

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO THE FLORIDA
RULES OF JUVENILE PROCEDURE—2018
REGULAR-CYCLE REPORT**

CASE NO: SC 18-174

**RESPONSE TO COMMENT
BY THE JUVENILE COURT RULES COMMITTEE**

Kara Ann Fenlon, Chair of the Juvenile Court Rules Committee (“JCRC”), and Joshua E. Doyle, Executive Director of The Florida Bar, file this response to comment.

The JCRC received a comment from the Civil Procedure Rules Committee (“CPRC”) regarding proposed amendments to Rule of Juvenile Procedure 8.255(e). The CPRC raises several concerns about the proposed rule. The JCRC thanks the CPRC for its thoughtful comments regarding this matter, but the JCRC declines to change its proposed rule in response to the Comment received for the reasons stated herein.

The CPRC’s comment raises concerns regarding proposed Rule 8.255(e)(4) that allows the parties to waive the requirement for a notary to be present in person to swear in a witness who testifies at a hearing through communication equipment when there is no question as to the identity of the witness.

**RESPONSE TO CPRC’S COMMENTS REGARDING PROPOSED
RULE 8.255(e)(4) ALLOWING THE PARTIES TO WAIVE THE
REQUIREMENT FOR A NOTARY TO BE PRESENT TO SWEAR IN A
WITNESS.**

The JCRC’s proposed Rule 8.255(e)(4) reads:

(4) Oath. Testimony may be taken through communication equipment only if a notary public or other person authorized to administer oaths in the witness’s jurisdiction is present with the witness and administers the oath consistent with the laws of the jurisdiction, unless all parties waive the requirement of a notary public or other person authorized to administer oaths in the witness’s jurisdiction because there is no question as to the identity of the

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witness and the court will administer the oath via the communication equipment on the record.

The CPRC questions whether the court could identify a witness, who testifies remotely, with certainty or ensure that the oath was administered properly. The JCRC respects the concerns of the CPRC but requests the court to recognize that there are very practical reasons to adopt this proposed amendment. Specifically, the JCRC included the notary waiver provision to effectively protect children who have allegedly been abused or neglected and to protect parents' due process rights. Dependency proceedings may require testimony for emergency hearings on short notice to witnesses, unlike civil cases where litigants typically have significantly more time to arrange witness testimony. Witnesses in dependency proceedings may not be able to personally attend a hearing or meet with a notary due to various circumstances. In dependency proceedings, the same witnesses including physicians and nurses from the Child Protection Team, therapists, other service providers, child protective investigators, case managers, guardians ad litem, and parents often testify in person before the same dependency judge on many occasions. In these cases, the dependency judge and the attorneys for the parties may be very familiar with these witnesses and may have no objection to waiving the notary requirement because the judge and the attorneys for the parties do not question the identity of witnesses. The dependency judge and the parties may want testimony through communication equipment from witnesses on short notice to avoid delaying the hearing to arrange personal appearance or for remote appearance of a witness in the presence of a notary. The JCRC membership, which includes Department of Children and Families attorneys, attorneys who represent parents, Guardian Ad Litem Program attorneys, and children's attorneys, recommends that this Court approve proposed Rule 8.255(e).

To illustrate why the proposed Rule 8.255(e) would be critical in dependency court, the JCRC requests this Court to consider a situation where a three-month-old child has a leg fracture. In this scenario, the Child Protection Team physician examined the child and concluded that the injury to the child is a result from child abuse. Consequently, a child protective investigator received a child abuse report and sheltered the child. At the shelter hearing the next day, the parents' provided an explanation for the injury. To make a fair and just determination, the dependency judge requested to hear testimony from the physician to determine the basis of the physician's conclusion of child abuse and to allow the attorneys for the parents to question the physician regarding the parents' explanation of the injury and to cross-examine the physician. However, at the time

of the shelter hearing, the physician was seeing sick patients at her office and did not have a notary at her office. The physician had testified before the dependency judge on twenty previous occasions, and the parents' attorneys had previously questioned the physician at trials in other cases. Under the proposed rule, the judge and the parties' attorneys could waive the notary requirement to allow the physician to provide essential testimony through communication equipment whether the child should be removed from or returned to the home. Thus, the proposed amendment regarding the notary waiver provision provides the dependency court and the parties with flexibility to meet the needs of the court, parties, and the children.

The CPRC asserts that proposed Rule 8.255(e)(4) does not clearly specify whether the court must accept the parties' waiver of the notary requirement. The JCRC always intended that the court had the discretion to accept the parties' waiver of the notary requirement. The JCRC believes that the court always has the inherent authority to accept stipulations by the parties and that the proposed rule is clear and unambiguous. The JCRC's proposal is consistent with the ability of parties to waive and/or stipulate to certain requirements. In contrast to the CPRC's proposed changes, the JCRC's proposal builds in a mechanism to waive certain requirements to address the practical needs of those involved in dependency proceedings. As the Florida Supreme Court and others have made repeatedly clear, stipulations are binding on the parties to the proceeding, and are encouraged where appropriate to further the efficient administration of justice. See Esch v. Forster, 168 So. 229, 231 (Fla. 1936) ("Courts look with favor upon stipulations designed to simplify, shorten, or settle litigation and save costs to the parties, and such stipulations will be encouraged by the courts, and enforced by them, unless good cause is shown to the contrary."); McGoey v. State 736 So. 2d 31, 34–35 (Fla. 3d DCA 1999) ("Where appropriately made, stipulations are binding not only upon the parties but also upon the trial and appellate courts."). The CPRC's comment fails to provide any authority why parties should not be permitted to waive an aspect of the oath requirement such as the person administering the oath being physically present with the witness.

The CPRC is concerned how the court and parties can conclude that there is no question as to the identity of a witness who testifies through communication equipment. The plain language of the words "there is no question" are unambiguous and mean that the court and the parties have no question as to the identity of the witness. The witness' identity could be verified by recognizing the

witness' voice or appearance or by the witness providing other forms of identification.

The JCRC included the waiver of the notary requirement to improve the dependency court system. Child protective investigators, case managers, and guardians ad litem should spend most of their day ensuring that children are protected and that appropriate services are provided to parents, children, and caregivers so children can achieve timely reunification or permanency. However, these child welfare professionals often may spend a significant amount of their day travelling to the courthouse and waiting for their hearings to occur. This prevents them from completing their core work functions. In addition, many parents and caregivers cannot miss work to attend court hearings. The JCRC hopes that the proposed amendments to Rule 8.255(e) can improve the efficiency of the court proceedings and the outcomes of the dependency court system.

RESPONSE TO LACK OF UNIFORMITY BETWEEN PROPOSED RULE 8.255(e), CRPC'S PROPOSED RULES 1.451 AND 1.310, AND RULE OF JUDICIAL ADMINISTRATION 2.530.

The CPCR asserts that proposed Rule 8.255(e) must be consistent with CPCR's proposed Rules 1.451 and 1.310. The JCRC does not believe that uniformity between the rules is necessary or beneficial. There are different rules of procedure for different areas of practice to address process issues and improve processes in specific areas of practice. The needs of the court and the parties and the focus of the proceedings are different in civil, criminal, juvenile, and other proceedings. While the JCRC understands that the CPCR is proposing changes to their rules to meet the needs of civil practice for testimony through communication equipment, it does not mean that procedural rules in other practice areas or the Rules of Judicial Administration must exactly match. The JCRC chose not to distinguish testimony through audio only or audiovisual equipment, but the JCRC respects that the CPCR is free to do so to meet the needs of civil proceedings.

Rule of Judicial Administration 2.530 specifically allows the procedural rules to create their own rules for testimony through communication equipment. Rule 2.530 provides:

(1) Generally. A county or circuit court judge, general magistrate, special magistrate, or hearing officer may allow testimony to be taken through

communication equipment if all parties consent or *if permitted by another applicable rule of procedure*. (Emphasis added.)

Therefore, this Rule of Judicial Administration allows the rules committees to propose different rules for testimony through communication equipment to meet the needs of specific areas of practice.

Rule 2.530 is a rule of general applicability and to make it (or any other similar rule) mirror a civil rule appears to undermine the thrust of the freedom the Florida Supreme Court gave to the Rule Committees to consider a communication equipment rule for their specific areas of practice.

In the Florida Supreme Court's 2011 opinion adopting the change to Rule 2.530, the Court not only discussed whether consent was needed to take testimony by communication equipment, but the Court also cited previous opinions which discussed tailoring the communication equipment rule to various types of cases. See In re Amend. Fla. Rules of Jud. Admin., 73 So. 3d 210, 211-12 (Fla. 2011) ("The rule is amended, as proposed, to provide that testimony also can be taken by communication equipment 'if permitted by another applicable rule of procedure.' This amendment will allow the various rules of court procedure committees to consider whether their bodies of rules should be amended to allow for the use of communication equipment without the parties' consent. Cf. Amend. Fla. Rules of Jud. Admin. (2-year Cycle), 851 So. 2d 698, 700 (Fla. 2003) (declining to adopt amendment to use of communication equipment rule that would have given the court discretion to use communication equipment to take testimony over objection of parties and referring issue to bar rules committees for rule tailored to various types of substantive cases); In re Amend. Fla. Rules of Jud. Admin. (2-Year Cycle), 915 So. 2d 157, 161 (Fla. 2005) (considering various committee reports on use of communication equipment rule and declining to adopt amendment rejected in 2003 because rules committees failed to offer narrowly drafted proposals that would allow for the use of communication equipment over objection of parties in specific types of cases or under limited circumstances as requested)

The JCRC believes this Court has authorized Rule Committees to create their own area specific communication equipment rules. It does not appear that the Court intended for all communication equipment rules to all match one another. Instead, the Court has indicated that it is better for each area of law to have a rule tailored to that area's particular needs. This desire for tailored rules is clearly explained as the Court refused issues to the rules committees stating, "it 'may be

best to tailor a rule that addresses the use of communication equipment in the various types of substantive cases,’ rather than a rule that would apply in all types of cases.” In re Amend. Fla. Rules of Jud. Admin. (2–Year Cycle), 915 So. 2d 157, 161 (Fla. 2005)

In addition, not only is uniformity unnecessary, the CPRC’s desire for uniformity may be detrimental to those participating in dependency proceedings. Dependency proceedings occupy a unique space in the legal landscape. While they are classified as civil proceedings, they can substantially impact the parties’ fundamental constitutional rights. See J.B. v. Fla. Dep’t of Children & Fams., 170 So. 3d 780, 79–92 (Fla. 2015); Padgett v. Dep’t of Health & Rehab. Servs., 577 So. 2d 565, 570–71 (Fla. 1991); Ostrum v. Dep’t of Health & Rehab. Servs., 663 So. 2d 1359, 1361 (Fla. 4th DCA 1995). Due to dependency’s unique position in the law, the JCRC believes that the courts must be endowed with the flexibility necessary to protect two of the interests, which our society holds most dear: the safety of Florida’s children and the parents’ fundamental right to parent and to raise their children free from undue governmental interference. See Padgett, 577 So. 2d at 570 (Fla. 1991) (“The state has a compelling interest in protecting all its citizens—especially its youth—against the clear threat of abuse, neglect and death.”); id. (“[T]his Court and others have recognized a longstanding and fundamental liberty interest of parents in determining the care and upbringing of their children free from the heavy hand of government paternalism.”).

To that end, the proposed amendments to Rule 8.255(e) will provide the court and the parties flexibility to obtain testimony remotely so issues can be resolved quickly, including whether a child should be removed from the home or can be safely returned to the home. As the Florida Supreme Court and the Legislature have made clear, time is of the essence in dependency proceedings and, thus, providing this flexibility not only furthers a child’s right to timely permanency but also the parent’s right to enjoy the company of their offspring. §§ 39.621(1) and 39.001(1)(h), Fla. Stat. (2017); see S.M. v. Fla. Dep’t of Children & Fams., 202 So. 3d 769, 781–83 (Fla. 2016). Flexibility by allowing efficient remote testimony will benefit all parties to dependency proceedings.

WHEREFORE, the JCRC respectfully requests this Court to adopt proposed Rule 8.255(e) as originally proposed.

Respectfully submitted on April 20, 2018.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by e-mail, via the Florida Courts E-filing Portal, on April 20, 2018, to:

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CERTIFICATE OF COMPLIANCE

I certify that this response was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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