

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC21-

**IN RE: AMENDMENTS TO FLORIDA
RULES OF CIVIL PROCEDURE, FLORIDA RULES
OF GENERAL PRACTICE AND JUDICIAL
ADMINISTRATION, FLORIDA RULES OF CRIMINAL
PROCEDURE, FLORIDA PROBATE RULES, FLORIDA RULES OF
TRAFFIC COURT, FLORIDA SMALL CLAIMS RULES, AND
FLORIDA RULES OF APPELLATE PROCEDURE**

**PETITION OF THE WORKGROUP ON THE CONTINUITY OF
COURT OPERATIONS AND PROCEEDINGS DURING AND AFTER
COVID-19 TO AMEND THE FLORIDA RULES OF CIVIL
PROCEDURE, FLORIDA RULES OF GENERAL PRACTICE AND
JUDICIAL ADMINISTRATION, FLORIDA RULES OF CRIMINAL
PROCEDURE, FLORIDA PROBATE RULES, FLORIDA RULES OF
TRAFFIC COURT, FLORIDA SMALL CLAIMS RULES, AND
FLORIDA RULES OF APPELLATE PROCEDURE**

The Workgroup on the Continuity of Court Operations and Proceedings During and After COVID-19 (“Workgroup”), by and through its undersigned chair, the Honorable Lisa T. Munyon, Chief Judge of the Ninth Judicial Circuit, respectfully files this petition to amend the Florida Rules of Civil Procedure, Florida Rules of General Practice and Judicial Administration, Florida Rules of Criminal Procedure, Florida Probate Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, and Florida Rules of Appellate Procedure.

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I. Authority to File Petition

This petition is filed pursuant to:

- *In re: Workgroup on the Continuity of Court Operations and Proceedings During and After COVID-19*, Fla. Admin. Order No. AOSC20-28 (April 21, 2020) at pp. C-3 and C-4, which directed the Workgroup to “identify whether certain proceedings, due to efficiencies beneficial to stakeholders, could continue to be conducted remotely when COVID-19 no longer presents a significant risk to public health and safety” and authorized the Workgroup to propose rule changes that are necessary to implement the Workgroup’s recommendations.
- *In re: Workgroup on the Continuity of Court Operations and Proceedings During and After COVID-19*, Fla. Admin. Order No. AOSC20-51 (June 15, 2020) at p. C-8 and *In re: Workgroup on the Continuity of Court Operations and Proceedings During and After COVID-19*, Fla. Admin. Order No. AOSC20-110 (November 23, 2020) at p. C-11, which extended the Workgroup’s term through December 31, 2020, and July 2, 2021, respectively, and charged the Workgroup with proposing rule changes in petition form to implement its recommendations submitted in response to Fla. Admin. Order No. AOSC20-28.

See Appendix C for the above-referenced administrative orders.

II. Background

During its initial term pursuant to Fla. Admin. Order No. AOSC20-28, the Workgroup determined that permanent, broader authorization for the remote conduct of court proceedings after the pandemic was warranted based on the positive outcomes and

efficiencies being observed during the pandemic.¹ Accordingly, the five subgroups of the Workgroup² each developed draft rule amendment proposals in their subject matter areas to implement such authorization and modernize outdated terminology relating to communication equipment throughout the rules. However, due to the many complexities associated with amending a large number of rules across multiple rule chapters, the Workgroup considered the proposals in concept only, recognizing that additional work was necessary to harmonize the varying approaches taken by the subgroups. See Appendix D for the Workgroup’s meeting minutes at pp. D-2, D-5, and D-8.

Since its initial term, the subgroups and Workgroup have worked to refine the proposed rule amendments and develop this petition. During this period, the need for greater subject matter expertise for the proposed rule amendments in the areas of delinquency, dependency, and family law was identified. As such on April 27, 2021, Chief Justice Canady referred responsibility for the review, revision, and finalization of the proposed rule amendments in these areas to the Steering Committee on Family and Children in the Courts. The referral directs the Steering Committee to file a rules petition for the amendments by December 31, 2021. See Appendix E for the referral letter at pp. E-1 and E-2.

Each of the proposed rule amendments in this petition were approved by the Workgroup at its meeting on June 24, 2021, by a vote of 15-to-0. The Workgroup is composed of 18 members. Chair

¹ The benefits of more broadly authorizing remote proceedings are discussed, *infra*, in the summaries for the proposed amendments to Florida Rule of General Practice and Judicial Administration 2.530 and for the proposed creation of new Florida Rule of Criminal Procedure 3.116.

² The five subgroups of the Workgroup are the: (1) Appellate Subgroup; (2) Civil Subgroup; (3) Court Operations Subgroup; (4) Criminal Subgroup; and (5) Unified Family Court Subgroup.

Munyon abstained from voting and two members were absent from the meeting. See Appendix D for the Workgroup’s meeting minutes at p. D-12.

III. Proposed Rule Amendments

The amendments are set forth in full as appendices to this petition. The text of the amendments appears first in full-page legislative format in Appendix A and second in a two-column chart in Appendix B. For purposes of using simplified terminology in compliance with *In re: Guidelines for Rules Submission*, AOSC06-14 (Fla. 2006), the term “shall” is updated to “must” or “will,” the term “shall be” is updated to “is,” and the term “shall not” is updated to “may not,” where it appears appropriate throughout the subdivisions of rules for which amendments are proposed by this petition. Additionally, the term “Florida Rule(s) of Judicial Administration” is updated to “Florida Rule(s) of General Practice and Judicial Administration” throughout the rules for which amendments are proposed by this petition. The publication notice for this petition is set forth in Appendix G.

A. Amendments to the Florida Rules of Civil Procedure

RULE 1.310. DEPOSITIONS UPON ORAL EXAMINATION

Current rule 1.310(b)(4) authorizes a deposition to be recorded by videotape without leave of court or stipulation by the parties if the deposition is taken in accordance with the subdivision. Given the advancements in recording technology, the Workgroup’s proposed amendments update this subdivision to substitute the term “audiovisually record” for references to videotaping. Further, the Workgroup’s proposal amends the existing requirements in subdivisions (b)(4)(A), (C), and (D) as follows:

- In subdivision (b)(4)(A), the notice requirements are amended to: clarify that the current requirements for a notice of

deposition specified in subdivision (b)(1) apply to the notice required for a deposition that will be audiovisually recorded; add a requirement to specify that the deposition will be audiovisually recorded in the title of the notice; and add a requirement to identify the method for audiovisually recording the deposition and, if applicable, the name and address of the operator of the audiovisual recording equipment in the body of notice. Amendments to conform to these changes are also proposed for the existing rule text that addresses subpoenas.

- In subdivision (b)(4)(C), the procedural requirements are amended to cross-reference the new provisions discussed, *infra*, for placing a witness under oath in subdivision (c)(1) and to use terminology consistent with that subdivision.
- In subdivision (b)(4)(D), the requirements for custody of the recording are amended to reflect the fact that a recording of deposition may be electronically stored on a device as well as on a magnetic tape in a video cassette. The subdivision is also amended to provide that a pro se party who requests audiovisual recording, like a party's attorney who requests audiovisual recording under the current rule, has certain responsibilities with respect to safeguarding and providing access to the recording.

In subdivision (b)(7), the current rule provides that, on motion, the court may order the taking of testimony at a deposition by telephone and that a party may also arrange for a stenographic transcription at that party's own initial expense. The Workgroup's proposed amendments:

- Update this subdivision to allow a deposition to be taken by "communication technology," as that term is defined in the amendments proposed, *infra*, for Florida Rule of General Practice and Judicial Administration 2.530(a), which means

that audio or audio-video communication technology may be used.

- Add authority for a deposition to be taken by communication technology when ordered by the court on its own motion and expressly state that a deposition may be taken by communication technology without leave of court if stipulated by the parties. Parties may currently stipulate to the manner in which a deposition will be conducted, e.g., by telephone or through audiovisual means, pursuant to Florida Rule of Civil Procedure 1.300(c).³
- Add requirements for the notice of deposition under subdivision (b)(1) to specify that the deposition is to be taken using communication technology in the title of the notice and to identify the form of communication technology to be used and provide instructions for access to the technology in the body of the notice. Language is added to indicate that these notice requirements also apply to a subpoena.

The proposed amendments further strike the current language in subdivision (b)(7) providing that a party may also arrange for a stenographic transcription at that party's expense because this issue is now addressed in the proposed amendments to newly created subdivision (c)(2) discussed, *infra*.

In subdivision (c), the current rule provides that a witness must be sworn by a person present with the witness who is qualified to administer an oath in that location when a deposition is

³ See *Wally v. Nat'l City Mortg. Co.*, 867 So. 2d 444, 445 (Fla. 4th DCA 2004) (stating in footnote 1 that "Given the nature of this case, it may be that the deposition could be accomplished by telephone; however, that would either require the plaintiff to agree to it by stipulation, rule 1.300(c), or the court to order it under rule 1.310(b)(7).").

taken by telephone. This subdivision also specifies that the testimony at a deposition must be transcribed if requested by a party at the party's initial cost and that prompt notice of such request must be given to all other parties. The Workgroup's proposed amendments to this subdivision:

- Divide the subdivision into subdivisions (c)(1) and (2).
- Make conforming changes for the amendments to this rule discussed, *supra*, to use the term "communication technology" instead of the term "telephone" and to use the term "audiovisually recorded."
- Indicate that the oath for a remote deposition may be administered as provided in the proposed amendments discussed, *infra*, for subdivision (c)(2)(C) of Florida Rule of General Practice and Judicial Administration 2.530, which authorizes the oath to be administered by a person who is physically present with the witness or who is not physically present with the witness through audio-video communication technology.
- Move the language addressing a party's request for the transcription of testimony to a new subdivision (c)(2) and to add a requirement for a party who intends to use an audio or audiovisual recording of testimony at a hearing or trial to have the testimony transcribed and to file a copy of the transcript with the court. This requirement is recommended by the Workgroup to enable the trial court to easily refer to the evidence and to ensure an adequate record in the event the case is appealed.

RULE 1.320. DEPOSITIONS UPON WRITTEN QUESTIONS

The Workgroup's proposed amendment to rule 1.320(b) makes a conforming change for the amendment proposed, *supra*, to rule

1.310(b)(4), by substituting the term “audiovisually recorded” for the term “recorded by videotape.”

RULE 1.430. DEMAND FOR JURY TRIAL; WAIVER

As discussed, *infra*, the Workgroup proposes amendments to Florida Rule of General Practice and Judicial Administration 2.530(d) that will allow prospective jurors to participate in voir dire and empaneled jurors to participate in a trial through audio-video communication technology when authorized by another rule of procedure. Given this authority, the Workgroup recommends creating a new subdivision (d) in rule 1.430 to authorize such juror participation for trials in proceedings subject to the Florida Rules of Civil Procedure when stipulated by the parties in writing and authorized by the presiding circuit or county court judge. The new subdivision further requires a written stipulation and a written motion requesting authorization to be filed with the court within 60 days after service of a demand for a trial by jury under subdivision (b).

RULE 1.440. SETTING ACTION FOR TRIAL

The Workgroup’s proposed amendment to rule 1.440(b) makes a conforming change for the amendments proposed, *supra*, for rule 1.430(d). Specifically, the instant amendment adds a requirement for the notice of trial to indicate, if applicable, that the court has authorized the participation of prospective jurors or empaneled jurors through audio-video communication technology under rule 1.430(d).

RULE 1.451. TAKING TESTIMONY

Under current Florida Rule of General Practice and Judicial Administration 2.530(d)(1), a judge, magistrate, or hearing officer may allow testimony to be taken through communication equipment only if all parties consent or if permitted by another

applicable rule of procedure. Current rule 1.451 took effect on January 1, 2014, for purposes of allowing testimony to be taken by audio or video communication equipment in proceedings subject to the Florida Rules of Civil Procedure not only when all parties consent, but also “for good cause shown on written request of a party and reasonable notice to all other parties.”⁴ When testimony is taken by audio or video communication equipment, subdivision (d) of rule 1.451 requires that the oath be administered by an authorized person who is physically present with the witness.

As discussed, *infra*, the Workgroup proposes amendments to Florida Rule of General Practice and Judicial Administration 2.530(c) that will allow a court official to authorize the presentation of testimony through communication technology in trial court proceedings upon the motion of a party or at the discretion of the court official. Among other things, these amendments prescribe requirements for the contents of a party’s motion and a court official’s notice; authorize a party to object to the use of communication technology within a specified period after service of the motion or notice; and authorize the oath to be administered by a person who is present with the witness or who is not physically present with the witness through audio-video communication technology. In subdivision (b) of rule 2.530, the amendments provide that communication technology may be used for trial court proceedings as specified in the rule unless another rule of procedure or general law governs.

Given the proposed amendments to rule 2.530, the Workgroup recommends the repeal of rule 1.451 to allow rule 2.530 to govern the presentation of testimony in proceedings subject to the Florida Rules of Civil Procedure. The impacts of this repeal will be to add authority for court officials in their discretion to order the

⁴ See *In re Amends. to Fla. Rules of Civ. Proc.*, 131 So. 3d 643, 644-645 (Fla. 2013).

presentation of testimony through communication technology and to authorize administration of the oath through audio-video communication technology.

RULE 1.700. RULES COMMON TO MEDIATION AND ARBITRATION

Current rule 1.700(a) provides that a court may enter an order referring all or any part of a contested civil matter to mediation or arbitration and that the parties to a contested civil matter may file a written stipulation to mediate or arbitrate any issue between them at any time. This rule and the other Florida Rules of Civil Procedure⁵ that address mediation conferences and arbitration hearings do not expressly address participation in such proceedings through communication technology; however, such participation can currently be authorized for a mediation conference by the court or by a stipulation of the parties under rule 1.720(b), which indicates that parties must be physically present unless otherwise provided by court order or stipulation of the parties. The arbitration rules do not contain physical presence requirements.⁶

Anecdotal reports indicate that remote dispute resolution proceedings have been effective and popular during the pandemic. Further, the Workgroup received recommended rule amendments to expressly address remote participation in mediation conferences

⁵ See Florida Rules of Civil Procedure 1.700, 1.710, 1.720, 1.730, 1.750, 1.800, 1.810, 1.820, and 1.830.

⁶ See Florida Rule of Civil Procedure 1.820(b) and (e) (using the terms “attend,” “appear,” and “present,” in the context of non-binding arbitration without modifying those terms as to the manner of attendance, appearance, or presence) and Florida Rule of Civil Procedure 1.830 (providing in subdivision (b) that the parties or the court may establish the hearing procedures for voluntary binding arbitration while otherwise being silent on the issue of attendance, appearance, or presence).

and arbitration hearings from this Court’s Committee on Alternative Dispute Resolution and Policy.⁷ Accordingly, the Workgroup recommends amendments to rules 1.700, 1.720, 1.730, and 1.750 that will expressly authorize remote participation in, and address related matters for, mediation and arbitration.

With respect to rule 1.700(a), the proposed amendment adds language specifying that the court order or written stipulation for mediation or arbitration may provide for the conference or hearing to be conducted in person, through the use of communication technology as that term is defined in Florida Rule of General Practice and Judicial Administration 2.530, or by a combination thereof. It also amends the notice requirements for mediation and arbitration to include specification of the manner in which the conference or hearing will be conducted.

RULE 1.720. MEDIATION PROCEDURES

As discussed, *supra*, rule 1.720(b) currently provides that specified parties are deemed to appear at the mediation conference if physically present unless otherwise provided by court order or stipulation of the parties. Further, rule 1.720(d) provides that a party that is a public entity is deemed to appear at the mediation conference by the physical presence of a representative with specified authority. The Workgroup’s proposed amendments to these two subdivisions add a cross-reference to its amendment to rule 1.700(a) in order to expressly authorize appearance at the mediation conference through the use of communication technology when ordered by the court or stipulated by the parties. A conforming technical amendment to subdivision (e) is also proposed to change the phrase “who will be attending the mediation conference” to “who will appear at the mediation conference.”

⁷ See Appendix F at pp. F-3 through F-10.

RULE 1.730. COMPLETION OF MEDIATION

Current rule 1.730(b) requires agreements reached at mediation to be reduced to writing and signed by the parties and their counsel. For purposes of mediations conducted by communication technology and for in-person mediations where the agreement is reduced to writing after the mediation, the Workgroup's proposed amendment to this subdivision clarifies that the signatures on the agreement may be original, electronic, or facsimile and may be in counterparts.

Further, the Workgroup recommends adding a new subdivision (c) to specify that parties may not object to the enforceability of a mediation agreement if the requirements for mediation in rules 1.700, 1.710, and 1.720, and this rule have been satisfied. The purpose of this addition is to avoid challenges based on the conduct of mediation through communication technology or other reasons when the procedural requirements of the court rules have been satisfied.

RULE 1.750. COUNTY COURT ACTIONS

Current rule 1.750(e) provides that parties are deemed to appear at mediations for county court actions other than small claims actions when physically present. The Workgroup's proposed amendment to this subdivision adds a cross-reference to its amendment to rule 1.700(a), to authorize appearance at the mediation conference through the use of communication technology when ordered by the court or stipulated by the parties. Proposed amendments to Florida Small Claims Rule 7.090(f) and (g) that are discussed, *infra*, address appearance at mediation through the use of communication technology for small claims cases.

Further, subdivision (f) of rule 1.750 currently requires agreements reached as a result of a small claims mediation to be written in the form of a stipulation. For purposes of mediations

conducted by communication technology and for in-person mediations where the stipulation is reduced to writing after the mediation, the Workgroup's proposed amendment to this subdivision clarifies that the signatures for the stipulation may be original, electronic, or facsimile and may be in counterparts.

B. Amendments to the Florida Rules of General Practice and Judicial Administration

RULE 2.256. JUROR TIME MANAGEMENT

Current rule 2.256(c) provides that each prospective juror "who has reported to the courthouse should be assigned a courtroom for voir dire before any prospective juror is assigned a second time." The Workgroup's proposed amendments to this subdivision make technical changes to eliminate references to "the courthouse" and "a courtroom" to accommodate the possibility of prospective jurors participating in voir dire through audio-video communication technology pursuant to the Workgroup's proposed amendments to rule 2.530(d) discussed, *infra*.

RULE 2.451. USE OF ELECTRONIC DEVICES

Current rule 2.451(b) addresses the use of electronic devices by empaneled jurors who appear in person. The Workgroup's proposed amendments clarify this subdivision to indicate that it applies to proceedings conducted in person; strike unnecessary language in subdivision (b)(1) that cross-references the definition in subdivision (a); and clarify subdivision (b)(2) to provide that the presiding judge may determine whether electronic devices will be removed from jurors during *any portion* of sequestration, rather than limiting the judge to making such determination for *the entire period* of sequestration.

The proposed amendments also create a new subdivision (c) to address the use of electronic devices by prospective jurors who

participate in voir dire and empaneled jurors who participate in a trial through audio-video communication technology as described in the Workgroup's proposed amendments to rule 2.530(d). Under new subdivision (c):

- Presiding judges should ensure that the prospective and empaneled jurors have the technical ability and means necessary to connect to and participate in the proceeding.
- Prospective and empaneled jurors are prohibited from using an electronic device during a court proceeding, except for the sole purpose of participating in the proceeding, unless otherwise authorized by the presiding judge. Further, presiding judges are authorized to determine whether any electronic devices may be used by empaneled jurors during any portion of sequestration. Notice of these restrictions, as applicable, should be provided in the jury summons and by the presiding judge at the beginning of voir dire and trial.
- Prospective and empaneled jurors are subject to the same prohibitions applicable to jurors who appear in person that are specified in subdivision (b)(3), which, among other things, proscribes using electronic devices during court proceedings to take pictures, make recordings, transmit texts, conduct research about the case, or otherwise communicate about the case.
- Chief judges and presiding judges are expressly authorized to allow a prospective or an empaneled juror to use an electronic device during a court proceeding.

RULE 2.515. SIGNATURE AND CERTIFICATES OF ATTORNEYS AND PARTIES

As discussed, *infra*, the Workgroup recommends amendments to rule 2.516 that will require unrepresented parties, unless

excused, to serve a designation of a primary e-mail address and up to two secondary e-mail addresses for purposes of service. Under current rule 2.515(b), an unrepresented party is required to sign any document and to state the party's address and telephone number. To conform to the changes proposed for rule 2.516, the Workgroup proposes amendments to subdivision (b) of 2.515 to add a requirement for unrepresented parties to also specify their primary email address and secondary e-mail addresses, if any, when signing a document. The proposed amendments also modify subdivision (a) by authorizing the court to require an attorney to give the primary email address and secondary e-mail addresses, if any, of a represented party in addition to the represented party's address as is currently allowed under the subdivision.

RULE 2.516. SERVICE OF PLEADINGS AND DOCUMENTS

Current rule 2.516(b)(1)(C) provides that parties who are not represented by an attorney "may" serve a designation of a primary e-mail address and up to two secondary e-mail addresses to which service must be directed in the proceeding. The Workgroup's proposed amendments to this subdivision change "may" to "must." The amendments also:

- Create a new subdivision (b)(1)(D) to provide that an unrepresented party is excused from the e-mail address requirement if in custody or may be excused from the requirement by the court upon motion by the party demonstrating that the party has no e-mail account and lacks access to the Internet.
- Provide in the new subdivision and in subdivision (b)(2) that service on an unrepresented party who is excused must be accomplished by delivering or mailing the document to such party at their last known address.

By increasing the number of documents served via e-mail, these amendments will reduce the use of paper and the risk of paper-based transmission of pathogens. Additionally, the amendments will benefit unrepresented parties by enabling them to receive filings from other parties and the court in real time, rather than waiting for physical delivery of a filing, and will reduce the costs to parties and the taxpayers for the preparation of paper filings and service of party and court filings via postal mail or other physical delivery means.

The proposed amendments also make: a technical change to subdivision (b)(1)(A) to clarify the existence of the excusal provision for attorneys in subdivision (b)(1)(B) and to make the language consistent with subdivision (b)(1)(C); and conforming changes to subdivisions (b)(1)(F) and (h) for the above-described amendments.

RULE 2.530. COMMUNICATION EQUIPMENT

Current rule 2.530 governs the use of “communication equipment,” defined as a conference telephone or other electronic device that allows all participants to hear and speak to each other in certain trial court proceedings. Use of communication equipment is addressed as follows:

- For a motion hearing or a pretrial or status conference, subdivision (b) authorizes a county or circuit court judge, upon the court’s own motion or upon the written request of a party, to direct the use of communication equipment by all parties subject to specified requirements.
- For a motion hearing, subdivision (c) authorizes a county or circuit court judge, upon the written request of a party, to permit the use of communication equipment by the requesting party.
- For testimony, subdivision (d) authorizes a county or circuit court judge, magistrate, or hearing officer to allow testimony to

be taken through communication technology if all parties consent or if permitted by another rule of procedure. Before testimony may be taken through communication technology, a notary public or other authorized person must be present with the witness and administer the oath. Further, a defendant in juvenile and criminal proceedings must make an informed waiver of any confrontation rights that may be abridged by the use of communication equipment.

Finally, the current rule specifies in subdivision (e) that the cost for the use of the communication equipment is the responsibility of the requesting party unless otherwise directed by the court and in subdivision (f) that communication equipment may be used for a hearing on a petition to override a family violence indicator under Florida Family Law Rule of Procedure 12.650.

The Workgroup proposes a substantial rewrite of rule 2.530 to modernize the rule to reflect current technology and to authorize the use of communication technology more broadly in trial court proceedings. As has been anecdotally demonstrated by the State Courts System's experience during the pandemic, allowing participation in trial court proceedings through the use of communication technology can improve access to the courts by providing significant cost and time efficiencies for litigants, counsel, and other stakeholders; increasing appearance rates; benefiting this state's public and private employers by lessening the time required for employees to make court appearances or appear for jury duty; reducing courthouse foot traffic and, in turn, potentially reducing costs for facility space, security, and maintenance; and expanding public access when remote court proceedings are live streamed or recordings are made available. The Workgroup recognizes, however, that remote proceedings are not appropriate in all circumstances (e.g., not all participants will have the means to participate in remote proceedings or not all courtrooms will have the technological capability to effectively conduct all types of remote proceedings), which is why its proposed amendments to rule 2.530 require the

court official to consider any objections to the use of communication technology and to ultimately approve all use of communication technology. This recognition is also the basis for the Workgroup's recommendation that a new rule of procedure be adopted to govern the use of communication technology in criminal proceedings. See Florida Rule of Criminal Procedure 3.116, *infra*.

Under the proposed amendments to rule 2.530, the defined term "communication equipment" is stricken in subdivision (a) and new definitions are created for the terms "audio communication technology" and "audio-video communication technology," as well as for the term "communication technology," which means either "audio communication technology or audio-video communication technology."⁸ The amendments further provide that the term "court official" means "a county or circuit court judge, general magistrate, special magistrate, or hearing officer."

In subdivision (b), the proposed amendments specify that communication technology may be used for trial court proceedings as provided in the rule unless another rule of procedure or general law governs. The rule is then divided to address the use of communication technology by participants other than jurors in subdivision (c) and by jurors in subdivision (d).

Pursuant to subdivision (c), a court official may authorize the use of communication technology for the presentation of testimony or for other non-juror participation in a proceeding based upon the written motion of a party or at the discretion of the court official. The proposed amendments further:

- Require the motion or a written notice from a court official exercising discretion to provide reasonable advance notice of

⁸ As the proposed rule embraces audio-video communication technology, the now obsolete provision in current rule 2.530(d)(5), separately addressing video testimony, is stricken.

the specific form of communication technology to be used and directions for access to the communication technology.

- Authorize parties to object in writing⁹ to the use of communication technology and require the court official to consider any objections. The decision to authorize the use of communication technology over objection is in the court official's discretion, except that subdivision (c)(1) requires a court official to grant a motion to use communication technology for a non-evidentiary proceeding scheduled for 30 minutes or less unless good cause exists to deny the motion.

The following provisions are also included in the amendments to subdivision (c)(2) for the presentation of testimony through communication technology:

- A party's motion for such presentation must specify whether each party consents to the specific form of testimony requested and set forth good cause as to why the testimony should be allowed in that form. A non-exclusive list of factors that may be considered by the court official in determining whether good cause exists is provided.
- Only audio-video communication technology may be authorized for the presentation of testimony by a person whose mental competency is at issue in the proceeding.
- The oath may not only be administered by an authorized person who is physically present with the witness, as is allowed under the current rule, but also may be administered by an authorized person who is not physically present with the

⁹ A requirement for a courtesy copy of a written motion or objection to be provided to the court official is included to ensure the court official receives timely notice of the motion or objection.

witness through audio-video communication technology subject to specified requirements.

- The provision addressing confrontation rights in current subdivision (d)(4) is redesignated as subdivision (c)(2)(d) and is amended to address only delinquency proceedings because the Workgroup proposes new Florida Rule of Criminal Procedure 3.116, *infra*, to address the use of communication technology in criminal proceedings. As discussed, *supra*, in the section of this petition titled “II. Background,” the Steering Committee on Families and Children in the Courts will file a petition for rule amendments to address the use of communication technology in delinquency proceedings.¹⁰

The Workgroup acknowledges that Baker Act proceedings have not been expressly excluded from the proposed amendments for subdivision (c)(2) based on *Doe v. State*, wherein a majority of this Court held that:

The right to be present at an involuntary commitment hearing is a fundamental due process right. ... While a patient may waive the right to be personally present, a court must certify that the waiver is knowing, intelligent, and voluntary. ... The requirement of physical presence, which is not disputed by any of the parties, would be meaningless if the judicial officer, or the finder of fact and ultimate decision-maker, is not also present in the

¹⁰ In new subdivision (c)(2)(A), one of the factors that a court official may consider in determining whether good cause exists to allow testimony to be presented through communication technology is “the applicability of any constitutional rights for the confrontation of the witness in delinquency proceedings.” The Steering Committee on Families and Children in the Courts will also make a recommendation in its petition regarding whether this factor should be retained or modified.

hearing room.¹¹

The Workgroup, however, respectfully requests that this Court reconsider *Doe* in recognition of the advancements in, and increased judicial and stakeholder experience with, currently available audio-video communication technology. The recent sustained and widespread use of this technology to conduct virtually all types of court proceedings strongly suggests that Baker Act proceedings can now effectively be conducted remotely while meaningfully preserving individual rights.

Pursuant to subdivision (d), at the discretion of specified judges, prospective jurors may participate through communication technology in a court proceeding to determine whether they will be disqualified or excused or have their jury duty postponed. Further, if authorized by another rule of procedure, prospective jurors may participate in voir dire and empaneled jurors may participate in a trial through audio-video communication technology.

Finally, the proposed amendments:

- Modify subdivision (e) to limit the burden of expense provisions to audio-video communication technology only because the Workgroup believes that the cost of audio-communication technology is de minimis. Existing rule text placing the responsibility for technology costs on the requesting party is retained; however, language is added to clarify that such costs may be allocated or taxed to another party who becomes liable for the costs of the litigation.
- Update subdivision (f), addressing the family violence indicator, to use the term “communication technology.” As with the delinquency provisions, the Steering Committee on

¹¹ *Doe v. State*, 217 So. 3d 1020, 1026 (Fla. 2017) (citations omitted).

Family and Children in the Courts will make a recommendation in its petition regarding whether this subdivision should be retained or modified.

C. Amendments to the Florida Rules of Criminal Procedure

RULE 3.116. USE OF COMMUNICATION TECHNOLOGY

The Workgroup recommends the creation of new rule 3.116 to govern the use of communication technology in proceedings that are subject to the Florida Rules of Criminal Procedure. The basis for this rule is existing rule 2.530, which has been updated to replace the term “communication equipment” with newly defined technology terms; replace the phrase “county or circuit court judge” with the more concise term “judge”; and make other changes necessary to conform to existing provisions in the Florida Rules of Criminal Procedure that currently address the use of communication equipment.

Under the new rule:

- Subdivision (a) incorporates the definitions of the terms “audio communication technology,” “audio-video communication technology,” and “communication technology” specified in the amendments proposed, *supra*, for Florida Rule of General Practice and Judicial Administration 2.530(a).
- Subdivision (b) provides that rule 3.116 governs the use of communication technology in criminal proceedings, except those proceedings governed by rules 3.130(a), 3.160(a), 3.180(b), 3.220(h), and 3.851(f) (note: each of these rules is discussed and amended, *infra*).
- Subdivision (c), like current Florida Rule of General Practice and Judicial Administration 2.530(b), continues to authorize a judge, upon the court’s own motion or upon the written

request of a party, to direct the use of communication technology by all parties, subject to specified requirements, for a motion hearing or a pretrial or status conference in a criminal case.

- Subdivision (d), like current Florida Rule of General Practice and Judicial Administration 2.530(c), continues to authorize a judge, upon the written request of a party, to permit the use of communication technology by the requesting party for a motion hearing in a criminal case.
- Subdivision (e), like current Florida Rule of General Practice and Judicial Administration 2.530(d), continues to allow the taking of testimony through communication technology only if all parties consent and continues to require defendants to make an informed waiver of their confrontation rights that may be abridged by the use of communication technology. The only substantive change for testimony is the addition of authority for the oath to be administered by an authorized person who is not physically present with the witness through audio-video communication technology.
- Subdivision (f), like current Florida Rule of General Practice and Judicial Administration 2.530(e), continues to provide that the cost for the use of the communication technology is the responsibility of the requesting party unless otherwise directed by the court.

RULE 3.130. FIRST APPEARANCE

The Workgroup’s proposed amendments to rule 3.130(a) make conforming changes for the new definitions incorporated by the amendments proposed, *supra*, for rule 3.116(a). In the first sentence of the subdivision, which authorizes first appearance to be remotely conducted, the term “audio-video communication technology” is substituted for the term “electronic audiovisual

device.” In the fourth sentence of the subdivision, which authorizes counsel to attend first appearance remotely, the term “communication technology” is substituted for the term “other electronic means.”

Additionally, the Workgroup’s proposed amendments add “as determined in the discretion of the court” to the end of the subdivision’s fourth sentence to expressly clarify that the court may determine whether counsel’s attendance will be through audio communication technology or audio-video communication technology.

RULE 3.160. ARRAIGNMENT

The Workgroup’s proposed amendment to rule 3.160(a) makes a conforming change for the new definitions incorporated by the amendments proposed, *supra*, for rule 3.116(a). In the first sentence of the subdivision, which authorizes arraignments to be conducted by audiovisual devices, the term “audio-video communication technology” is substituted for the term “audiovisual device.”

RULE 3.180. PRESENCE OF DEFENDANT

The Workgroup’s proposed amendments to rule 3.180(a) make technical changes to strike the unnecessary phrase “In all prosecutions for crime ...” at the beginning of the subdivision and to correct the improper use of the present tense “shall be” in subdivision (a)(2) so that it properly refers to the past tense.

The amendments also revise the definition of “presence” specified in subdivision (b). The only substantive change made by these amendments is set forth in subdivision (b)(2) for purposes of authorizing the remote conduct of plea and sentencing proceedings under limited circumstances. Under the amendments, the defendant is authorized to waive physical attendance in writing or

on the record for the entry of a plea under subdivision (a)(2) or for the pronouncement of judgment and the imposition of sentence under subdivision (a)(9). The amendments further specify that the court must accept the waiver and the defendant must appear by audio-video communication technology.

Allowing remote pleas and sentences when consented to by the defendant and approved by the court can provide significant cost and time efficiencies for defendants, counsel, and other stakeholders; reduce the need to transport in-custody defendants to the courthouse and, in turn, expedite case resolution, reduce costs, and enhance security; improve appearance rates; and benefit this state's public and private employers by lessening the time required for employees to make court appearances. Moreover, a misdemeanor plea or sentencing proceeding that may have otherwise occurred in absentia¹² through a paper-based process can now be conducted through audio-video communication technology; thereby, affording the defendant and the court the ability to address one another.

RULE 3.191. SPEEDY TRIAL

The Workgroup's proposed amendments to rule 3.191(i)(5) make a technical change to update the cross-reference to the Chief Justice's authority under Florida Rule of General Practice and Judicial Administration 2.205(a)(2)(B)(iv) to suspend the speedy trial procedures for certain emergency situations to also cross-reference the Chief Justice's authority in subdivision (a)(2)(B)(v) of that rule to suspend the speedy trial procedures for certain public health emergencies. Further, the amendments revise subdivision (l) to clarify that the exceptional circumstances listed in subdivisions

¹² See Florida Rule of Criminal Procedure 3.180(d) (authorizing defendants charged with a misdemeanor to be excused, at their request and with leave of court, from attending any stage of the proceeding).

(l)(1) through (6) are non-exclusive by adding “but are not limited to” at the end of the first paragraph.¹³

RULE 3.220. DISCOVERY

The Workgroup’s proposed amendment to rule 3.220(h)(7) makes a conforming change for the new definitions incorporated by the amendments proposed, *supra*, for rule 3.116(a). In subdivision (h)(7)(D), which provides that the court may consider any alternative electronic or audio/visual means available when determining whether a defendant should be present at a deposition, the term “communication technology” is substituted for the term “alternative electronic or audio/visual means.”

RULE 3.851. COLLATERAL RELIEF AFTER DEATH SENTENCE HAS BEEN IMPOSED AND AFFIRMED ON DIRECT APPEAL

The Workgroup’s proposed amendments to rule 3.851(c)(2) and (f)(5)(D) make conforming changes for the new definitions incorporated by the amendments proposed, *supra*, for rule 3.116(a). In subdivision (c)(2), which authorizes counsel to appear electronically, if authorized by the court, for a status conference for a postconviction proceeding in a death sentence case, the phrase “by communication technology” is twice substituted for the term “electronically.” Additionally, in subdivision (f)(5)(D), which addresses the taking of testimony in a postconviction evidentiary hearing, the term “audio-video communication technology” is substituted three times for the term “video communication equipment.” Finally, this subdivision is amended to authorize the oath to be administered to a witness who is remotely testifying by

¹³ See, e.g., *State v. Carter*, 397 So. 2d 679, 680 (Fla. 1981) (“The court's justification for the instant extension is not invalid merely because it is not one of the exceptional circumstances enumerated in [the rule].”).

an authorized person who is not physically present with the witness subject to specified requirements.

D. Amendment to the Florida Probate Rules

RULE 5.080. DISCOVERY, SUBPOENA, AND TAKING TESTIMONY

The Workgroup’s proposed amendment to rule 5.080(a) makes a conforming change for the repeal of Florida Rule of Civil Procedure 1.451 proposed, *supra*, which will result in amended Florida Rule of General Practice and Judicial Administration 2.530 governing the presentation of testimony in probate and guardianship proceedings.

E. Amendments to the Florida Rules of Traffic Court

RULE 6.140. CONDUCT OF TRIAL

Current rule 6.140 provides that:

- All trials and hearings shall be held in open court and shall be conducted in an orderly manner according to law and applicable rules.
- All proceedings for the trial of traffic cases shall be held in a place suitable for the purpose.

Pursuant to rule 6.040(p), the term “open court” means “in a courtroom as provided or judge's or traffic hearing officer's chambers of suitable judicial decorum.”

The Workgroup recommends repeal of this rule as it is axiomatic that trials and hearings should be conducted in an orderly manner according to law and applicable rules and in a place suitable for the purpose. Further, repeal of this provision avoids an

argument that it requires participants in trials and hearings to physically be “in a courtroom” or “in chambers of suitable judicial decorum.” As a result of the repeal, it will be clear that Florida Rule of General Practice and Judicial Administration 2.530, as amended by the Workgroup, *supra*, governs the use of communication technology for participation in trials and hearings in noncriminal traffic infraction proceedings pursuant to subdivision (b) of amended rule 2.530, which provides that communication technology may be used for trial court proceedings as provided in the rule unless another rule of procedure or general law governs. Further, it will be clear that Florida Rule of Criminal Procedure 3.116, as created by the Workgroup, *supra*, governs the use of communication technology for participation in trials and hearings in criminal traffic proceedings pursuant to rule 6.160, which provides that the Florida Rules of Criminal Procedure govern criminal traffic proceedings “except as provided” in Part III of the Florida Rules of Traffic Court. The use of communication technology is not currently addressed in the Florida Rules of Traffic Court.

RULE 6.340. AFFIDAVIT OF DEFENSE OR ADMISSION AND WAIVER OF APPEARANCE

Current rule 6.340(a) authorizes a defendant charged with a noncriminal traffic infraction to waive “personal appearance at trial” by filing an affidavit of defense or an admission that the infraction was committed. For clarification purposes and to conform to the amendments discussed, *supra*, for rule 6.140, the Workgroup’s proposed amendment to this subdivision adds language to reference the potential for a defendant to appear at trial through the use of communication technology. Additionally, for these same reasons, the Workgroup proposes an amendment to subdivision (d) to strike the term “personal” from the portion of the affidavit sample relating to pleading not guilty.

F. Amendments to the Florida Small Claims Rules

RULE 7.090. APPEARANCE; DEFENSIVE PLEADINGS; TRIAL DATE

Current rule 7.090(a) requires the plaintiff and defendant in a small claims case to appear personally or by counsel at the pretrial conference. The Workgroup's proposed amendments clarify that such appearance may be in person or through the use of communication technology under Florida Rule of General Practice and Judicial Administration 2.530, as amended, *supra*.

Current rule 7.090(f) provides that a party's attorney or a nonlawyer representative may appear on behalf of a party at mediation and that in such case the party need not appear in person. The Workgroup's proposed amendments add that appearance at the mediation may be in person or, if authorized by the court or by written stipulation of the parties, through the use of communication technology. Further, "in person" is stricken given the authorization for remote appearance at mediation.

Finally, current rule 7.090(g) requires agreements reached as a result of small claims mediation to be reduced to writing in the form of a stipulation. For purposes of mediations conducted by communication technology and for in-person mediations where the agreement is reduced to writing after the mediation, the Workgroup's proposed amendment to this subdivision clarifies that the signatures for the stipulation may be original, electronic, or facsimile and may be in counterparts. This same amendment is proposed for the corresponding provision in Florida Rule of Civil Procedure 1.750(f), *supra*.¹⁴

¹⁴ See Appendix F at pp. F-10 and F-11 (providing recommended amendments from the Committee on Alternative Dispute Resolution and Policy to rule 7.090 to address remote participation in small claims mediations).

RULE 7.100. COUNTERCLAIMS; SETOFFS; THIRD-PARTY COMPLAINTS; TRANSFER WHEN JURISDICTION EXCEEDED

Current rule 7.100(e) requires a third-party plaintiff and a third-party defendant in a small claims case to appear personally or by counsel at the supplemental pretrial conference. The Workgroup's proposed amendments clarify that such appearance may be in person or through the use of communication technology under Florida Rule of General Practice and Judicial Administration 2.530, as amended, *supra*.

RULE 7.140. TRIAL

Current rule 7.140(f) provides that testimony and attorney representation in a trial for a small claims case may be presented over the telephone in the discretion of the court. The Workgroup's proposed amendments change this provision to specify that communication technology may be used for the presentation of testimony or other participation in the trial as provided under Florida Rule of General Practice and Judicial Administration 2.530. Amendments to the remainder of the language in this subdivision are proposed to conform to the aforementioned changes.

RULE 7.150. JURY TRIALS

Current rule 7.150 provides that jury trials may be had upon written demand of the plaintiff at the time of the commencement of the suit, or by the defendant within 10 days after service of the summons/notice to appear or at the pretrial conference, if any. The Workgroup's proposed amendments add authority for prospective jurors to participate in voir dire and empaneled jurors to participate in a trial through audio-video communication technology when stipulated by the parties in writing and authorized by the presiding county court judge. The new subdivision further requires a written

stipulation and a written motion requesting authorization to be filed with the court within 10 days after service of a demand for a trial by jury.

G. Amendments to the Florida Rules of Appellate Procedure

RULE 9.320. ORAL ARGUMENT

Current rule 9.320 authorizes parties to make requests for oral argument, addresses the duration of oral argument, and provides that the court, on its own motion or that of a party, may require, limit, expand, or dispense with oral argument. This rule and other rules in the chapter do not address the use of communication technology for oral argument.

The Workgroup's proposed amendments create a new subdivision (e) to authorize a party to request that one or more of the parties participate in oral argument through the use of communication technology. The request must:

- Be included in the request for oral argument unless the court authorizes otherwise.
- State the reason for requesting participation by communication technology.
- Indicate that the requesting party has consulted with each opposing party and is authorized to represent that each opposing party does not object or will file an objection. An objection must be filed within five days after service of the request or within such other period directed by the court.

The proposed amendments provide that the court, in the exercise of its discretion, may grant or deny a request and may order participation in oral argument through communication technology on its own motion.

Further, for oral arguments in which communication technology is used, the amendments:

- Require the proceeding to be recorded and made publicly available through a live broadcast or by posting the recording on the court's website.
- Specify actions the court may take if a technological malfunction occurs.

RULE 9.700. MEDIATION RULES

Current rule 9.700(a) provides that an appellate court, on its own motion or on motion of a party, may refer a case to mediation at any time. The motion of a party must contain a certificate in which the movant represents whether opposing counsel or an unrepresented party objects to mediation.

The Workgroup's proposed amendments to subdivision (a) provide that the court, in addition to referring a case to mediation, may direct that one or more of the parties participate in the mediation using communication technology based on the court's motion or on motion of a party. The amendments also require a motion requesting the use of communication technology for mediation to contain a certificate in which the movant represents whether opposing counsel or an unrepresented party objects to the use of communication technology.¹⁵

¹⁵ See Appendix F at pp. F-15 through F-19 (providing recommended amendments from the Committee on Alternative Dispute Resolution and Policy for rules 9.700, 9.720, and 9.740 to address remote participation in appellate mediations).

RULE 9.720. MEDIATION PROCEDURES

Current rule 9.720(a) requires the physical presence of certain representatives of parties at a mediation conference. The Workgroup's proposed amendments change this subdivision to also authorize participation in the mediation conference using communication technology if directed by the court. Further, the amendments make a conforming technical amendment to subdivision (g) to change the phrase "who will be attending the mediation conference" to "who will appear at the mediation conference."

RULE 9.740. COMPLETION OF MEDIATION

Current rule 9.740(b) requires agreements reached at mediation to be reduced to writing and signed by the parties and their counsel, if any. For purposes of mediations conducted by communication technology and for in-person mediations where the agreement is reduced to writing after the mediation, the Workgroup's proposed amendment to this subdivision clarifies that the signatures on the agreement may be original, electronic, or facsimile and may be in counterparts.

Wherefore, the Workgroup respectfully requests this Court to adopt the proposed amendments, as detailed above, to the Florida Rules of Civil Procedure, Florida Rules of General Practice and Judicial Administration, Florida Rules of Criminal Procedure, Florida Probate Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, and Florida Rules of Appellate Procedure.

Respectfully submitted on July 1, 2021.

A handwritten signature in black ink, appearing to read "Lisa T. Munyon", written over a horizontal line.

Lisa T. Munyon
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Ninth Judicial Circuit
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CERTIFICATE OF COMPLIANCE

I certify that this rule was read against Thomson Reuters' Florida Rules of Court—State (2021 Edition), *In re: Amendments to the Code of Judicial Conduct*, SC21-737, 2021 WL 2024507 (Fla. May 21, 2021), and *In re: Amendments to the Florida Rules of Criminal Procedure*, SC20-1564, 2021 WL 2371730 (Fla. June 10, 2021). I certify that this report was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and word count limit requirements of Florida Rule of Appellate Procedure 9.100(g).

/s/ Dustin William Metz
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