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**Recording Date** – February 13, 2017

**Recording Availability** – June 20, 2017

Meeting Location	Date	Time	Topic
King County Bar Association 1200 Fifth Avenue - Suite 700 Seattle, WA	<b>Monday, February 13, 2017</b>	12:00 PM to 1:15 PM	Supersedeas Procedures in Washington State Courts

### AGENDA

**12:00 PM** Introductions/Lunch

**12:10 PM** Presentation: ‘Supersedeas Procedures in Washington State Courts’, by Averil Rothrock, Shareholder at Schwabe, Williamson & Wyatt; William R. Hanley Jr., Vice President, Jurisco, Inc.

**1:15 PM** Evaluations & Adjourn

### SPEAKER BIOGRAPHY:

**Averil Rothrock, Shareholder at Schwabe, Williamson & Wyatt** - Averil Rothrock has over 20 years of litigation experience and has advocated in more than 40 appeals in Washington’s Court of Appeals and 14 review proceedings before the Washington State Supreme Court, in addition to regular work in the Ninth Circuit. Averil also helps clients who are not parties in a case use the *amicus curiae* process to provide input on issues of concern in their industry. Averil joined Schwabe, Williamson & Wyatt in 1994 and leads the firm’s General Litigation practice. She served as Chair of the Appellate Section of the King County Bar Association from 2012-2013. Averil is a member of WALA, the Washington Appellate Lawyers Association. Recent presentations include *Strategic Use of Amicus Briefs in Appellate Advocacy* to a national audience for Strafford Seminars in June 2016, and *Winning on Appeal: Settlement and Argument Preparation with Former Judges* for the WSBA in November 2016. A recent publication includes *Sanctions for Sexist Remarks: Don’t Overlook Obnoxious, Demeaning Behavior* in the NW Lawyer, March 2016. Averil serves on the Board of the King County Bar Foundation.

**William R. Hanley Jr., Vice President, Jurisco, Inc.** - Jurisco specializes in lawyer's surety bond services to clients across the nation. Founded in 1987, Jurisco specializes in civil court surety bonds and provides bonds in every state.

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For pre-recorded A/V (self-study) programs, although the sponsor should apply for accreditation, **lawyers need to report the credits earned for taking the course.**

To add an approved course to your roster, follow the procedures below:

- ❖ Go to the "mywsba" website at [www.mywsba.org/](http://www.mywsba.org/).
- ❖ Log in.
- ❖ Click on the "Access MCLE" link in the "MCLE Info" box on your home profile page.
- ❖ Click on "Add Activity." Search to find the approved course in our system. (See search suggestions on the screen.)

### **Adding a Recorded Course**

Select Recorded Course from the Add New Activity screen.

This will prompt you to search for the activity in case the activity has already been accredited in the MCLE system.

You can search by Activity ID or by specific Activity Details. For the Activity Details search, you can use keywords for the title, sponsor name and date.

After entering your search criteria and selecting Search at the bottom of the screen, a list of possible activities will be provided.

You can select the correct one by clicking the Activity ID. This will take you to the specific activity. Entered the date(s) on which you began and ending viewing this recorded activity.

Then claim the correct credits for which you attended this activity in the Credits Claimed fields and click the Submit button at the bottom of the page.

You will receive a confirmation message at the top of your screen stating, "The activity has been added to your roster."

## Supersedeas Procedures and Considerations in Washington State Courts

### Part One: Applicable Rules of Appellate Procedure, Cases and Considerations

February 13, 2017

By Averil Rothrock

#### 1. Starting Point for Supersedeas Relief in Civil Cases

- Civil judgments are enforceable even if appealed.

“Any person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed as provided in rules 8.1 or 8.3.” *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 47 (1991) citing Rule of Appellate Procedure (RAP) 7.2(c). “[A] trial court judgment is presumed valid and, unless superseded, the judgment creditor has specific authority to execute on that judgment.” *Id.* at 44.

See Title 6.17 RCW regarding execution of judgments.

- Automatic stay on the judgment expires quickly. Civil Rule 62.

10 day automatic stay; if file NoA, 14 day automatic stay, except for injunction and receivership orders for which no stay arises except on order of the trial court. Civil Rule 62(a).

Can seek an order of stay “on such conditions for the security of the adverse party as are proper” pending disposition of motion for a new trial/amendment/relief from judgment/motion for judgment as matter of law/new findings. CR 62(b).

- Judgments can be stayed, usually contingent on posting security.

The purpose behind supersedeas security is two-fold: “it serves the interest of the judgment debtor by delaying the execution of the judgment, and it serves the interest of the judgment creditor by ensuring that the judgment debtor's ability to satisfy the judgment will not be impaired during the appeal process.” *Estate of Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 769 (2001) (citing *Lampson Universal Rigging, Inc. v. Wash. Pub. Power Supply Sys.*, 105 Wn.2d 376, 378 (1986)).

A supersedeas filing should “guarantee that the debtor’s ability to satisfy the judgment cannot be altered pending outcome of the appeal.” *Seventh Elect Church in Israel v. Rogers*, 34 Wn. App. 105, 120 (1983).

Bonds can be posted pursuant to RAP 8.1 or RCW 6.17.040.

## 2. The Process Under RAP 8.1 Starts in the Superior Court for Money Judgments and Decisions Affecting Property, or in the Appellate Court for “Other Civil Cases.”

- Judgment Debtor can make supersedeas filing for money judgment or decision affecting property immediately, without prior Superior Court approval.

*See* RAP 8.1(b)(1)(“*Money Judgment*) and (b)(2)(“*Decision Affecting Property*”).  
*See also* RAP 8.1(d) (“*Form of Cash Supersedeas; Effect of Filing Bond or Other Security*”).

If possession, ownership or use of a trademark, trade secret, patent or other IP is at issue, only get a stay if “reasonably possible to quantify the loss” during life of appeal. RAP 8.2(b).

Judgment debtor provides the opposing party notice and copies of the filings or deposits.

- Creditor must challenge amount of bond, but stay remains in place pending Superior Court evaluation.

A challenge to the sufficiency of the amount or form of the security can follow **by motion** of a dissatisfied judgment creditor. RAP 8.1(e)(“*Objection to Supersedeas*”). The trial court has discretion to resolve the judgment creditor’s challenge.

The rules allow the opposing party **7 days** to object by motion to the cash or bond supersedeas. *See* RAP 8.1(e).

Once the trial court resolves that motion, the judgment creditor has 7 days to cure the deficiencies or enforcement may occur. *Id.* At this point, either party might employ RAP 8.1(h) and take its concerns to the appellate court.

- Exception: “Alternate Security” requires a motion or stipulation.

If not going with a bond or cash, the court can approve “an account consisting of cash or other assets, or “any other reasonable means” of security. RAP 8.4(4).

- Only “other” types of judgment (like equitable relief or injunction) require judgment debtor to make a motion for stay in the appellate court—plan this out.

First, ask trial court before relief is entered if it will stay the relief pending an anticipated appeal, but if trial court enters relief make a motion in the appellate court. RAP 8.1(b)(3).

The appellate court has the authority before or after acceptance of review, to stay enforcement “upon such terms as are just.” RAP 8.1(b)(3)(“Other Civil Cases”).

For this type of stay relief, the court considers whether debatable issues are presented by the appeal, with the burden on the party seeking the stay, and compares any injury to the judgment debtor without a stay to any injury to the judgment creditor if a stay were imposed. RAP 8.1(a)(3). Parties address any lack of merit of the appeal and injury if a stay is imposed. This contrasts with a stay of money judgments and decisions affecting property where the merits of the appeal are not at issue, the judgment creditor is entitled to the stay and the court’s discretion is limited to the amount and form of the security.

An attorney should consider an emergency motion under RAP 17.4(b) before the Court of Appeals if time is short.

- State and local governments not required to post security, but are still on the hook for damages attributable to the supersedeas if lose on appeal. *See* RAP 8.1(f).

“Washington courts follow the established rule that once an appeal has failed, the supersedeas obligor’s ‘liability for damages ... is *absolute*,’” and the city is an obligor where it has stayed the judgment without the requirement of a bond under RAP 8.1(f). *Holmquist v. King County*, 192 Wn. App. 551 (2016), citing *Norco Construction, Inc. v. King County*, 106 Wn.2d 290, 295-97, 721 P.2d 511 (1986) (King County liable for damages while supersedeas in place).

*See* RCW 6.17.080 regarding execution on local government entities.

Additionally, the State may act as a surety for individuals or parties. RAP 8.5.

### **3. Superior Court Discretion/Amounts**

- Trial court has much discretion to decide if the amount and form of the supersedeas posting are adequate when challenged by the judgment creditor, and to decide the judgment debtor’s motion to approve “alternate security.”

Money judgments ordinarily must be secured by the amount of the judgment, interest likely to accrue during the pendency of the appeal and attorney fees, costs and expenses “likely to be awarded on appeal.” RAP 8.3(c)(1). To determine an appropriate amount of post-judgment interest, the parties should address the expected length of the appeal, usually through affidavits of the attorneys or an expert setting forth an average appeal time. If the respondent has a right to attorney fees for successful defense of the appeal, the parties usually dispute a reasonable amount. In that case, the size of the record usually is a consideration, as that often drives expense.

A decision affecting property involves these same considerations plus “the amount of loss which the prevailing party...would incur as a result of the party’s inability to enforce the judgment during review.” RAP 8.1(c)(2). Often this is the value of the use of the property during review, although the judgment creditor is free to make any showing and argument. *Id.* Also, the property itself may be the security once its value is established. *Id.* Expert testimony could be submitted on value, or the testimony of the landowner because “[i]t is longstanding and well-established law that an owner is qualified to testify to the value of his property—no further expertise is required.” *Erickson v. Chase*, 156 Wn. App. 151, 160 (2010).

- The rules also permit a stay of only a portion of the judgment, and permit supersedeas requirements that mimic requirements of a judgment calling for periodic payments. RAP 8.1(c)(3).
- A stay based on “alternate security” requires a motion, or a stipulation, to post or hold other assets or other “reasonable means” of securing enforcement of the judgment. RAP 8.1(b)(4).

The rule specifically contemplates that such other assets may be held by the party’s counsel or a non-party awaiting the result of the appeal. *RAP 8.1(b)(4)*.

A party could offer property or any other type of arrangement satisfactory to the judgment creditor; in such cases, the parties should submit a stipulation and nothing is deposited with the Court Clerk. If an agreement cannot be reached, the trial court has discretion to accept such an offering in lieu of cash or a bond.

#### **4. Surety Qualifications**

- If your client intends to post a bond, review RAP 8.4 regarding surety qualifications and be sure that the bonding company is a resident or is authorized to conduct a surety business in this state. Additionally, the State may act as a surety for individuals or parties. RAP 8.5.

#### **5. Mechanics**

- For cash deposits, a party simply goes to the Clerk’s Office with the cash or certified check.

At the same time that the cash is deposited, the party should file a Notice of Cash Supersedeas. RAP 8.1(d)(1). Review Form 24 of the RAP and RCW 36.48.090 to inform the content of the notice.

- For bonds or approved alternate security, a similar procedure is followed. *See* RAP 8.1(d)(2). Although the rules do not specifically require it and the bond or alternate security might readily appear in the docket, an attorney should consider

filing a notice of the filing of the bond or alternate security highlighting that a stay is in effect.

## 6. **Review of Supersedeas Decision at the Court of Appeals**

- Any party can seek review by an appellate court of the trial court's supersedeas decision. RAP 8.1(h).

## 7. **Adjustment During Appeal**

- The trial court may change the supersedeas "for good cause shown." RAP 8.1(g). Altered circumstances likely would constitute good cause if they undermine the adequacy of the security. The rules are explicit that the trial court retains jurisdiction during the appeal to address "matters of supersedeas, stays, and bonds...." RAP 7.2(h).

## 8. **Post-Decision Consequences, Including Risks to Respondents**

- **Risks to Respondents.** Lawyers should inform their clients about exposure for the supersedeas costs post-appeal. A respondent who loses on appeal likely is responsible for costs under Title 14 RAP that include "expenses incurred in superseding the decision of the trial court, but not ordinarily greater than the cost of a commercial surety bond." RAP 14.3(a)(5). Many bonding companies offer bonds at 2% of the supersedeas amount per year. Thus, the judgment creditor who argues for a large supersedeas amount and disputes alternate security to insist upon a bond could find that its approach backfires because if it loses the appeal it will pay the costs. Respondents should be receptive to proposals that achieve a reasonable stay solution and avoid unnecessary risk.
- If no stay is sought, a judgment is paid and then the judgment is reversed, restoration and restitution can be due and likely will include prejudgment interest, i.e. interest over life of appeal.

Trial court "shall enter orders and authorize" restoration of property or restitution. RAP 12.8.

"Where a party has voluntarily satisfied a trial court decision that the appellate court later modifies, RAP 12.8 requires the trial court to order restitution in appropriate circumstances." *Arzola v. Name Intelligence, Inc.*, 188 Wn. App. 588 (2015). Where the appellate court reversed the award of exemplary damages, attorney fees and costs, the judgment creditors had to pay the monies back including interest in the **equitable** action at 5%, which was a reasonable rate and not abuse of discretion.



Restitution/refund may be sought by any former judgment debtor against any former judgment creditor where liability was joint. *Arzola*, 188 Wn. App. at 594-95.

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Averil Budge Rothrock focuses her practice on appellate review in the Seattle office of the Pacific Northwest regional firm Schwabe, Williamson & Wyatt. She is a former Chair of the KCBA Appellate Law Section. At Schwabe, she is Practice Group Leader of General Litigation. She can be reached at [arothrock@schwabe.com](mailto:arothrock@schwabe.com).

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# II.

## How Surety Companies Work

# How Surety Companies Work

A Surety Bond is a contract among at least three parties:

- 1. The Obligee** - the party who is the recipient of an obligation.
- 2. The Principal** - the primary party who will perform the contractual obligation.
- 3. The Surety** - who assures the obligee that the principal can perform the task.

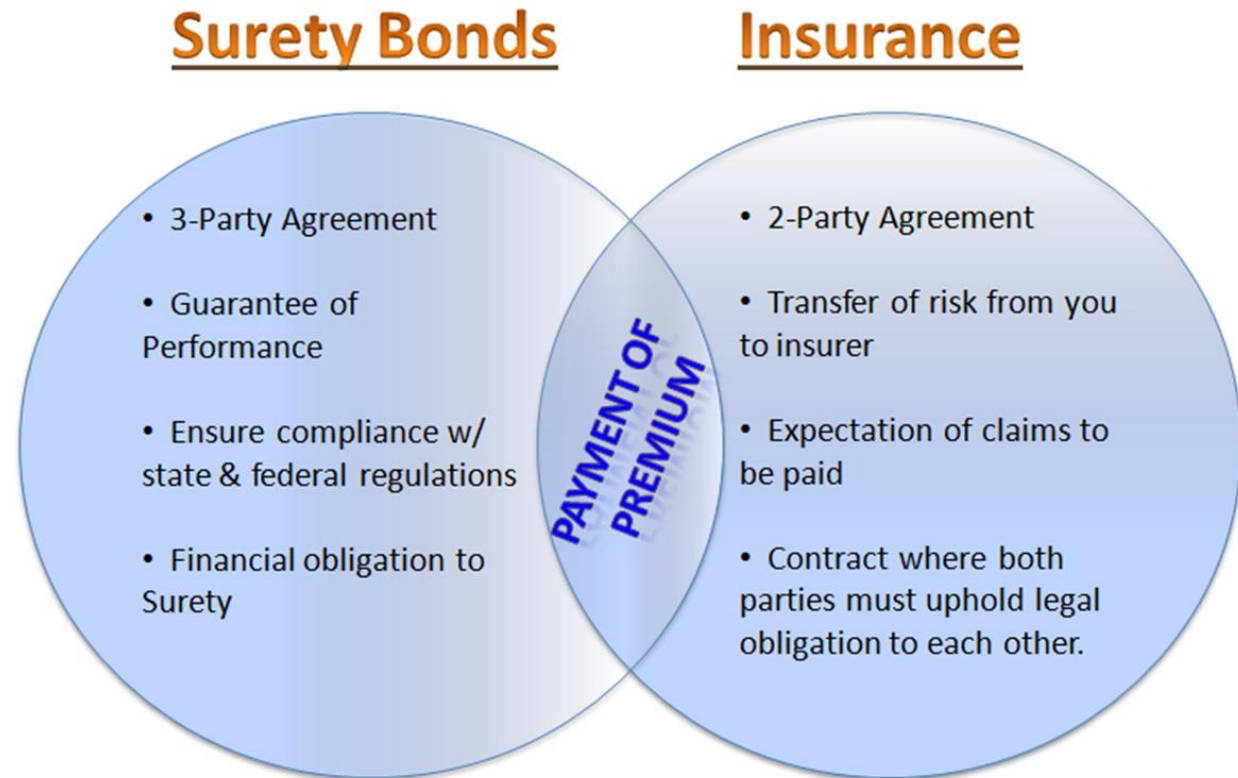
# How Surety Companies Work

## Surety Bond Agency

- Work as agents for larger insurance companies
- Work with attorneys, businesses and individuals.
- 90% of clients are attorneys (on behalf of their clients).
- Insurance companies carry the financial risk of the bond though claims against bonds can be made against agencies, insurance companies and principals.

# How Surety Companies Work

## Relationship with Insurance.



# How Surety Companies Work

## Surety Bond Agency

- Premiums charged are lower than other insurance products and underwriting must be very strict because of the  $\Delta$  between the premium and risk.

# How Surety Companies Work

## Types of Bonds

1. Defendant Bond
2. Plaintiff Bond
3. Probate/Fiduciary Bond
4. License & Permit Bond
5. Performance/Construction Bond

Different types of bonds have different underwriting standards (or “headaches”)

# How Surety Companies Work

Surety Bond v Cash Deposit w/ court

1. Cost
2. Time
3. Retrieval of deposit.



# How Surety Companies Work

## Underwriting Standards

1. Credit Score/Credit History (all applicants)
2. Merits of the case (all bonds)
3. Relationship to the estate and beneficiaries (probate bonds)
4. Profit and Loss statement (License and Permit)

# How Surety Companies Work

## Collateral

Collateral must be posted for the full amount of the bond.

# How Surety Companies Work

## Types Accepted

1. Cash/Cashiers Check/Wire transfer
2. Irrevocable Letter of Credit
3. Illiquid assets/Securities/Real Property

# How Surety Companies Work

## Types Accepted

1. Cash/Cashiers Check/Wire transfer

# How Surety Companies Work

## Types Accepted

2. Irrevocable Letter of Credit.
  - a. Must be written verbatim on issuing bank's letter head
  - b. Must be from a major US bank.
  - c. "Irrevocable" for a reason. Must remain in place for the duration that claims can be made against the bond.

# How Surety Companies Work

## Types Accepted

3. Illiquid Assets/Securities/Real Property
  - a. Much harder to approve
  - b. More costly/Higher Premiums
  - c. Process takes significantly longer

# How Surety Companies Work

## The Application

1. Personal Information
  - a. Credit History
  - b. Personal Finances
2. Indemnity
  - a. Necessary for all bonds.
  - b. Principals must sign
  - c. Company officials must sign for business.

# How Surety Companies Work

## Expunging Bond

To expunge/dismiss bond, the surety needs an order from the court releasing the bond/surety from all liability. Without this order the bond will be technically still in place and premiums will be charged. **It is important to have a similar statement written into settlement documents or to make a request of the court.**