutory appeals.

We would be happy to assist your committee in addressing this issue in any way you think appropriate.

Respectfully,

Gregory S. Grossman

Enclosures
- Florida Supreme Court
  - Pleasant Valley Farms & Morey Condensery Co. v. Carl, 106 So. 427 (Fla. 1925)

- First DCA
  - Doug Sears Consulting, Inc. v. ATS Services, Inc., 752 So.2d 668 (Fla.1st DCA 2000)

- Second DCA
  - Hill v. Haywood, 735 So.2d 539, 24 Fla. L. Weekly D1232 (Fla. 2d DCA 1999)

- Third DCA
  - Barbouti v. Lysandrou, 559 So.2d 648 (Fla. 3d DCA 1990)
  - Cerna v. Swiss Bank Corp. (Overseas) S.A., 503 So.2d 1297 (Fla. 3d DCA 1987)
  - Transportes Aereos Mercantiles Panamericanos, S.A. v. Banco Cafetero, 451 So.2d 932 (Fla. 3d DCA 1984)
  - Maryl v. Hernandez, 254 So.2d 47 (Fla. 3rd DCA 1971)
  - Jefferson Nat. Bank of Miami Beach v. Cloverleaf Hospital, Inc., 194 So.2d 287 (Fla.3rd DCA, 1967)

- Fourth DCA
  - Brock v. Westport Recovery Corp., 832 So.2d 209, 27 Fla. L. Weekly D2587 (Fla. 4th DCA 2002)
  - Second Shift Inc. v. Great West Life & Annuity Insurance Corp., 797 So.2d 1287, (Fla. 4th DCA 2001)
  - Faro v. Porchester Holdings, Inc., 792 So.2d 1262, 26 Fla. L. Weekly D2164 (Fla. 4th DCA 2001)
  - Rudd v. First Union Nat. Bank of Florida, 761 So.2d 1189, (Fla.4th DCA 2000)
  - Marshall-Shaw v. Ford, 755 So.2d 162, (Fla. 4th DCA 2000)
  - Gerlick v. Chandler, 758 So.2d 1221, (Fla. 4th DCA 2000)
  - 5361 N. Dixie Highway, Inc. v. Capital Bank, 658 So.2d 1037 (Fla. 4th DCA 1995)
  - Mullins Lumber Co. v. W.W. Lumber and Bldg. Supplies, Inc., 446 So.2d 1083 (Fla.4th DCA 1983)
  - Barnett Bank of Broward County v. Tabatchnick, 401 So.2d 1166 (Fla. 4th DCA 1981)
• **Atria v. Anton**, 379 So.2d 462 (Fla. 4th DCA 1980)
• **C & S Plumbing, Inc. v. Live Supply, Inc.**, 397 So.2d 998 (Fla. 4th DCA 1981)
• **Hamilton v. Hanks**, 309 So.2d 229. (Fla. 4th DCA 1975)

❖ **Fifth DCA**

• **Ramseyer v. Williamson**, 639 So.2d 205 (Fla. 5th DCA 1994)-
Leban, Mark

From: steve.brannock@hklaw.com
Sent: Friday, May 14, 2004 1:13 PM
To: Leban, Mark
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Subject: Report of the Civil Rules Subcommittee

Dear Judge Leban,

set forth below is the report of the actions of the Civil Rules Subcommittee. We also attach the Greg Grossman memorandum referred to in the report. The memorandum summarizes the relevant case law.

REPORT OF THE CIVIL RULES SUBCOMMITTEE

The Civil Rules Subcommittee had one assignment. Greg Grossman, a partner of Rules Committee member Ed Mullins, wrote Chair Leban on January 21, 2004 regarding a conflict in the law concerning the appealability of orders relating to garnishments. Judge Leban assigned the issue to the subcommittee. As set forth below, the subcommittee unanimously recommends an amendment to Rule 9. 13 O(a)(3)(C)(ii) to clarify the rule to comport with the practice of the majority of appellate courts in Florida. A vote of the full rules committee is required.

Background

Mr. Grossman's letter raises concerns about conflict and confusion in the law concerning the appealability of orders relating to garnishments. He litigated a case in which a third party moved to dissolve a post-judgment writ of garnishment. The motion was denied and the third party appealed. The Third DCA dismissed the appeal for lack of jurisdiction citing Ramseyer v. Williamson, 639 So. 2d 205 (Fla. 5th DCA 1994). The third party moved for rehearing citing numerous other cases in which garnishment cases were heard on appeal and the subject of substantive opinions without any issue raised regarding the court's jurisdiction. The Third DCA granted rehearing (without discussion) and set the case for oral argument on the merits. The case then settled.

Chair Lebanon assigned the issue to the civil rules subcommittee to determine whether an amendment to the rules was appropriate in light of the apparent conflict and confusion in the law. A work group of the subcommittee was formed to address the issue in more detail. Mr. Grossman graciously agreed to assist as an ad hoc member. The work group researched the law on this issue which is summarized in a memorandum prepared by Mr. Grossman. The research revealed that orders granting or refusing garnishments and orders dissolving or refusing to dissolve writs of garnishment have long been subject to interlocutory appellate review. In the vast majority of those cases, Florida appellate courts have reviewed such orders without any question or discussion of its jurisdiction. The few cases that have specifically addressed the jurisdictional issue, however, have reached conflicting results. As noted above, the Fifth District in Ramseyer held that an order denying a motion to dissolve a writ of garnishment was not appealable. The Fourth District reached the opposite result in 5361 Dixie Highway

05/14/2004
v. Capital Bank, 658 So. 2d 1037 (Fla. 4th DCA 1995), acknowledging the conflict with Ramsmeyer.

Even after this conflict was joined, other Florida appellate courts continue to review interlocutory orders concerning garnishment, without any discussion of jurisdiction. See e.g., Doug Sears Consulting v. ATS Services, 752 So. 2d 668 (Fla. 1st DCA 2000); Hill v. Haywood, 735 So. 2d 539 (Fla. 2d DCA 1999).

The Proposed Amendment

The work group recommended that Rule 9.130(a)(3)(C)(ii), the rule permitting interlocutory appeals from orders regarding the immediate possession of property, be amended to clarify that orders relating to garnishment are subject to interlocutory appeal. The full subcommittee then met to examine and discuss the recommendation of the work group. After discussion and comment the subcommittee voted unanimously to recommend the following amendment to the rule and also voted to include an explanatory comment.

Proposed Amendment

"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 subsection. Compare Ramsmeyer 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.

Rationale for the Amendment

The subcommittee favors the amendment. First, it appears that most courts in Florida have long assumed that orders relating to garnishment are appealable. Unless "possession" in Rule 9.130(a)(3)(C)(ii) is defined very narrowly, it would seem that garnishment orders directly affect the possession of property. Alternatively, garnishment orders have much the same impact as an order granting or denying injunctive relief because of the limits the garnishment order places on the use or alienation of the property. The amendment avoids future litigants being surprised by a jurisdictional issue concerning garnishment appeals.

Second, the subcommittee thought it made sense to resolve the conflict between the 4th and 5th DCA on the issue. Members strongly felt that appellate rights should not depend on accidents of geography. Members were concerned that the average garnishment case is not likely to be worth enough for the parties to expend the resources necessary to obtain resolution of the conflict by the Florida Supreme Court. Presenting the proposed amendment to the Court will give the it the opportunity to resolve that conflict.

The subcommittee drafted the rule to include references to attachment and replevin because it was concerned that a reference solely to garnishment might be misinterpreted as a limitation on the appealability of similar writs not mentioned. Because attachment and replevin orders have unanimously
been treated as appealable interlocutory orders, we thought it made sense to include a specific reference to attachment and replevin to eliminate any chance of confusion. In that same vein, the subcommittee recommended a comment to clarify that amendment is solely to clarify the appealability of garnishment orders and that no further limitation or expansion of the rule was intended.

<<Memo on Appealability of Garnishment Orders (00036035;2).DOC>>
To: Garnishment Sub Subcommittee of the Civil Subcommittee of the Appellate Rules Committee of the Florida Bar

From: Gregory S. Grossman, Ad Hoc Member

Date: May 2, 2004

Subject: Should Orders Regarding Writs of Garnishment Be Immediately Appealable?

The following memorandum explains the garnishment process, provides a survey of the current law, and recommends that the Appellate Rules be amended to clarify that orders on garnishments be immediately appealable.


A. Pre-Judgment & Post-Judgment: Chapter 77 allows writs of garnishment to those persons who have “sued to recover a debt” (hereinafter “Pre-Judgment Writ of Garnishment”) or has “recovered judgment” (hereinafter “Post-Judgment Writ of Garnishment”). Fla. Stat. §77.01. Pre-Judgment Writs of Garnishment are not available in tort actions. Fla. Stat. §77.02.

B. What is Garnished?

1. Debts Owed To Judgment Debtor/Defendant. Florida law allows a non-tort plaintiff or judgment creditor to issue a garnishment writ to a third party who owes monies to the defendant to subject that debt to the outstanding judgment or in the case of a Pre-Judgment Writ to cause the garnishee to retain control over the money. Fla. Stat. §§77.01; 77.06

2. Personal Property. Moreover, the garnishment writ and the statute also requires the garnishee to disclose and to hold until further court order any tangible or intangible personal property of the judgment creditor/defendant. §§77.01; 77.06

C. Grounds for Issuance of Post-Judgment. The issuance of Post-Judgment Writs of Garnishment is centered on the allegation that the defendant does not have possession of sufficient visible property to satisfy the existing judgment Fla. Stat. §77.03.

D. Grounds for Issuance of Pre-Judgment Writ of Garnishment. A plaintiff seeking a Pre-Judgment Writ of Garnishment must utilize a sworn complaint, make the requisite allegation of the amount owed, that the debt is just, due, and unpaid,
that the plaintiff does not believe the defendant will have enough tangible property to satisfy the anticipated judgment, that the issuance was not sought to injure the defendant, and must post a bond equal to two times the debt demanded. Fla. Stat. §77.031.

E. Effect of Writ.

1. **Debts Owed To Judgment Debtor/Defendant.** The service of the writ makes the garnishee liable to the plaintiff for all debts due by garnishee to the judgment debtor/defendant. Fla. Stat. §77.06

2. **Personal Property.** The service of the writ also makes the garnishee liable to the plaintiff for any tangible or intangible personal property of the judgment debtor/defendant in garnishee’s possession during the period of time between service of the writ and the answer. Fla. Stat. §77.06

3. **Lien Created.** The service of the writ “creates a lien” as of the date of service on the debts due by garnishee to the judgment debtor/defendant and the tangible or intangible personal property of the judgment debtor/defendant in the garnishee’s possession. Fla. Stat. §77.06(1). This provision was added in the 2000 revision to Chapter 77 to overrule the holding in In re Masvidal, 10 F.3rd 761 (11th Cir. 1993) (Creditor who had writ of garnishment issued and served is subordinate to trustee in bankruptcy because service of writ did not create lien and there was no judgment in garnishment); see In re Giles, 271 B.R. 903 (Bankr. M.D. Fla. 2002) (recognizing amendment to statute intended to overrule Masvidal and citing legislative history of that intent)

F. Procedure After Issuance and Service

1. **Garnishment Proceeding Between Plaintiff and Garnishee.** Once the writ is issued and served, the garnishee must answer and the plaintiff/garnishor may reply to such answer. Fla. Stat. §§77.055; 77.061. Disputes between the plaintiff/garnishor and the garnishee are tried before a jury. Fla. Stat. §77.08. For Pre-Judgment Writs of Garnishment, no judgment may be rendered against the garnishee unless and until a judgment is rendered against the defendant in the underlying action. Fla. Stat. §77.081(2).

2. **Motions to Dissolve.** Additionally, motions to dissolve the writ of garnishment may be brought by the judgment debtor/defendant or any other person having an ownership interest in the property Fla. Stat. §77.07. In the event of such a motion, the plaintiff must prove the grounds for issuance (and for Pre-Judgment Writs of Garnishment the plaintiff must also prove that there is a reasonable probability that the final judgment in the underlying action will be rendered for plaintiff).

3. **Claims of Exemption.** If the judgment debtor/defendant is an individual he or she may file a claim of exemption alleging that the debt and/or property that is the subject of the garnishment is exempt from collection processes. Fla. Stat.
§77.041 The Court will determine the validity of the exemption in the event of disputes between the judgment debtor/defendant and plaintiff. Id.

4. **Forthcoming Bond.** A judgment debtor/defendant may secure release of property by posting a bond equal to the lower of two times the debt demanded or two times the value of the property for which release is sought. Fla. Stat. §77.24

II. **The Caselaw on Appealability of Orders Regarding Writs of Garnishment**

In summary:

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<td>4th DCA:</td>
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<td>5th DCA:</td>
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A. **Post-Judgment Writs of Garnishment**

1. **Hill v. Haywood,** 735 So. 2d 539 (Fla. 2nd DCA 1999)

   (a). **Facts:** Writ of garnishment issued to employer. Defendant claimed that as head of household the monies were exempt wages and filed motion to quash writ of garnishment. Plaintiff did not contravene defendant’s affidavit. Trial court denied motion to quash.

   **Issue & Holding:** Did affidavit of exemption have to say “head of household” and did it have to be executed before the court? Answer: No. Order reversed with instructions to quash writ of garnishment.

   **Pertinent Reasoning:** No discussion regarding appealability.

2. **Maryl v. Hernandez,** 254 So. 2d 47 (Fla. 3rd DCA 1971)

   (a). **Facts:** Judgment rendered. Post-judgment writ of garnishment issued. Garnishee defaults and judgment rendered. Defendant moves to set aside default and files claim of exemption.

   **Issue & Holding:** Was untimely motion to dissolve sufficient to justify vacating default judgment. Answer: Yes. Default judgment reversed with instructions to hold evidentiary hearing on exemption claim.

   **Pertinent Reasoning:** No discussion regarding appealability.
3. **Jefferson Nat’l Bank of Miami Beach v. Cloverleaf Hospital**, 194 So. 2d 287 (Fla. 3rd DCA 1967)

**Facts:** Trial court denied motion for final judgment in garnishment and granted judgment for fees to garnishee.

**Issue & Holding:** Were orders denying final judgment in garnishment and granting fees appealable? Answer: Order denying final judgment in garnishment not appealable. Order granting fees appealable and reversed.

**Pertinent Reasoning:** Court found that garnishment proceeding is one at law, the order merely denied a motion, and additional judicial labors still needed to occur.


(a). **Facts:** Continuing Writ of Garnishment issued. Defendant moved to dissolve garnishment and claimed exemption for head of the household. Trial court denied motion to dissolve. Appeal taken.

(b). **Issue & Holding:** Were monies sought to be garnished exempt salary or wages? Answer: No, however, because they were not salary or wages continuing writ is improper. Writ quashed.

(c). **Pertinent Reasoning:** No discussion regarding appealability of order.

5. **Second Shift v. Great West Life & Annuity Ins.**, 797 So. 2d 1287 (Fla. 4th DCA 2001)

**Facts:** Trial court denied defendant’s motion to dissolve writ of garnishment on its bank account.

(b). **Issue & Holding:** Is order appealable? Answer: No.

(c). **Pertinent Reasoning:** Court holds that order is not a final judgment that either terminates the writ citing Tabatchnick, infra.


**Facts:** First writ of garnishment issued to bank. Trial court denied motion to dissolve. Appeal taken. Second writ of
garnishment issued to bank. Trial court denied motion to dissolve the second writ and issued judgment against garnishee. Appeal taken. On its own motion the appellate court consolidated both appeals for disposition. **Issue & Holding:** Did bank account holding proceeds of cash surrender on life insurance policy remain exempt. Answer: Yes. **Pertinent Reasoning:** No discussion on appealability of orders.

7. **Rudd v. First Union National Bank of Florida**  
761 So. 2d 1189 (Fla. 4th DCA 2000)

**Facts:** Defendant filed claim of exemption and motion to dissolve continuing writ of garnishment. Trial Court denied motion on grounds that garnishee had failed to answer garnishment. Final judgment rendered against garnishee. Appeal taken. **Issue & Holding:** Can defendant file claim of exemption and motion to dissolve prior to answer to garnishment by garnishee? Answer: Yes. **Pertinent Reasoning:** No discussion on appealability of orders.

8. **Gerlick v. Chandler,** 758 So. 2d 1221 (Fla. 4th DCA 2000)

(a). **Facts:** Continuing Writ of Garnishment issued. Defendant filed motion to dissolve writ and provided affidavits of wage exemption. Plaintiff did not file objection to exemption claim. Trial court denied motion to dissolve. Appeal taken. **Issue & Holding:** Where Plaintiff does not file objection to exemption claim can court do anything other than dissolve writ? Answer: No. **Pertinent Reasoning:** No discussion on appealability of order.

(c). **Pertinent Reasoning:** No discussion on appealability of order.


(b). **Issue & Holding:** Where third party is not specifically named in garnishee’s answer does it have standing to
move to dissolve garnishment writ under §77.07(2).
Answer: No.

(c). Pertinent Reasoning: Court held that there was no violation of clearly established principal of law resulting in miscarriage of justice.

10 Mullins Lumber Company v. W.W. Lumber and Building Supplies, 446 So. 2d 1083 (Fla. 4th DCA 1984)

Facts: Writ of garnishment issued within time for rehearing on underlying judgment. Motion to dissolve garnishment denied. Appeal taken.
Issue & Holding: Should garnishment be dissolved when it is issued within the time for new trial or rehearing on the underlying judgment. Answer: Yes.
Pertinent Reasoning: No discussion on appealability of order.

11. Barnett Bank of Broward County v. Tabatchnik
401 So. 2d 1166 (Fla. 4th DCA 1981)

(a). Facts: Writ of garnishment issued. Garnishee answered saying it owed monies but had setoff rights in excess of amount held. Motion for judgment in garnishment filed and denied. Appeal taken. Appellee moved to dismiss appeal for lack of jurisdiction.


(c). Pertinent Reasoning: Garnishment is ancillary in nature but is separate and distinct proceeding requiring service and answer and permits a reply and motion to dissolve by the defendant and affidavits by third parties claiming the garnished property. All “contemplate ultimate entry of final judgment which terminates the writ, either by discharging the garnishee from further liability under the writ or by awarding judgment in favor of the judgment creditor against the garnishee.” Court holds that the order is neither a final order nor an appealable non-final order under FRAP 9.130(a)(3) or (a)(4).

12 C & S Plumbing v. Live Supply
397 So. 2d 998 (Fla. 4th DCA 1981)

(a). Facts: Writ issued six days after entry of underlying judgment. Garnishee answered. Defendant filed motion to
dissolve writ which was denied and final judgment in garnishment was issued.

**Issue & Holding:** Can writ issue within period for rehearing/new trial? Answer: No.

**Pertinent Reasoning:** No discussion on appealability of order.

**B. Pre-Judgment Writs of Garnishment**

1. **Pleasant Valley Farms & Morey Condensery Co. v. Carl,**
   106 So. 427 (Fla. 1925).

   **Facts:** Trial court issued prejudgment writ of garnishment. Defendant moved to dissolve. Judgment of dissolution.

   **(b). Issue & Holding:** Was judgment of dissolution subject to writ of error? Answer: Yes.

   **(c). Pertinent Reasoning:** Analogized situation to attachment writs which are subject to writ of error review because (i) they separate from the underlying action, (ii) an order dissolving an attachment is conclusive as to its object, (iii) dissolution takes away the lien given by the attachment, and (iv) an appeal in underlying case will not restore that taken away. Only difference between garnishment and attachment is no lien is granted by the garnishment writ [NOTE: As of the 2000 Amendments this is no longer true – see above] only an inchoate ability to obtain a lien.

2. **Doug Sears Consulting v. ATS Services**
   752 So. 2d 668 (Fla. 1st DCA 2000)

   **(a). Facts:** Motion for Pre-judgment garnishment filed. Trial Court held hearing and issued garnishment writs based upon verified pleadings. Defendant filed motion to dissolve prejudgment writ of garnishment. Court held hearing and relying upon affidavits and verified pleadings denied motion. Appeal taken.

   **Issue & Holding:** Does Plaintiff have to prove the grounds for issuance of writ with more than verified pleadings and affidavits? Answer: Yes. Order reversed with instruction to dissolve writ of garnishment.

   **Pertinent Reasoning:** No discussion regarding appealability.

3. **Barbouti v. Lysandrou,** 559 So. 2d 648 (Fla. 3rd DCA 1990)
Facts: Injunctive relief denied but prejudgment writ of garnishment issued. Subsequently, Defendant’s motion to dissolve the garnishment was denied. Appeal taken.

(b). Issue & Holding: Does garnishment lie if some counts allege torts and other contract (express or implied) claims? Answer: No.

(c). Pertinent Reasoning: No analysis of appealability of garnishment order.

4. Cerna v. Swiss Bank Corporation (Overseas) S.A.
502 So. 2d 1297 (Fla. 3rd DCA 1987)


Issue & Holding: Do writs of attachment and garnishment lie against property of a defendant who is the alleged fraudulent transferee of the primary obligor? Answer: Writ of attachment but not writ of garnishment will lie because garnishment does not establish lien [NOTE: this has likely changed given the 2000 Amendments to Chapter 77].

Pertinent Reasoning: No analysis of appealability of garnishment order.


Issue & Holding: Can co-trustee bring garnishment proceeding individually for theft of jewelry? Answer: Yes.

Pertinent Reasoning: No analysis of appealability of order.

6. 5361 N. Dixie Highway v. Capital Bank
658 So. 2d 1037 (Fla. 4th DCA 1995)

(a). Facts: Trial court denied motion to dissolve prejudgment writ. Appeal taken. Appellee’s moved to dismiss appeal claiming that order is not an authorized non-final appeal under FRAP 9.130.

Issue & Holding: Is order denying motion to dissolve prejudgment writ an authorized non-final appeal under FRAP 9.130. Answer: Yes.

(c). Pertinent Reasoning: Court distinguished Hamilton, infra, as being under the prior appellate rule which did not have FRAP 9.130(a)(3)(C)(ii)[order determining the immediate possession of property]. Court holds that
jurisdiction, at minimum, exists under that rule. Court acknowledges conflict with Ramseyer, infra.

7. **Hamilton v. Hanks**, 309 So. 2d 229 (Fla. 4th DCA 1975)
   
   (a). **Facts**: Motion to Dissolve Writ of Garnishment denied. Motion for rehearing sought and denied. Appeal taken. Appellate court asks for briefs on jurisdiction.
   
   
   (c). **Pertinent Reasoning**: Court holds that Pleasant Valley case determined that an order dissolving a prejudgment writ of garnishment is a final appealable order but an order denying a motion to dissolve a prejudgment writ of garnishment is not the same as an injustice can be remedied during the plenary appeal of the underlying action. Court also finds that the order is not one of the appealable non-final orders under former FRAP 4.2.

8. **Ramseyer v. Williamson**, 639 So. 2d 205 (Fla. 5th DCA 1994)
   
   (a). **Facts**: Trial court denied motion to dissolve writ of garnishment.
   
   (b). **Issue & Holding**: Is order appealable? Answer: No.
   
   (c). **Pertinent Reasoning**: Court says order is not an appealable non-final order pursuant to FRAP 9.130. No discussion of subsections of FRAP 9.130.

III **Analogous Situations?**

A. **Injunctions**: FRAP 9.130(a)(3)(B) makes all non-final orders concerning injunctions immediately appealable. In many ways, writs of garnishment are akin to injunctions in that they (1) restrict the judgment debtor/defendant’s (and sometimes a third party’s) right to obtain or use personal property, (2) command the garnishee to retain certain property, (3) preserve the status quo regarding collectibility of an ultimate judgment, and (4) for prejudgment garnishment writs, requires the posting of a bond and the right to post-issuance hearings. However, in some ways the garnishment writ is even more intrusive than injunctive relief in that (since the 2000 amendments) the service of the writ creates a lien in favor of the garnisor on the debt owed by garnishee to the defendant and the personal property of the defendant.

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1 Courts have held that an order directing a party to deposit funds in the court registry is immediately appealable under FRAP 9.130(a)(3)(B) as an injunction. See CMR Distributors v. Resolution Trust Corporation, 593 So. 2d 593 (Fla. 3rd DCA 1992). A garnishment writ is easily analogized to this scenario as it commands the garnishee to retain the property essentially in *custodia legis*.
B. **Replevins.**

1. **Similarity to Garnishment.** Another prejudgment remedy similar to a prejudgment writ of garnishment is a prejudgment writ of replevin. While replevin is the proper cause of action to recover one's own property, a prejudgment writ of replevin is available to obtain possession when the defendant has failed to make payment as agreed. Fla. Stat. §78.068(2). A prejudgment writ of replevin can only issue upon sworn pleadings and a pre-issuance hearing (or if done ex-parte the posting of a surety bond with the right to seek dissolution where the plaintiff will bear the burden of proving the grounds for issuance). Unlike providing that the garnishee retain possession of the property at issue as in the case of a prejudgment writ of garnishment, a prejudgment writ of replevin provides for the immediate seizure and delivery of the claimed property to the petitioner.

2. **Appellate Treatment.**

   (a). **Orders Dissolving Prejudgment Writs of Replevin.** Some courts have held these orders are appealable non-final orders under FRAP 9.130(a)(3)(C)(ii). See Lennox Retail v. McMillan, 786 So. 2d 1252 (Fla. 5th DCA 2001); Lease Financing v. National Commuter Airlines, 462 So. 2d 564 (Fla. 3rd DCA 1985). Other courts have heard appeals of these orders without discussion of FRAP 9.130. See KDC Financial v. American Rock, 578 So. 2d 757 (Fla. 3rd DCA 1991).

   (b). **Orders Denying Motions to Dissolve Prejudgment Writs of Replevin.** Some courts have held these orders are appealable non-final orders under FRAP 9.130(a)(3)(C)(ii). See McMurrain v. Fason, 573 So. 2d 915 (Fla. 1st DCA 1991); Waite Aircraft v. Ford Motor Credit, 430 So. 2d 1003 (Fla. 4th DCA 1983). Other courts have heard appeals of these orders without discussion of FRAP 9.130. See Advantage Car Rental & Sales v. Mitsubishi Motor Sales of America, 664 So. 2d 46 (Fla. 3rd DCA 1995); Kalman v. World Omni Financial, 651 So. 2d 1249 (Fla. 2nd DCA 1995); Pici v. First Union National Bank of Florida, 621 So. 2d 732 (Fla. 2nd DCA 1993); Transtar Corporation v. Itex Recreation, 570 So. 2d 366 (Fla. 4th DCA 1990); Meireles Truck Sales v. Industria Del Autobus, 555 So. 2d 1253 (Fla. 3rd DCA 1989); Hutchens v. Maxicenters, 541 So. 2d 618 (Fla. 5th DCA 1989).


C. **Attachments.**

1. **Similarity to Garnishment Writ.** Another prejudgment remedy related to a prejudgment writ of garnishment is a prejudgment writ of attachment. A prejudgment writ of attachment is appropriate for a debt due if the debtor is engaging in
misconduct (e.g. fraudulently disposing of his property "before judgment can be obtained", removing the property from the state, secreting the property, absconding, moving out of the state) or for a debt not due only if the property is being fraudulently disposed, being moved out of state, or being fraudulently secreted. Fla. Stat. §§76.04; 77.05. Like the others, a prejudgment writ of attachment only can issue upon sworn pleadings, upon the issuance of an attachment bond, and subject to the opportunity for a post-issuance hearing on dissolution. Fla. Stat. §§76.08; 76.12; 76.24.

2. **Appellate Treatment.**

   (a). **Orders Dissolving Writs of Attachment.** Some courts have heard appeals of these orders without discussion of their appealability. See APD Holdings v. Reidel, 865 So. 2d 682 (Fla. 4th DCA 2004); see also Pleasant Valley Farms & Morey Condensery v. Carl, 106 So. 427 (Fla. 1925)(holding dissolution of attachment is appealable under “writ of error”).

   (b). **Order Denying Motions to Dissolve Writs of Attachment.** Some courts have held these orders are appealable under FRAP 9.130(a)(3)(C)(ii). See Estudios, Proyectos E Inversiones de Centro America v. Swiss Bank Corporation (Overseas), 507 So. 2d 1119 (Fla. 3rd DCA 1987); Transportes Aereos Mercantiles Panamericanos, 451 So. 2d 932 (Fla. 3rd DCA 1984).

   (c). **Other Orders.** Hordis Brothers, Inc. v. Sentinel Holdings, 562 So. 2d 715 (Fla. 3rd DCA 1990)(appeal of issuance of writ of attachment).

IV. **Recommendation:**

Because garnishments have many of the same trappings of injunctions, replevin writs, and attachment writs, order concerning writs of garnishments ought to be subject to the same appellate rules allowing immediate appeals of non-final orders.

For the same reasons why injunctions are immediately appealable, an immediate appeal should be permitted from a court’s refusal to lift a restraint on a person’s use or ability to obtain possession of his/her property (whether such property consists of a bank account, a debt owed, or tangible or intangible personal property). Conversely, an immediate appeal should be available if a court refuses to allow a creditor its rightful opportunity to obtain the statutorily provided lien right given by the garnishment statute with all of its attendant safeguards (i.e. garnishment bond equal to two times the debt demanded).

The present rule allowing interlocutory appeals of orders that determine the right to immediate possession of property has not been uniformly understood to cover orders concerning garnishments. Perhaps this is a result of the recognition that garnishment writs do not dispossess the parties of their property (the way a writ of replevin or writ of attachment as to personality does) but merely restrains the subject property. Clarification
of that rule to include not just immediate possession but perhaps “immediate use or possession” of property would be an appropriate starting point. However, the lack of uniformity may be the result of the rule simply being too general to lend itself to easy application in the case of orders regarding garnishment writs. In this way the rule could be clarified to contain a non-exclusive list of the typical creditors’ remedies (replevin, attachment, and garnishment).

2 It is hard to imagine an order that determines the immediate use of property that would not be appealable under the current regime as being in the nature of an injunction.
APPENDIX F
CIVIL RULES SUBCOMMITTEE

REPORT FOR JUNE 2006 MEETING

The Civil Rules Subcommittee (CRS) met telephonically on May 16 and 23, 2006, to consider the following four issues:

1. Whether Fla. R. App. P. 9.130(a)(5) should be amended to clarify 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.

2. Whether Fla. R. App. P. 9.400(b) should be amended to address the “safe harbor” provision of section 57.105(4), Florida Statutes, which requires that a motion for fees under the statute not be filed with the court unless within 21 days of service of the motion, the offending paper, claim, defense, contention, allegation, or denial is not withdrawn or correct.

3. Whether Fla. R. App. P. 9.110(m) should be amended to clarify the nature of the orders immediately appealable thereunder. Specifically, whether such an order requires a determination of an insurer’s duty to indemnify an insured or whether a determination as to an insurer’s duty to defend suffices.

4. Whether Fla. R. App. P. 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.

The following individuals were in attendance at the May 16, 2006 meeting:

Edward Guedes
Jack Reiter
Dave Miller
Kelly O’Keefe
Neil Rose
Maria McGuiness
Natalie Carlos
Jim Daniel
Hinda Klein
Christopher Kise
Jennifer Carroll
Dorothy Easley
Chris Keyes
The following individuals were in attendance at the May 22, 2006 meeting:

Edward Guedes
The Honorable Joseph Lewis (Judge, First DCA)
Natalie Carlos
Dave Miller
Kelly O'Keefe
Jim Daniel
Patrice Talisman
Hinda Klein
Maria McGuiness
Jennifer Carroll
Dorothy Easley
Neil Rose
Jim Middleton
Jack Reiter

RULE 9.130(a)(5)

This item was referred to the CRS (via the ACRC) by the Florida Supreme Court, which observed that there were “preexisting conflicting decisions on this issue” and cited to Khem-Troll, Inc. v. Edelman, 351 So. 2d 1040 (Fla. 4th DCA 1976). Natalie Carlos prepared a research memorandum that reflected that all five district courts of appeal have consistently ruled that a motion for rehearing does not toll the time of rendition of an order granting or denying relief pursuant to Fla. R. Civ. P. 1.540. A copy of the memorandum is appended at ___. The Fourth District subsequently discredited its own prior decision in Khem-Troll, thus eliminating any conflict.

Nonetheless, both Jack Reiter and Jennifer Carroll expressed a concern that practitioners might be confused by the current language of the rule. Jack further noted that the Court had specifically requested clarification of the rule. Accordingly, upon motion by Jennifer and second by Natalie, the subcommittee unanimously voted to amend the rule and provide a committee note explaining the reason for the modification. Natalie and Jennifer conducted additional research to verify that the rules enumerated in subdivision (5) were all of a similar ilk, then drafted the proposed amendment and committee note, which were subsequently modified slightly. Upon motion by Jim Middleton and second by Dave Miller, the amendment was unanimously adopted by the subcommittee at the May 22, 2006 telephone conference. Upon motion by Jim and second by Patty Talisman, the committee note was unanimously approved.

As a result, the CRS unanimously recommends the following amendment to Rule 9.130(a)(5) and related 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 CRS also unanimously concluded that the matter be referred to the committees responsible for amending the lower tribunal rules enumerated in Fla. R. App. P. 9.130(a)(5) for consideration of a possible amendment to those rules consistent with the amendment that has been proposed herein.

RULE 9.400(b)

The issue presented was whether Fla. R. App. P. 9.400(b) needed to be modified to render it consistent with or account for the 21-day “safe harbor” provision of section 57.105(4), Florida Statutes. Dorothy Easley took the lead on this item and prepared a research memorandum detailing her findings and recommendations. A copy of the memorandum is appended at ___. Dorothy discovered that there does not appear to be any conflict or confusion arising from the body of appellate case law applying section 57.105. She noted that the filing deadlines for briefs and petitions/responses allow sufficient time for a practitioner to determine (early on) whether a claim for fees under section 57.105 should be asserted and comply with the 21-day safe harbor provision. Moreover, since a motion for attorney’s fees is due when the reply...
brief is due, an extension of time as to the reply brief would further ensure compliance with the
safe harbor provision.

Kelly O'Keefe moved that no amendment to Rule 9.400(b) be adopted, which was
seconded by Dave Miller. The CRS then voted unanimously to approve the motion.
Accordingly, the CRS recommends to the ACRC that no action be taken to amend Fla. R. App.
P. 9.400(b) in order to render it consistent with the safe harbor provision of section 57.105(4),
Florida Statutes.

RULE 9.110(m)

The CRS was asked to consider a potential clarification or amendment to Fla. R. App. P.
9.110(m) in order to address whether an order finding a duty to defend under an insurance policy
is immediately appealable pursuant to the rule in the absence of a finding that there is also a
contractual duty to indemnify. Jim Daniel took the lead on this issue and provided a detailed
research memorandum setting forth the status of the law on this subject. A copy of the
memorandum is appended at .

Jim recommended a possible amendment to the rule to change the title so that it would
not refer to “judgments,” but rather to “final orders,” since it appeared from the case law that the
intent was to provide review only of final orders. This would preserve the status quo in terms of
the category of orders that would be immediately appealable. Jack Reiter expressed a concern
that perhaps it would be beneficial to expand the scope of the rule to encompass orders finding a
duty to defend, even if such orders are technically not final orders. The chair observed that
taking such action involved a significant policy consideration which would enlarge the
jurisdiction of the appellate courts. Jim's research memorandum had not addressed these policy
considerations because they had not been previously presented.

Therefore, in order to allow the CRS to have all relevant information regarding this topic,
this item was rolled over to the next reporting cycle. Hinda Klein volunteered to conduct
additional research and prepare a memorandum advocating in favor of expanding the scope of
the rule to include orders finding a duty to defend, while Patty Talisman agreed to research and
present the opposing view.

RULE 9.130(a)(3)(C)(iv)

The issue presented was whether Fla. R. App. P. 9.130(a)(3)(C)(iv) should be amended to
make clear that an order determining a party’s entitlement to an appraisal pursuant to an
insurance policy was an immediately appealable non-final order. Hinda Klein researched the
issue and prepared a memorandum detailing her findings and recommendations. A copy of the
memorandum is appended at . Hinda noted that prior to 2002, Florida's district courts of
appeal had concluded that a trial court's decision to grant or deny an appraisal was immediately
appealable pursuant to Rule 9.130(a)(3)(C)(iv), which permits appeals of non-final orders
determining a party's right to arbitration. However, in 2002, the Florida Supreme Court decided
Allstate Ins. Co. v. Suarez, 833 So. 2d 762 (Fla. 2002), finding that an appraisal is not conducted pursuant to the formal procedures of the Florida Arbitration Code. Subsequent appellate decisions have interpreted Suarez to require the conclusion that orders determining a party's right to an appraisal are therefore no longer appealable pursuant to Rule 9.130. The Second District Court of Appeal, while following the trend, specifically inquired whether the ACRC might want to consider the advisability of an amendment to Rule 9.130 that would allow for immediate appeal of appraisal orders. Burnett v. Clarendon Select Ins. Co., 920 So. 2d 188, 189 n.1 (Fla. 2d DCA 2006).

Hinda noted that from 1994 to 2002 (when Suarez was decided), it did not appear that the district courts were being inundated with appeals of appraisal orders. She recommended that an amendment be proposed that unequivocally provided that orders determining a party's entitlement to an appraisal be immediately appealable.

The CRS considered at length whether such an amendment should be incorporated within subdivision (a)(3)(C)(iv) or include as a separate subdivision on its own. A concern was expressed by more than one member that including a separate subdivision might create the impression that the jurisdiction of the district courts was being expanded, rather than returned to where it existed prior to the recent interpretations of Suarez.

Both Natalie Carlos and Maria McGuiness recommended inserting specific language in the subdivision to provide for review of appraisal orders. Based on their recommendation, Hinda made a motion (seconded by Maria) that the subdivision be amended to read: “the entitlement of a party to an appraisal pursuant to an insurance policy or to arbitration.” The motion carried unanimously.

Dorothy Easley then recommended that a committee note be adopted to clarify that the proposed amendment was not intended in any way to affect the ability of a party to appeal a non-final order determining its entitlement to arbitration outside the insurance context. Kelly O’Keefe made a motion, seconded by Dorothy, that the following committee note be proposed: “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.” The motion carried unanimously.

Accordingly, the CRS recommends to the ACRC that the following rule amendment and committee note be approved:

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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.
MEMORANDUM

To: Appellate Court Rules Committee,
    Civil Rules Subcommittee of the Florida Bar

From: Natalie J. Carlos

Date: May 12, 2006


The Supreme Court of Florida has asked the Committee to consider whether Rule 9.130, titled “Proceedings to Review Non-Final Orders and Specified Final Orders,” should be amended to clarify whether an order entered on a motion filed under Florida Rule of Civil Procedure 1.540 (Relief from Judgment, Decrees, or Orders) is a “final order” such that the filing of a motion for rehearing will toll the time for seeking an appeal under FRAP 9.130. Put another way, the issue is whether a motion for rehearing from an order granting or denying Fla. R. Civ. P. 1.540(b) relief postpones the time for filing an appeal.

Rule 9.130 provides, in relevant part:

(a) Applicability.

(1) This rule applies to appeals to the district courts of appeal of the non-final orders authorized herein and to appeals to the circuit court of non-final orders when provided by general law. Review of other non-final orders in such courts and non-final administrative action shall be by the method prescribed by rule 9.100.

(4) Non-final orders entered after final order on motions that suspend rendition are not reviewable; provided that orders granting motions for new trial in jury and non-jury cases are reviewable by the method prescribed in rule 9.110. Other non-final orders entered after final order on authorized motions are reviewable by the method prescribed by this rule.

The full text of Rule 9.130 is attached as Exhibit 2.

The full text of Fla. R. Civ. P. 1.540 is attached as Exhibit.
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.

Every district court of appeal in Florida has held that a motion for rehearing from an order granting or denying Fla. R. Civ. P. 1.540(b) relief does not postpone the time for filing an appeal. See Frantz v. Moore, 772 So. 2d 581 (Fla. 1st DCA 2000); Ramos v. State, 456 So. 2d 1297 (Fla. 2d DCA 1984); Thornton v. Jabeen, 683 So. 2d 150 (Fla. 3d DCA 1996); Harris v. Ferne L. Graves Trust, 893 So. 2d 602 (Fla. 4th DCA 2005); Amwest Sur. Ins. Co. v. State, 721 So. 2d 408, 409 (Fla. 5th DCA 1998). The courts reasoned that Rule 9.130 only provides the mechanism for filing an appeal from Fla. R. Civ. P. 1.540 orders, and that such orders seeking relief from a judgment, even if deemed final orders, are not “judgments” within the meaning of Fla. R. Civ. P. 1.530 to allow for motions for rehearing. See, e.g., Francisco v. Victoria Marine Shipping, Inc., 486 So. 2d 1386, 1391 (Fla. 3d DCA 1986); Albano v. Albano, 579 So. 2d 757 (Fla. 5th DCA 1991).

The Supreme Court of Florida indicated in its letter to the ACRC that there was “preexisting conflicting decisions on this issue” and cited to Khem-Troll, Inc. v. Edelman, 351 So. 2d 1040 (Fla. 4th DCA 1976), in which the Fourth District Court of Appeal held that a petition for review of an order denying Fla. R. Civ. P. 1.540 relief was proper and tolled the time to appeal the order. Since Khem-Troll, however, the Fourth District Court of Appeal has followed the other districts and do not permit motions for rehearing of orders under Fla. R. Civ. P. 1.540 to toll the time to file a notice of appeal. See, e.g., Intercoastal Marine Towers v. Suburban Bk., 506 So. 2d 1177 (Fla. 4th DCA 1987); Atlas v. City of Pembroke Pines, 441 So. 2d 652 (Fla. 4th DCA 1983); Tacy v. Davis, 425 So. 2d 603 (Fla. 4th DCA 1982). The Fourth
District has explained that its *Khem-Troll* decision was “incorrect” and “unsound” because it was decided before the adoption of Rule 9.130, and that it misapplied precedent on the issue of appealing final post-decretal orders. *See Talley v. Canal Indem. Co.*, 558 So. 2d 1088 (Fla. 4th DCA 1990).

Accordingly, without any apparent conflict in the decisions by the district courts of appeal interpreting Rule 9.130 on this narrow issue, there does not appear to be a need to amend the rule.
MEMORANDUM

EDWARD G. GUEDES, CHAIR
THE CIVIL RULES SUBCOMMITTEE OF THE FLORIDA BAR,
APPELLATE COURT RULES COMMITTEE

FROM: HINDA KLEIN, COMMITTEE MEMBER

DATE: MAY 15, 2006

WHETHER RULE 9.130 SHOULD BE AMENDED TO INCLUDE
ORDERS GRANTING OR DENYING A PARTY’S DEMAND FOR
APPRAISAL AS AN APPEALABLE NON-FINAL ORDER.

THE ISSUE

Should Fla. R. App. P. 9.130 be amended to include orders
granting or denying a party’s demand for appraisal as an appealable
non-final order?

RECOMMENDATION

This issue has been referred to the Appellate Rules Committee by
Mr. Matthew R. Danahy and the Second District Court of Appeal. Mr.
Danahy has suggested that Florida Rule of Appellate Procedure
9.130(a)(3)(C)(iv) be amended to specifically authorize appeals from
non-final orders determining a party’s right to appraisal. The Second
District Court of Appeal, in See,Burnett v. Clarendon Select Ins. Co., 920
So. 2d 188 (Fla. 2d DCA 2006), has likewise suggested that the
Committee consider the advisability of such an amendment.

The issue has arisen because many insurance policies in Florida
contain a provision that requires the insured and the insurer to undergo
an appraisal proceeding when they are unable to agree to a value for
the particular claim after suit has been filed. The appraisal proceeding
is similar to an arbitration proceeding without the more formal arbitration
procedure. Typically, in an appraisal proceeding, each party picks an
appraiser and both agree to an umpire, totaling a panel of three
appraisers that determine the value of the claim at issue.
After suit has been filed by either party, the appraisal proceeding is triggered by the trial court’s ruling on a party’s motion to compel appraisal. Many times, the appraisal proceeding results in resolution of the suit and is, therefore, a very powerful and efficient tool in alternate dispute resolution. While in many cases, trial courts utilize the procedure correctly, there are some times when courts require parties to engage in the appraisal process when it would be contrary to law and a violation of due process with respect to a particular issue, i.e., coverage for the loss, see, Johnson v. Nationwide Mutual, 828 So. 2d 1021 (Fla. 2002), or find, incorrectly, that the appraisal provision has been waived by the conduct of either party. See, Burnett v. Clarendon Select Ins. Co., 920 So. 2d 188 (Fla. 2d DCA 2006).

Since 1984 when the appellate rule came into effect, whenever a party challenged the trial court’s decision to grant or deny appraisal, the complaining party could file an appeal under Rule 9.130. American Reliance v. Village Homes, 632 So. 2d 106 (Fla. 3rd DCA 1994). Between 1994 and 2002, appellate courts routinely exercised jurisdiction over non-final orders granting or denying appraisal pursuant to Rule 9.130(a)(3)(C)(iv), which permits appeals of non-final orders entitling a party to arbitration. However, after the decision in Allstate Insurance Company v. Suarez, 833 So. 2d 762 (Fla. 2002), which recognized that an appraisal is not conducted in accordance with the formal procedures under the Florida Arbitration Code, some appellate courts have construed that case to signify that appellate courts do not properly have jurisdiction under Rule 9.130(a)(3)(C)(iv) over non-final orders concerning appraisal.

Such an interpretation of Suarez results in considerable delay of the resolution of a claim and expense to both parties who are forced to bear the cost of the appraisal before an appeal becomes appropriate. Furthermore, the goals behind appraisal---fair, efficient and expedient resolution of claims---are frustrated if a challenge to an order granting or denying appraisal cannot be had until after judgment.

It is recommended, for these reasons, that Rule 9.130(a)(3)(C)(iv) be amended to include entitlement of appraisal. The court in Suarez did not determine the appealability of non-final orders granting or denying appraisal; rather, the court held that appraisal proceedings are not governed by the procedures under the Florida Arbitration Code and therefore, the ruling should not have any affect over the appealability of
a non-final order granting or denying appraisal. Prior to Suarez, appellate courts analogized appraisal cases to arbitration cases insofar as their interlocutory jurisdiction was concerned. Although Suarez does not directly or indirectly address the appellate courts' jurisdiction over non-final orders addressing appraisal and the scope thereof, the appellate courts have interpreted the decision as rendering a distinction between arbitration and appraisal orders with respect to the court's jurisdiction. However, there is nothing in the history of the rule to suggest that the impetus for the original rule permitting non-final appeals from orders determining a party's right to arbitration was the procedure associated with that type of alternative dispute resolution. Rather, it appears that the rationale behind the rule is to determine, before the parties have expended significant time and expense, the appropriate forum for resolving their disputes in the first instance. See, Padovano, Florida Appellate Practice § 22.9. This rationale applies with equal force to orders compelling or denying appraisal. As such, I agree with the Burnett court and Mr. Danahy, who referred this matter to the Committee, that the Rules Committee should propose a revision to the existing Rule 9.130(a)(3)(C)(iv) to permit non-final appeals of orders entitling a party to appraisal on all or part of its claim, just as the current rule permits a non-final appeal of orders determining a party's right to arbitration on all or part of a claim.

ANALYSIS

The Florida Supreme Court, in Allstate Insurance Company v. Suarez, 833 So. 2d 762 (Fla. 2002), held that appraisal proceedings are not governed by the procedures of the Florida Arbitration Code. The Court's rationale is premised on contractual interpretation of the appraisal provision in the insurance policy:

Neither the trial court nor the Third District in Suarez found the appraisal clause in the homeowner's policy to be ambiguous, nor do we find any ambiguity in the clause. It is clear from a plain reading of the clause that an informal appraisal proceeding, not a formal arbitration hearing pursuant to section 682.06, Florida Statutes (1999), was intended and agreed upon by the parties in agreeing to the appraisal provisions of the policy.
Suarez, 833 So. 2d, at 765. For this reason, the Supreme Court held that the procedures under the Florida Arbitration Code were not to be applied to appraisal proceedings.

Despite the narrow holding in Suarez, several appellate courts have interpreted the decision as disapproval of appeals of non-final orders that determine the right to an appraisal. The First District reasoned that Suarez no longer permits appeals of said orders under Rule 9.130:

In Suarez, the supreme court held that a panel of appraisers could not be compelled to apply the Florida Arbitration Code, because an agreement to submit to an appraisal is not the equivalent of an agreement to resolve a dispute by arbitration. [citation omitted.] The court disapproved of our opinion in Sheaffer, which involved a similar appraisal provision. [citation omitted.] Although the differences between appraisal and arbitration were discussed in Suarez in a different context, the rational applies here, as well. As the Fourth District Court of Appeal concluded in Nationwide Mutual Fire Insurance Company v. Schweitzer, 872 So. 2d 278 (Fla. 4th DCA 2004), the Suarez decision effectively overrules the line of cases allowing appeals from orders that determine the right to an appraisal. We agree with this assessment.

Based on the rationale of the Suarez decision, we hold that an order compelling an appraisal is not appealable under rule 9.130(a)(3)(C)(iv). This conclusion is one that flows from the analysis in Suarez, and it is also consistent with the language of the rule itself. Subdivision (a)(3) states that “appeals to the district court of appeal of nonfinal orders are limited to” the orders enumerated in the rule. Because the rule does not refer to an order determining the right to an appraisal, such an order could be appealable only if it were essentially the same as another kind of order that is expressly listed in the rule. It would be logical to conclude that an appraisal order is appealable under the rule if it were
the functional equivalent of an order determining the right to arbitration, but that is not the case. In Suarez, the supreme court described the appraisal process as an “informal proceeding” and explained that it was not the same as arbitration.

*Cotton States Mutual Insurance v. D’Alto*, 879 So. 2d 67, 70 (Fla. 1st DCA 2004). The First District’s conclusion that it no longer has jurisdiction to review appraisal orders hinges on the characterization of the appraisal proceeding. In other words, because an appraisal proceeding is an “informal” proceeding, it no longer is similar to an arbitration proceeding for purposes of appealability. Such a tenuous distinction is precisely the reason why an amendment of Rule 9.130 is necessary. Based on the reasoning of the First District, it appears that form (the informal nature of the proceeding) over substance (the parties’ rights) prevails in appealability of an appraisal order. Surely, the *Suarez* court never intended this result.

The First District relied on *Nationwide Mutual Fire Insurance Company v. Schweitzer*, 872 So. 2d 278 (Fla. 4th DCA 2004), for the proposition that the line of cases that previously permitted review of appraisal orders under Rule 9.130(a)(3)(C)(iv) were overruled by *Suarez*. This reliance, however, is error. As stated above, *Suarez* makes no mention whatsoever of reviewability of appraisal orders; the ruling is narrowly tailored to the issue of whether the Florida Arbitration Code governs appraisal proceedings. It does not follow that, simply because *Suarez* concludes that arbitration is not what the parties contemplated when they agreed to an appraisal provision, an arbitration and appraisal proceeding are not sufficiently similar to justify non-final review of one type of order and not the other. While it is true that arbitration and appraisal are conducted differently from a procedural standpoint, this distinction is insignificant with respect to the issue of whether appraisal should be treated as arbitration for purposes of permitting a non-final appeal of an order precluding a party from litigating its position in the trial court. In fact, that was the reasoning of many appellate courts before *Suarez*. See *United Services Automobile Association v. Modregon*, 818 So. 2d 562 (Fla. 4th DCA 2002); *Delisfort v. Progressive Express Insurance Co.*, 785 So. 2d 734 (Fla. 4th DCA 2001); *U.S. Fidelity & Guaranty Co. v. Romay*, 744 So. 2d 467 (Fla. 3d DCA 1999); *Florida Select Insurance Co. v. Keelean*, 727 So. 2d 1131
Prior to Suarez, appellate courts reasoned that appraisal provisions were the equivalent to arbitration provisions because they identified with particularity what matters were to be submitted to appraisal, the number of appraisers, the manners of selection of the appraisers, and the procedure to be followed. Intracoastal Ventures Corp. v. Safeco Insurance Company of America, 540 So. 2d 562 (Fla. 4th DCA 1989). These similarities survive Suarez. As such, appraisal proceedings are still sufficiently similar to arbitration proceedings for purposes of reviewability of non-final appraisal orders under 9.130(a)(3)(C)(iv).

Most recently, the Second District followed the trend of the First and Fourth District, in holding it did not have jurisdiction over an order compelling appraisal pursuant to Suarez. However, the Second District noted that, “The Appellate Rules Committee of The Florida Bar may wish to consider the advisability of an amendment to Florida Rule of Appellate Procedure 9.130 that would authorize nonfinal appeals of orders that determine the entitlement of a party to appraisal.” Burnett v. Clarendon Select Insurance Co, 920 So. 2d 188, 189 n.1 (Fla. 2nd DCA 2006). While the Second District followed the First and Fourth Districts in their interpretation of Suarez, it acknowledges the need for clarification of this issue and the inference that non-final appraisal orders should be appealable in light of their pre-Suarez decisions that permitted same.

On my review of the case law on this issue, it does not appear that between 1994 and 2002, when appellate courts were permitting non-final appeals from appraisal orders, that there were a tremendous amount of these appeal and there is no reason to believe that an amendment to the rule clarifying that appraisal and arbitration orders are equally appealable would not appear to be opening the floodgates in that regard. Based on the foregoing, it is recommended that the ACRC strongly consider proposing an amendment to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv) to expressly permit a non-final appeal of orders determining entitlement to appraisal.
December 23, 2004

Via facsimile and email

Siobhan Helene Shea, Esq.
PO Box 2436
Palm Beach, Florida 33480-2436


Dear Ms. Shea:

Pending before our subcommittee is a Formal Proposal to Amend Florida Rule of Appellate Procedure 9.130, which was originally submitted to the Supreme Court of Florida on July 19, 2004, by board-certified appellate attorney Ryan Thomas Truskoski. Thomas Hall forwarded the proposal to you on July 28, 2004, and you assigned the matter to the Family Law Rules Subcommittee for consideration.

Mr. Truskoski’s proposal addresses three issues, predominantly relating to non-final appeals in juvenile dependency and termination of parental rights (“TPR”) cases. A copy of the proposal is attached hereto. Each issue is addressed separately.

Non-Final Orders Determining Custody

Rule 9.310(a)(3)(C)(iii) authorizes an immediate direct appeal of non-final orders that determine “the right to immediate monetary relief or child custody in family law matters.” The supreme court has held that this rule applies only to “domestic relations cases” and specifically does not apply to non-final orders determining child custody in dependency cases. Dep’t of H.R.S. v. Honeycutt, 609 So. 2d 596, 597 (Fla. 1992). Review of such orders is thus limited to certiorari proceedings. See, e.g., B.A.G. v. D.C.F., 860 So. 2d 498, 500 (Fla. 1st DCA 2003). Contending that certiorari review is insufficient and that direct review should be available, Mr. Truskoski proposes amending Rule 9.310(a)(3)(C)(iii) to authorize a direct appeal of a non-final order determining child custody in dependency and TPR cases.

The subcommittee has considered two questions raised by this proposal. Is Mr. Truskoski correct that the rules do not authorize direct review? If so, should they be amended to allow direct review?
Orders entered 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.

The listed rules all govern motions for relief from judgment. The subcommittee unanimously agreed that this rule does not provide for review of motions for relief from judgment in dependency and delinquency cases, respectively governed by Rules 8.270 and 8.140 of the Florida Rules of Juvenile Procedure. The subcommittee further agreed that there is no apparent reason to treat these motions differently. Ms. Lantz pointed out that such orders are in fact frequently appealed without the jurisdictional issue being raised.

Accordingly, the subcommittee unanimously recommends that Rule 9.103(a)(5) be amended to provide as follows:

Orders entered on an authorized and timely motion for relief from judgment are reviewable by the method prescribed by this rule.

The subcommittee determined that it is preferable to refer to motions for relief from judgment generally, instead of continuing to refer to the specific rules of procedure, which might one day be amended or renumbered. The proposed order is patterned after the rendition rule. To avoid confusion, the subcommittee recommends that following Committee Note:

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).

Conclusion

In sum, the subcommittee solicits input from the full committee regarding Rule 9.130(a)(3)(C)(iii) and formally recommends that the full committee recommend the proposed change and committee noted to Rule 9.130(a)(5). Please let me know if you have any questions. Otherwise, I look forward to seeing you in January.

Very truly yours,

John S Mills
jmills@appellate-firm.com
IV. Rule 9.210 – Certificates Excluded from Page Limitations

The final issue referred to the subcommittee was a proposal from Louis Rosenbloum, a board-certified appellate attorney, regarding whether Rule 9.210 should be amended to clarify whether certificates of service and compliance should be excluded from the page limitation.

The subcommittee also discussed this issue at the May 23, 2006 meeting. The minutes of that meeting are attached as Exhibit 3, and Mr. Rosenbloum’s proposal appears at Exhibit C thereto.

The consensus among the subcommittee was that in practice the certificates are not counted, but that the rule should make this clear, particularly because it already states that the tables of contents and citations are excluded.

A proposed amendment to Rule 9.210(a)(5) was drafted by John Mills and circulated by email on May 23 and 24, 2006. Comments as to form were received and considered by the subcommittee.

By a vote of 9-3, the subcommittee voted to recommend the amendment and note appearing on the next page. Subcommittee chair John Mills intends to move that this recommendation be adopted by the full committee at the June 2006 meeting.
Rule 9.210(a)(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 table 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.

Voting in favor of this proposal were John Mills, Judge Ricky Polston, Doug Stein, Ed Mullins, Patty Talisman, Cindy Hoffman, Brandon Vesely, Denise Powers, and John Crabtree. Voting against (as to form only) were Kristy Gavin, Rob Teitler, and Bob Biasotti.

Kristy Gavin and Rob Teitler believed that the phrase “of authorities” should not be deleted. The phrase “citation of authorities” was amended to “citations,” over this objection, because Rule 9.210(b)(2) refers to the table as a “table of citations.”

Bob Biasotti believed that the sentence in question should read “The table of contents, table of citations, certificate of service, and certificate of compliance shall be excluded from the computation.”

The subcommittee has no other items currently pending.
E. Brandon Vesley noted that having multiple reply briefs would cause logistical problems within the courts and among the judicial law clerks.

F. After a consensus was reached that the rule is ambiguous on this point, the subcommittee voted 11-0 in favor of proposing an amendment to clarify.

G. The subcommittee also voted 11-0 that the same general rule from federal court should apply.

H. Cindy Hoffman noted that the federal rule misplaced the word “only”.

I. Judge Polston queried whether the same rule should not apply to initial briefs where there are multiple appellants.

J. John Mills noted that under the 11th Circuit rule, this was easy to address because the federal rules us the term “principal brief” to refer to the first brief filed by each party.

K. Kristy Gavin volunteered to draft a proposed amendment to Rule 9.210 to incorporate the substance of the federal rule. Ed Mullins volunteered to assist her.

L. By consensus, the subcommittee decide to brief the full committee on the issue at the June meeting and to have a specific proposal drafted after then to be ready for action by the September meeting.

III. Rule 9.210 – page limits and certificates of counsel

A. Pursuant to the email attached as Exhibit C, ACRC Chair Jack Reiter forwarded a suggestion from attorney Louis Rosenbloum that Rule 9.210(a)(5) be amended to clarify that certificates of service and compliance are not counted in page limitations.

B. The federal rule, FRAP 32(a)(7)(B)(iii), provides this result:

- Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitations.

C. The consensus was that the members understood that certificates are not included in practice.

D. Judge Polston indicated that he had verified with Clerk Jon Wheeler that the 1st DCA does not count the certificates in the page limitations for purposes of screening briefs for compliance.

E. Because current Rule 9.210(a)(5) expressly excludes tables of contents and authorities from the page limitations, however, the consensus was that the rule should be clarified consistent with this practice.
F. By a vote of 11-0, the subcommittee voted to propose the following amendment to the full committee at the June meeting:

Rule 9.210(a)(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 table 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.

G. Brandon Vesley reminded the subcommittee that the full committee recently proposed other changes to this rule regarding cross-appeals. John Mills subsequently confirmed with Joanna Maurer that this proposal is still pending and that, for now, other proposed amendments should be based off the current version of the rule.
MEMORANDUM

TO: Ed Mullins, ACRC Chair
    Joanna Mauer, Florida Bar Liaison
FROM: David K. Miller, P.A.
      Subcommittee Chair
DATE: August 21, 2006
RE: Administrative Appeal Subcommittee Report

On August 17, 2006, the Administrative Appeal Subcommittee met by teleconference call to consider a proposal to recommend amending Rule 9.310(b)(2) to eliminate inconsistency with provisions in the Administrative Procedure Act. This issue has been under discussion for over a year. All subcommittee members were in attendance. In addition, Bill Williams, Esq., a member of the Administrative Law Section Executive Committee, and Larry Sellers, Esq., a member of the Florida Bar Board of Governors, attended the meeting and spoke in favor of the proposal, although neither Mr. Williams nor Mr. Sellers was representing an official position of these organizations.

The subcommittee voted unanimously in favor of a motion by Judge John Lazzara, seconded by Bob Pritt, to recommend that Rule 9.310(b)(2) be amended as follows:

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.

The attached materials were considered by the subcommittee

(1) Memorandum by subcommittee Chair David Miller on the proposed amendment.

(2) Memorandum by Administrative Law Judge Charles Stampelos, a former member of the Appellate Court Rules Committee, on the chronology of the automatic stay provision.

For any questions call me at 850/681-6810 or email dmiller@broadandcassel.com.
RESPONSE TO OBJECTIONS RE PROPOSED AMENDMENT TO RULE 9.310(b)(2)
(CONCERNING AUTOMATIC STAY IN ADMINISTRATIVE APPEALS)

To: Members of Administrative Practice Subcommittee

David Miller

August 2, 2007

This memo addresses requests by attorneys Edward de la Parte and David Caldevilla, joined by the City, County and Local Government Section and the League of Cities, to reconsider the proposed amendment to Rule 9.310(b)(2). By way of background, the Administrative Practice Subcommittee began studying this issue in September 2004, and sent the issue to the Administrative Law Section for comments in September and November 2005. That Section has expertise in administrative practice, and has diverse membership of lawyers representing both government and private parties, but it took no position. Some individual Section members expressed support for the proposed rule amendment; no adverse comments were received. This Subcommittee and the full Committee include lawyers who represent both government and private clients. On the Subcommittee’s unanimous recommendation, the proposed rule amendment was approved by unanimous vote of the full Committee (46-0), on September 15, 2006.

The Supreme Court directed our Committee to bring to its attention any rule that appears to be in conflict with a statute, so it can address the conflict by rulemaking. This is such a situation. The proposed rule amendment defers to the Administrative Procedure Act, which gives effect to final administrative orders pending appeal unless the appellant shows grounds for a stay. The statute promotes the administrative remedy and equalizes the status of private and government litigants, preventing the latter from negating the administrative tribunal’s final order by filing an appeal.

The objectors argue that Rule 9.310(b)(2) and Section 120.68(3) are consistent, based on the following sequence of events:

1. Lewis v. Career Service Comm'n, 332 So.2d 371 (Fla. 1st DCA 1976), and City of Panama City v. PERC, 333 So.2d 470 (Fla. 1st DCA 1976), denied automatic stays based on Section 120.68(3), even though Rule 5.12 allowed appeals without bond.

2. In 1977, the Supreme Court adopted new Rule 9.310. The committee note to this amendment stated the new Rule 9.310(b)(2) was intended to supersede Lewis.

3. City of Jacksonville Beach v. PERC, 359 So.2d 578, 579 (Fla. 1st DCA 1978), held the stay pending appeal is procedural, so to the extent there is conflict, the new Rule 9.310(b)(2) must prevail over Section 120.68(3).

See text of the rule and statutes in my memo dated August 10, 2006. The objectors have not discussed Florida Statute § 120.56(4), although that statute also appears to be inconsistent with the current rule.
(4) *Wait v. Florida Power and Light Co.*, 372 So.2d 420 (Fla. 1979), held that a statute directing compliance with a court order to disclose public records intruded on Rule 9.310(b)(2). However, this was a close question. Justices Sundberg, England and Adkins dissented, stating that while an exercise of judicial discretion as to whether a stay should be imposed is a matter of practice and procedure, the statute fell in a “twilight zone” between substantive and procedural matters, and the general policy in the rule should yield to the specific policy of the statute. Id. at 425-26. The Court later amended Rule 9.310(b)(2) to defer to the statute. The Florida Bar Re: Rules of Appellate Procedure, 463 So.2d 1114 (Fla. 1985). The Court has similarly amended other rules to give effect to statutes. Query: why shouldn’t the Supreme Court also consider amending the rule to defer to the APA provisions?

(5) In 2000, the Supreme Court adopted Rule 9.190(e), which concerns stays pending review of administrative appeals, and refers to Rule 9.310(b)(2).

My memo of August 10, 2006, supporting the proposed rule amendment (copy attached to the objectors’ memo), discussed all these authorities, and the Committee was fully informed when it voted. As discussed below, the cited cases actually support the Committee’s action, because the rule and statute remain in conflict today.

The objectors contend that Rule 9.310(b)(2) and Section 120.68(3) are consistent, but they do not compare the text of the rule and statute. The 1977 committee note states that the rule “supercedes” Lewis, meaning that the rule preempts a conflicting statute, not that the rule and statute are in harmony.

The objectors misapply a rule of construction that after a judicial interpretation of a statute, legislative re-enactment of the statute is presumed to approve the judicial interpretation. They contend that the Legislature did not amend Section 120.68(3), so it impliedly approved the ruling in *Jacksonville Beach*, above, that the rule overrides the statute. This argument was discussed in the Subcommittee, and was not overlooked. The proper analysis is that the First District had already interpreted the statute in Lewis and Panama City, so the *Jacksonville Beach* panel could not change its earlier interpretation of the statute and did not choose between competing interpretations, but rather held the statute unconstitutional as inconsistent with the new rule. Properly read, *Jacksonville Beach* confirms the rule and statute are inconsistent. The Legislature could not amend the statute to change this outcome, so its inaction does not imply approval of the rule.

The objectors also contend that the Legislature’s failure to act by a two-thirds vote under Fla. Const. Art. V, § 2(a) to repeal Rule 9.310 indicates approval of this application of the rule. This is not a fair analysis. The Legislature can only repeal rules, not modify or fine-tune them. *Raymond v. State*, 906 So.2d 1045, 1051 (Fla. 2005). The

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2 The First District panel in *Jacksonville Beach* could not harmonize the statute with the rule, so it held the statute unconstitutional as a last resort. See, e.g., *Lisky v. Fla. Dept. of Insurance*, 643 So.2d 631, 634-35 (Fla. 1st DCA 1994) (if it is possible to do so, court will construe statute to avoid constitutional invalidity).
Legislature apparently has no quarrel with Rule 9.310, except within the purview of the APA provisions, so repeal would be unwarranted overkill. The absence of a two-thirds vote to repeal the rule does not logically indicate approval of the application of the rule in the particular situations covered by these statutes.

Although the Legislature in reviser’s bills often modifies or repeals statutes that have been held unconstitutional, it did not modify or repeal Section 120.68(3). The statute remains on the books as the Legislature’s firm policy choice, so the inconsistency continues to this day.

The objectors’ real argument is that the Supreme Court’s inaction since adopting the rule in 1977 implies that it currently opposes the policy in the statute. However, the Court directed our Committee to bring conflicts to its attention, so we cannot ignore this directive or assume that we should leave this conflict unreported. The fact that the rule has not been changed for a long time does not mean it cannot be questioned. See In re Amendments to the Florida Rules of Criminal Procedure - Final Arguments, 957 So.2d 1164 (Fla. 2007) (amending 150 year old procedural rule to conform to statute).

The objectors make a policy argument that an automatic stay protects the public from harm. However, the Constitution gives the political branches policymaking authority over local government and administrative practice and procedure. The political branches could well find the automatic stay gives an unfair advantage to the government that cannot be remedied by damages (because of sovereign immunity) and creates substantial hardship for opposing parties. The political branches may find the risk of public and private harm from automatically staying administrative orders outweighs the potential harm from implementing those orders, so there be no automatic stay on appeal of a final administrative order. Why should the Supreme Court arbitrarily assist the government as a litigant, when the political branches have directed the Courts to be even-handed in these cases? The objectors do not address these concerns at all.

An automatic stay undermines the finality of the administrative remedy and renders it ineffectual. These statutes may be considered an integral part of the APA’s purpose to provide fair and adequate administrative remedies in lieu of court jurisdiction. Even if the statutes were contrary to the Court’s rulemaking power if viewed in isolation, if they are an integral part of a statutory scheme, the Supreme Court may defer to them under current jurisprudence. See Caple v. Tuttle’s Design-Build, Inc., 753 So.2d 49, 54 (Fla. 2000) (Court rejects challenges to procedural statutes that are intertwined with laws protecting substantive rights); Peninsular Properties Braden River LC v. City of Bradenton, 2007 Fla. App. Lexis 11693 (Fla. 2d DCA Aug. 1, 2007).

The objectors argue that the proposed rule amendment may force local governments to incur the cost of an appeal bond, but it is unclear that this will be a major problem. Sovereign immunity protects local regulatory action from monetary liability absent an express statutory waiver. See, e.g., Trianon Park Condo. Ass’n, Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985) (city building inspection error is immune from liability); see also City of Lauderdale Lakes v. Com., 415 So.2d 1270, 1271 (Fla. 1982).
(the distinction between planning and operational functions in sovereign immunity law applies to supersedeas bonds; a supersedeas bond may be appropriate for operational functions, but no legal authority exists to impose such a bond for judicial review of planning functions unless the appeal is a bad faith delaying tactic). The proposed rule amendment deals only with appeals from administrative orders, and would not change the ruling in Corn, an appeal from a court ruling declaring a zoning ordinance invalid. The local government normally has immunity from monetary liability for its legislative or quasi-legislative planning functions, so local governments would not be required to post an appeal bond in such cases unless the Legislature expressly waives immunity. The objectors’ quotation from Corn actually supports the Committee’s action, confirming the scope of sovereign immunity is a legislative policy issue, which is the foundation argument for the proposed rule amendment.

If administrative rulings decide “operational” functions, for which Corn allows imposition of an appeal bond, local governments can generally show financial responsibility, so they can still oppose an appeal bond as unnecessary in such cases.3

The Supreme Court balanced similar concerns in the context of a temporary injunction bond (similar in function to an appeal bond). It did not grant municipalities “automatic” immunity from an injunction bond, but allowed the trial court discretion to make the municipality post an injunction bond, or if no bond is posted, to stand liable for damages if the injunction is wrongful. Provident Mgmt. Corp. v. City of Treasure Island, 796 So.2d 481 (Fla. 2001). It is difficult to understand why there should be a different rule for an appeal of a final administrative order, in which an automatic stay has the same effect as an injunction pending appeal. The Court may want to harmonize its rule with its more recent Provident decision, or explain why these two situations are different.

The proposed rule amendment would not necessarily alter the outcome in the cases cited by the objectors. If the public interest is genuinely at risk, the government has a strong case for a stay. The proposed rule amendment would simply require the issue to be determined case by case, without an arbitrary presumption that the administrative tribunal’s order is wrong, and the government party that lost in that tribunal is right.4

The Committee should follow the Supreme Court’s directive to report all conflicts between the rules and statutes, not leave this issue buried and unreported. It should adhere to its vote and send the proposed rule amendment to the Court, which can hear the supporting arguments and objections, and decide whether to amend the rule to defer to the statutes.

3 If an appeal bond were lawfully imposed, the cost does not appear exorbitant. I have been quoted a premium of $2,218 annually (uncollateralized) for appeal bond on a $100,000 court judgment. The government may also recover this cost from the opposing party if it prevails on appeal.

4 The objectors also complain that some administrative agency heads are nonlawyer “political appointees If there is a problem with administrative tribunals, this problem is beyond the purview of our Committee.
The Administrative Law Practice Subcommittee met by telephone conference on November 15, 2007, at 2:15 p.m. Those who participated included Vice-Chair Kelly O'Keefe, Dave Miller, Allen Watts and Chair Jon Whitney.

The agenda items set forth below were discussed. Regarding Item (2), in light of the proposed amendment to Fla. R. App. P. 9.310(b)(2) which was approved by the full Committee at the last ACRC meeting, Dave Miller prepared the attached analysis, which concludes that further amendments to Fla. R. App. P. 1.190(e) are not necessary, and the quorum agreed with Dave's analysis.

We are continuing to research Item (1) by contacting past ACRC Chair Kathi Giddings to ask for specific examples of cases in which the "IFO" issue arose, and Item (3) by contacting the Chair of the Rules of Judicial Administration Committee (Judge Benton) to ask whether that committee is looking at the possible overlap or conflict between Appellate Rule 9.190 and Civil Rule 1.630, in light of the provisions of Fla. R. Jud. Admin. 2.130, which provides for preemption by the Florida Rules of Appellate Procedure in those cases in which the Circuit Courts exercise their appellate jurisdiction. Dave Miller subsequently found the decision in Barnett v Barnett Bank, 338 So2d 888 (Fla 1st DCA 1976), in which the court held that in a case where the civil rules and appellate rules conflicted on a supersedeas issue, the appellate rules controlled in an appeal to the 1st DCA. Attached is a copy of that opinion.

We expect to have additional information for these items from Kathi Giddings and Judge Benton by the time of the Midyear Meeting of the full Committee.

Respectfully submitted,

Jon Whitney

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AGENDA

We have the following referrals for review and recommendation
(1) Committee Chair Steve Brannock has referred to us past ACRC Chair Kathi Giddings' email request to look at a proposed amendment to Fla. R. App. P. 1.190(e). Kathi's proposal is as follows: Rule 9.190(e) does not provide for an expedited process for review of stays of immediate final orders issued under Section 120.569(2)(n). The rule is limited to expedited review of stays involving license revocation or suspension orders. Consideration should be given to including a process for expedited review of stays of IFOs (which in practice the courts are doing but there is no rule governing this). Rule 9.190(e)(2)(B) could be amended as follows to resolve this problem: (B) When an agency has ordered emergency suspension, restriction, or limitation of a license under section 120.60(6), Florida Statutes, or issued an immediate final order under Section 120.569(2)(n), a licensee the affected party may file with the reviewing court a motion for stay on an expedited basis. There is an article in the Florida Bar Journal (October 2007) that Kathi co-authored with Todd D. Engelhardt on this subject, containing an analysis of the problem and proposed amendatory language, and can be accessed at this link:

http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/97e14dcd78ddf4d952576300552a00?OpenDocument

If the link doesn't open, the flabar.org website has a link to the Florida Bar Journal under "Publications" that will take you to the October 2007 issue. Kathi's article is the third one listed under "Columns".

(2) Committee Chair Steve asked the Subcommittee to give its recommendation, in light of the proposed amendment to Fla. R. App. P. 9.310(b)(2) which was approved by the full Committee, on whether the change needed to 9.190(e)(1) is substantive or technical (in which case we don't need to recommend alternative language). Dave Miller agreed to look at this for the subcommittee, and attached is his memo that expresses his viewpoint that further amendments to Fla. R. App. P. 1.190(e) are not necessary:

His memo also addresses the concern of Cathy Lannon, who is Bureau Chief, Administrative Law, Office of the Attorney General, on the effect of the proposed change to 9.310(b)(2) upon 9.190(e)(1): Here, again, is Cathy's memo:

MEMORANDUM

To: Jon Whitney
From: Cathy Lannon
Re: Appellate Rules 9.190(e)(1) in light of the proposed change to Rule 9.310(b)2
Date: September 13, 2007

Jon, you asked me to look at the proposed change to Rule 9.310(b)2, which would eliminate the automatic stay currently afforded public bodies and public officers in all case arising under Chapter 120, Florida Statutes, to see if it would cause a conflict with or inconsistency with Rule 1.190(e)1. Present Rule 9.310(b)(2) provides an automatic stay, except in criminal cases, when the state, any public officer in an official capacity, board, commission, or other public body seeks review.
The issue of a possible conflict between the proposal and Rule R.190(e) was previously considered by the Administrative Law Subcommittee, but that consideration focused only on the public bodies and public officers issue. What was not discussed, as far as I can tell, is the impact the proposed amendment could have on another part of Rule 9.190(e):

The filing of a notice of administrative appeal or a petition seeking review of administrative action shall not operate as a stay, except that such filing shall give rise to an automatic stay as provided in rule 9.310(b)(2) or when timely review is sought of an award by an administrative law judge on a claim for birth-related neurological injuries.

Sections 766.301-766.316, F.S., address a statutory scheme for providing compensation, on a no-fault basis, for birth-related neurological injuries. (This arrangement is commonly referred to as NICA, with the A standing for Association.) Claims under the NICA law are heard and determined by DOAH Administrative Law Judges (Section 766.304, F.S.) and are administrative proceedings under Chapter 120 (Sections 766.301(1)(d) and 766.304, F.S.)

Thus, it would appear that adding to Rule 9.310(b)(2) the language "or in administrative actions under the Administrative Procedures Act" after the words "except in criminal cases" would create an express conflict between the provision of Rule 9.190(e) delineated above and the proposed amended language of Rule 9.310(b)(2).

There is one twist to this that I should mention and that is whether the Florida Birth-Related Neurological Injury Compensation Plan is cognizable under Rule 9.310(b)(2), that is, is it a public body? Rule 9.310(b)(2) provides an automatic stay, except in criminal cases, when the state, any public officer in an official capacity, board, commission, or other public body seeks review. The NICA Board Directors are appointed by the Chief Financial Officer. Section 766.315(1)(c), F.S. The Board is not a state agency, board, or commission, but it is authorized to use the state seal. Section 766.315(1)(a), F.S.. Sovereign immunity is waived on behalf of NICA solely to the extent necessary to assure payment of compensation as provided in 766.31. Funds held on behalf of the plan are funds of the State of Florida. Section 766.315(5)(e), F.S. In my view, however, even though it is not a board or commission, it is clearly an other public body. Why else would there be a waiver of sovereign immunity?

(3) There is one additional issue referred to the Subcommittee concerning the possible overlap or conflict between Appellate Rule 9.190 and Civil Rule 1.630. Attached is the letter sent last July by Chairman Steve to Tom Elligett for this item.
To: Appellate Court Rules Committee, Appellate Practice Subcommittee

From: David K. Miller

Re: Conformity of Rule 9.190(e) with proposed amendment to Rule 9.310(b)(2)

Date: November 1, 2007

The Subcommittee and full Committee have recommended a proposed change to Fla. Rule App. Pro. 9.310(b)(2), as follows:

(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.

When this rule amendment was initially proposed in 2006, the Subcommittee gave some consideration to whether a conforming amendment to Rule 9.190(e)(1) was needed, but the consensus was no amendment was needed. At the last Committee meeting, there was brief discussion about revisiting this issue, and the Committee deferred action for this Subcommittee to look at it again.

Rule 9.190(e)(1) provides

Effect of Initiating Review. The filing of a notice of administrative appeal or a petition seeking review of administrative action shall not operate as a stay, except that such filing shall give rise to an automatic stay as provided in rule 9.310(b)(2) or when timely review is sought of an award by an administrative law judge on a claim for birth-related neurological injuries.

The proposed amendment in Rule 9.310(b)(2) was tailored to conform to the APA (specifically Fla. Stat. §§ 120.68(3) and 120.56(4)(d)). I have not canvassed the law to find out what other administrative actions exist that can be appealed outside the APA, but as to any such actions, the general principle of an automatic stay for appeals by public officers and bodies would still apply, even if the proposed amendment is adopted. In such cases, Rule 9.190(e)(1) and amended Rule 9.310(b)(2) would confirm that the automatic stay is in effect in those situations, except only where the APA says otherwise. The expressio unius rule of construction limits the amended Rule to cases under the APA.
Assistant Attorney General Cathy Lannon’s email memo expresses concern that the proposed change to Rule 9.310(b)(2) may create confusion in its application to appeals of awards under the Florida Birth-related Neurological Injury Compensation (NICA) Law, Fla. Stat. § 766.301 et seq. She points out that NICA proceedings are administrative proceedings under the APA, and that the Plan may be a public body. However, NICA awards are automatically stayed pending appeal by statute, and are apparently not subject to the provisions of § 120.68(3). See § 766.311(2):

(2) In case of an appeal from an award of the administrative law judge, the appeal shall operate as a suspension of the award, and the association shall not be required to make payment of the award involved in the appeal until the questions at issue therein shall have been fully determined.

Under the rule of construction that specific terms govern general terms, this statute, by its specific terms, seems to be an exception to the general principle in § 120.68(3) that “The filing of the petition does not itself stay enforcement of the agency decision....”

I do not see any reason to change the proposed amendment to Rule 9.310(b)(2) based on the NICA law. In fact, the NICA law seems to be an example of a situation where Rule 9.190(e)(1) and amended Rule 9.310(b)(2) would still allow the automatic stay in an appeal from an administrative ruling.

Conclusion – I do not see the necessity to recommend a conforming amendment to Rule 9.190(e)(1), or to change the proposed amendment to Rule 9.310(b)(2). However, when the matter is presented to the Supreme Court, the Court will be made aware of this question from the record materials, and can direct changes, if appropriate.
APPENDIX I
II. SUPREME COURT REVIEW OF PCA’S

The Supreme Court of Florida has asked the ACRC to propose an amendment to the appellate rules to prohibit motions for rehearing from dismissals of attempts to invoke the court’s jurisdiction to review “unelaborated per curiam decisions issued by a district court of appeal.” A copy of the referral letter from the Court appears as Exhibit D.

The subcommittee considered a draft amendment by Patrice Talisman at the October meeting, but determined that further work needed to be done. Fran Toomey developed an alternative proposal that was considered at the November meeting. After a few minor changes were agreed upon, the subcommittee voted 9-0 to propose the following amendment to Rule 9.330(d) be approved by the full committee at the January 2007 meeting:

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).
Mr. Edward Maurice Mullins  
Chair, Appellate Court Rules Committee  
Astigarraga, Davis, Mullins, & Grossman, P.A.  
701 Brickell Avenue Floor 16  
Miami, Florida 33131-2801  

Re: Rehearing and Clarification Motions Filed in Dismissals Pursuant to  
Jackson v. State, 926 So. 2d 1262 (Fla. 2006)  

Dear Mr. Mullins:  

At the request of the Court, I am writing to you in your capacity as Chair of the Appellate Court Rules Committee to ask that the committee consider and propose amendments to the appellate rules concerning the filing of rehearing and clarification motions filed in dismissals pursuant to Jackson v. State, 926 So. 2d 1262 (Fla. 2006). In Jackson, which I have enclosed, this Court held that  

article V, section 3(b)(1) of the Florida Constitution [regarding this Court’s mandatory appeal jurisdiction] does not authorize this Court’s jurisdiction over unelaborated per curiam decisions issued by a district court of appeal. As we have long recognized in the context of discretionary review jurisdiction and now apply to mandatory review jurisdiction, per curiam decisions issued without an opinion do not constitute a decision of a district court sufficient to establish jurisdiction under article V, section 3(b)(1) of the Florida Constitution. . . . We also hold that in the future, the clerk’s office will
dismiss notices of appeal and petitions for discretionary review asserting jurisdiction on similar grounds. No motions for rehearing or clarification will be entertained in these cases or in cases which are dismissed in the future based on the reasoning set forth in this opinion.

926 So. 2d at 1266 (emphasis added). As relevant here and emphasized above, the Court has determined that it will no longer entertain motions for rehearing or clarification in the category of cases at issue. The Court's dismissal orders in all such cases will accordingly state that no rehearing or clarification motions may be filed; the Court's Internal Operating Procedures will be amended to so provide; and the Clerk's Office will be striking all such motions.

The Court would like the Committee to propose an amendment to the appellate rules providing that no motions for rehearing or for clarification may be filed in such cases. See, e.g., Fla. R. App. P. 9.330(d). The Committee should include its proposals concerning this matter in its next regular-cycle submission of proposed rule amendments, unless it determines that the proposed changes should be considered out-of-cycle.

Should you have any questions, please do not hesitate to contact me or Justice Wells, who is the liaison to your Committee.

Most cordially,

Thomas D. Hall

Enclosure

TDH/gp/dm/sb

cc: Justice Charles T. Wells, Liaison to Committee
    Joanna Mauer, Bar Staff Liaison
    Deborah J. Meyer, Supreme Court Central Staff Director
November 1, 2006

Mr. Edward Maurice Mullins  
Chair, Appellate Court Rules Committee  
Astigarraga, Davis, Mullins, & Grossman, P.A.  
701 Brickell Avenue Floor 16  
Miami, Florida 33131-2801

Re: Notice of Intent to File Amicus Brief in Certified Questions of Great Public Importance Cases

Dear Mr. Mullins:

Pursuant to instructions from the Court, I am writing you in your capacity as Chair of the Appellate Court Rules Committee to ask your committee to consider an issue that recently came to the Court’s attention.

The enclosed law review article, Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 Stetson L. Rev 269, 308, points out the potential benefits of allowing amicus participation at the jurisdictional stage of cases involving certified questions of great public importance. As suggested by the authors, the Court would like your committee to consider whether a new rule should be adopted that “would allow potential amici to submit, at the jurisdictional stage, a one-page notice of intent to file an amicus brief if jurisdiction is accepted, explaining the importance of the case to an amicus party.”
Please have the committee consider this issue. If the committee determines a new rule is in order, please submit the proposal in your next regular-cycle submission to the Court, unless the committee determines that the proposal should be considered out of cycle. If the committee determines a new rule is not warranted, please file an out-of-cycle report explaining the committee’s reasoning by April 1, 2007. If you file an out-of-cycle report, the original should be submitted directly to my office, with copies to the liaison justice and the director of central staff.

Should you have any questions, please do not hesitate to contact me or Justice Wells, the Court’s liaison to your committee.

Enclosure

TDH/DM/sb

cc: Honorable Charles T. Wells, Liaison to Committee
     Joanna Mauer, Bar Staff Liaison
     Deborah Meyer, Director of Central Staff
The subcommittee convened one telephone meeting on April 16, 2007, the minutes of which are attached as Exhibit A.

I. AMICUS CURIAE BRIEFS

In response to an article by appellate lawyers Sylvia Walbolt and Joe Lang, the Supreme Court of Florida asked the Committee to consider whether a new rule should be adopted to allow potential amici to file a notice of their intent to file an amicus brief on the merits in cases in which a district court has certified one or more questions of great public importance. A copy of the referral letter with the law review article is attached as Exhibit B.

After preliminary discussion summarized in the January 2007 report, John Mills and Henry Gyden explored the issues in detail and conferred with Tom Hall, Clerk of the Supreme Court of Florida. They reported on those discussions to the subcommittee in April and presented a draft for discussion. Specific details of the discussions and issues raised at the subcommittee meeting are found in the minutes.

Following the subcommittee meeting, Mr. Gyden revised the draft, and Mr. Mills circulated it to the subcommittee and Mr. Hall by email for comments and a vote by the subcommittee. There was some discussion regarding whether the committee note was sufficiently clear that the filing of a notice of intent is optional and does not affect the need to move for leave to file an amicus brief in jurisdiction is granted, but the subcommittee reached a consensus that the proposed note was adequate. The subcommittee voted 14-0 to propose the following amendment as a new subsection to Rule 9.370 be approved by the full committee at the June 2007 meeting:

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.
ACRC GENERAL SUBCOMMITTEE
April 16, 2007 Minutes

Attended: Denise Powers, Fran Toomey, Ed Mullins, Beth Coleman, Patty Talisman, Henry Gyden, Al Gayoso, Jere Tolton, Andy Berman, Jim Daniel, Brandon Vesely, John Mills (12 out of 15, so a quorum was present)

I. AMICUS BRIEFS ON SUPREME COURT JURISDICTION

Discussion was had regarding the supreme court’s referral for the committee to consider whether to amend the amicus rule to authorize the filing of a “one-page notice of intent to file amicus brief” when the court is considering whether to take discretionary jurisdiction.

Mills and Gyden reported that they had discussed the issue with Tom Hall, clerk of the supreme court. Mr. Hall explained that the court has recently changed the manner and timing in which it considers its discretionary jurisdiction. Unlike in the past, the court is much more likely to reach a decision on whether it will accept jurisdiction before merits briefing. Mr. Hall opined that the court might find a notice of intent to be helpful in any case with a jurisdictional question because it will help inform the court as to whether the case will have an impact beyond the parties. He noted that the court does not allow amicus briefs on jurisdiction and that motion for leave at the amicus stage are denied by the clerk’s office without prejudice to seek leave to file an amicus brief on the merits if the court takes jurisdiction.

Tolton noted that there does not appear to be any obstacle to filing a motion for leave to file an amicus brief on the merits pending the court’s decision about jurisdiction, which might accomplish the same purpose. Once Mr. Hall’s explanation that motions for leave to file amicus briefs are not circulated to the court while the jurisdictional issue is pending was related, Tolton indicated that a rule change may be necessary.

Bennan noted a concern that any amendment not make the filing of a notice a prerequisite to filing a motion for leave to file an amicus brief on the merits. There was a consensus among the subcommittee that any rule should be drafted to avoid this result.

Berman noted that he generally does not favor rules that would tend to cabin or codify the courts’ discretion.

Mullins and Daniel both spoke in favor of a rule change as something that could be helpful to the court in deciding what cases are truly important to various segments of the bar.

Mills, Gyden, and Mullins both indicated that they read between the lines in the supreme court’s referral letter and believe that it is likely that the court affirmatively wants a rule on this issue, even though it did not direct that a rule be drafted.

Mullins, Toomey, and Powers questioned whether a provision could be worked into 9.370(8), but a consensus developed that this would not be practical.

In the end, the subcommittee unanimously agreed that an amendment should be drafted as a new subparagraph (d) to Rule 9.370. (12-0)

Exhibit A.
The subcommittee then considered the following propose language, drafted by Gyden

(d) Notice of Intent to File Amicus Brief in Supreme Court. When a party has invoked the discretionary jurisdiction of the supreme court as prescribed by rule 9.120(b), 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 important to the amicus curiae, but shall not contain argument. The notice must be filed within 10 days of the filing of the notice to invoke discretionary jurisdiction of the supreme court. The filing of a notice under this subdivision shall not relieve an amicus curiae from compliance with the provisions of subdivision (a) of this rule.

Gyden explained the draft, and there was discussion on whether a deadline should be included.

Gyden proposed 10 days from the filing of the notice to invoke, although he questioned whether this was too long because the court might rule before then.

Mullins, Mills, and Toomey all questioned whether a deadline was really necessary and suggested that there should not be deadline. It is possible that potential amici will not learn of the case until after the deadline, so there was a concern that providing a deadline would lead to motion for extensions or for leave to file out of time. A committee note could be drafted advising that a notice be filed as soon as possible because the court is under no obligation to wait to see if one is filed. A consensus appeared to develop that no deadline should be included.

Powers objected to language allowing the amicus to explain the importance without a page limit. She worried that the notices would be turned into briefs. Mills noted that the supreme court referral and Sylvia Walbolt's law review article that prompted the referral contemplated that some explanation would be appropriate. Mills also noted that we could develop language similar to the rule on supplemental authority allowing the issue to be identified but prohibiting argument.

Gyden pointed out that a one-page limit might cause some confusion as to whether the caption would count against the limit. A consensus seemed to develop that a provision stating that the body of the notice is limited to a page was appropriate.

Toomey suggested that the word “importance” be changed to “interest.”

Mills suggested a limitation along the following lines: “The body of a notice of intent shall not exceed one page. The notice may identify the interest of the amicus, but it shall not contain argument.”

Mullins suggested that the last sentence be moved to a committee note.

Toomey suggested that, to address Berman’s concern, the note could also clarify that the failure to file a notice does not affect the ability to seek leave to file an amicus brief on the merits.

Gyden agreed to revise the draft amendment in light of the comments.

Mills will circulate the revised draft and the subcommittee will attempt to vote on it by email in time to present at the June meeting.
APPENDIX K
Thomas D. Hall
Clerk of Court
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1925

February 10, 2006

Proposal for Rule Amendment
Rule 9.430, Florida Rules of Appellate Procedure

Dear Mr. Hall:

Pursuant to Rule 2.130(b), Florida Rules of Judicial Administration, please accept this letter as my proposal for amendment to Rule 9.430, Florida Rules of Appellate Procedure. This rule pertains to proceedings by indigent appellants.

The current rule does not reflect the shift of responsibilities from the trial courts to the Clerks of Courts at the Circuit level under recent amendments to Chapters 28 and 57, Florida Statutes.

The current rule directs non-incarcerated appellants to file "a motion in the lower tribunal." Fla.R.App.P. 9.430(a). Regarding incarcerated appellants, the rule states that for non-criminal cases, "the court may 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." Fla.R.App.P. 9.430(b)(2). However, the current statutes governing indigent litigants direct the person to obtain a certification of indigence "in accordance with s. 27.52 or s. 57.082." §57.081, Fla. Stat. (2005). The certification of indigence is obtained from the Clerk of Court, not a circuit judge. §§27.52(1), 57.082(1), Fla. Stat. (2005). The circuit judge or court becomes involved only if the Clerk of Court denies the certificate of indigence and the litigant/appellant seeks review of the Clerk's determination. §§27.52(2)(e), 27.52(4), 57.082(2)(e), 57.082(4), Fla.Stat. (2005).

The document filed by a litigant seeking a certificate of indigence is an "application" to the Clerk of Courts, not a "motion" to the court. §57.082(1), Fla.Stat. (2005).
I am aware that the Florida Supreme Court has ruled that where there is conflict between the rules and statute as to matters of procedure, the rules must prevail. *Chappell v. Fla. Dept. of Health & Rehabilitative Services*, 419 So.2d 1051 (Fla. 1982). However, the substantial changes in the statutory provisions regarding indigent litigants and the increasing volume of cases filed by indigent persons in recent years might justify an amendment to the rule at this time.

I propose the following amendments for your consideration:

Rule 9.430. Proceedings by Indigents

(a) Application Motion and Affidavit. A party who has the right to seek review by appeal without prepayment of costs shall, unless the court directs otherwise, file a signed application with the Clerk of a motion in the lower tribunal, using an application form approved by the Supreme Court 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 a motion and affidavit with the reviewing court. If a certification of indigence the motion is issued granted, the party may proceed without further application to the court but must comply with any partial payment plan ordered by the lower tribunal, and without either the prepayment of fees or costs in the lower tribunal or court or the giving of security therefor. The Clerk’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) 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 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, an application a motion and affidavit 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, upon the recommendation of the Clerk of Courts the court may 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. The lower tribunal may direct the detaining agency to place a lien or other restriction on a prisoner’s inmate trust account to assist the Clerk of Courts in collecting partial payments ordered.

In addition to Rule 9.430, the attendant form Orders in Rule 9.900(i) should be amended because it is the Clerk of Courts who reviews the documentation for completeness and makes the determination of the prisoner’s indigence, non-indigence, or ability to make partial payments. Thus, the form “Order Requiring Further Information for Determination of Prisoner’s Indigency” might more accurately be entitled “Clerk’s Response to Notice of Appeal Filed Without Fees Attached,” indicating that preparation of the record will be abated if the indicated documents are not timely filed. The “Order on Prisoner Indigency” might be more accurately entitled “Clerk’s Certificate of Indigence” with a section at the bottom for the judge to order any partial pre-payment or lien for the fees on the prisoner’s inmate trust account. The Clerk of Court for the 2nd Judicial Circuit is currently using such 2-part forms which might be helpful.

Thank you for your consideration of this matter. If I can be of any assistance, please do not hesitate to call.

Sincerely,

Nancy S. Isenberg
Sr. Trial Court Staff Attorney
Leon County Courthouse, Rm. 342
Tallahassee, Florida 32301
Florida Bar Number 0612758
Ph. (850) 577-4415
e-mail: nancyi@leoncountyfl.gov
Report for June 2006 ACRC Meeting
General Rules Subcommittee

By John S. Mills, Chair

I. Rule 9.420 – Electronic Filing and Service

The first matter referred to the subcommittee was a proposal by Celene Humphries, a board-certified appellate attorney, regarding whether Rule 9.420, which governs filing and service, should be amended to permit electronic service of appellate papers.

The subcommittee solicited the participation of Fourth DCA Judge Martha Warner and Supreme Court of Florida Clerk Tom Hall, who are both involved in the implementation of electronic filing, and considered the matter during a March 1, 2006 telephone conference. The minutes for this meeting are attached as Exhibit 1. Ms. Humphries proposal appears as Exhibit A to those minutes.

The consensus was that in light of the imminent changes regarding electronic filing, Rule 9.420 would need to be amended with regard to both filing and service. The subcommittee recommended that the ACRC Chair, Jack Reiter, appoint a special committee to explore this issue in greater depth.

This recommendation was accepted, so the matter is no longer pending before the General Rules Subcommittee.

II. Rule 9.430 – Proceedings by Indigents

The second matter was a proposal by Nancy Isenberg, a staff attorney at the Fourth Judicial Circuit in Tallahassee, regarding whether Rule 9.430, which governs proceedings by indigents, should be amended in light of recent statutory changes.

This matter was discussed during the March 1, 2006 conference call and additional calls on May 11 and May 23, 2006. The minutes of these meetings are attached as Exhibits 2 and 3, respectively. Ms. Isenberg’s proposal appears as Exhibit B to the May 11 minutes.

A special subcommittee of Brandon Vesely, Maria McGuiness, and Frank Winstead, was appointed to explore the issue and propose amendments to the rule to conform to the statutory changes, as well as the Supreme Court of Florida’s creation of a new form application for determination of indigency status.

In addition to suggesting technical changes necessary in light of the new form, the subcommittee noted that the different roles and obligations of trial court clerks and appellate clerks required different treatment for appellate and original proceedings. Therefore, they proposed limiting paragraph (a) to the procedure for appeals, and creating a new paragraph (b) to address original proceedings.
The proposed amended rule was discussed by the entire subcommittee in two meetings and was further revised in light of the group's comments.

By a vote of 11-0, the subcommittee voted to recommend the amendment and note appearing below. Subcommittee chair John Mills intends to move that this recommendation be adopted by the full committee at the June 2006 meeting.

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 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 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).]

III. Rule 9.210 – Number of briefs allowed

The third issue referred to the subcommittee was a proposal from Ms. Humphries that Rule 9.210 be amended to clarify two questions: (1) When there are multiple appellees, may each appellee file a separate answer brief? and (2) If so, may a single appellant file separate reply briefs to each answer brief?