

IN THE SUPREME COURT OF FLORIDA

**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**

CASE NO.: SC21-990

APPELLATE COURT RULES COMMITTEE COMMENT

Laura A. Roe, Chair of the Appellate Court Rules Committee (Committee), and Joshua E. Doyle, Executive Director of The Florida Bar, file this comment addressing the proposed amendments to the Florida Rules of Appellate Procedure proposed by the Workgroup on the Continuity of Court Operations and Proceedings During and After COVID-19 (Continuity Workgroup) in its petition filed July 1, 2021. The Committee agrees with the Continuity Workgroup's proposed amendments to mediation rules 9.700 (Mediation Rules), 9.720 (Mediation Procedures), and 9.740 (Completion of Mediation), but proposes a revised amendment to rule 9.320 (Oral Argument).

The Committee has reviewed the Continuity Workgroup's report and agrees with the Continuity Workgroup's recommendation that certain proceedings governed by the Rules of Appellate Procedure should continue to be conducted remotely after the current public health and safety concerns are resolved. The Committee recommends that this Court adopt the Continuity Workgroup's proposed changes to mediation rules 9.700, 9.720, and 9.740 without further amendment.

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A majority of the Committee also agrees that it is appropriate to amend rule 9.320 to recognize the important role that communication technology and remote access play in promoting unfettered public access to oral argument. The Committee voted 32 to 5 to recommend an amended proposal that uses much of the Continuity Workgroup's language, as proposed in subdivisions (e)(1) and (e)(4) of its draft.

However, the majority does not believe it is necessary that the rule be amended to encompass subsections detailing motions practice before the appellate courts with respect to the discretionary use of communications technology or its possible malfunction in any given case. The appellate courts already possess the discretion to grant remote argument based on motion or their own initiative and have done so for over a year as they continue to address the ongoing pandemic and apply *In re: COVID-19 Health and Safety Protocols and Emergency Operational Measures for Florida Appellate and Trial Courts*, AOSC21-17. It may also be premature to impose rule-based uniformity of practice on the appellate courts, given the developing and unique circumstances to which the district courts of appeal must routinely respond.

Accordingly, the Committee's more succinct proposed amendment to rule 9.320 recognizes that the courts should provide for remote oral argument using communication technology. By embedding this feature in the rule through a new subdivision, communication technology properly becomes a permanent, but discretionary fixture of appellate practice and procedure.

The Committee members voting in the minority were split across several distinct positions. First, and notwithstanding a general agreement with the Committee's more succinct proposed amendment to rule 9.320, a minority of the Committee expressed concerns that the proposed amendment to the rule did not include language expressly stating that appellate courts have inherent authority to conduct remote arguments and providing a procedural mechanism for parties to specifically request a remote argument. This minority believed adding such language would make it clearer that appellate courts can conduct remote oral arguments even after the pandemic and offer guidance to parties and attorneys who do not routinely practice in appellate courts as to how they can make a specific request for remote argument. Second, a separate minority of Committee members did not support any amendment to rule 9.320, believing that current rule 9.320 provided sufficient authority and guidance

and questioning whether appellate courts should be required to record oral argument. Finally, a small portion of the minority vote would have approved the Workgroup's proposed amended rule language as drafted.

The majority of the Committee felt that the appellate courts' authority to conduct remote arguments was sufficiently clear without having to so state in the rules and that the procedure already outlined in rule 9.320 was sufficient to apprise litigants and attorneys as to how to request a remote oral argument or any other accommodation.

The two proposals are set forth below for the Court's consideration:

Continuity Workgroup's original proposed amendment:

Rule 9.320 Oral Argument

(a) – (d) [NO CHANGE]

(e) Use of Communication Technology.

(1) Definition. As used in this subdivision, the term "communication technology" has the same meaning provided in Florida Rule of General Practice and Judicial Administration 2.530(a).

(2) Request to Participate by Communication Technology. A request may be made by a party for one or more of the parties to participate in oral argument through the use of communication technology. Such request must be included in the request for oral argument under subdivision (a). The court in its discretion may consider a request filed outside the time prescribed for filing a request for oral argument under subdivision (a). The request must state the reason for requesting participation by communication technology and must indicate that the requesting party has consulted with each opposing party and that the requesting party is authorized to represent that each opposing party does not object or will file an objection. A party objecting to the request for the use of communication technology for oral argument must file a response to the request within 5 days after service of the request or within such other period as directed by the court.

(3) Court Order. The court, in the exercise of its discretion, may grant or deny the request of a party under subdivision (e)(2) or may, on its own motion, order participation in oral argument through the use of communication technology.

4) Public Availability. If communication technology is used for participation in an oral argument, the proceeding must be recorded and made publicly available through a live broadcast or by posting the recording to the court's website as soon as practicable after the proceeding.

(5) Technological Malfunction. If a technological malfunction occurs during an oral argument for which communication technology is used, the court may recess the proceeding to address the malfunction, expand the time for oral argument, reschedule oral argument, or dispense with oral argument.

ACRC's alternative proposed amendment:

Rule 9.320 Oral Argument

(a) – (d) [NO CHANGE]

(e) Public Availability of Communication Technology.

(1) The term "communication technology" shall have the same meaning as provided in Florida Rule of General Practice and Judicial Administration 2.530(a).

(2) If communication technology is used for participation in oral argument, the proceeding must be recorded and made publicly available through a live broadcast and by posting the recording to the court's website as soon as practicable after the proceeding.

Respectfully submitted on September 30, 2021.

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