

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC21-990

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

**COMMENTS OF THE NATIONAL LEGAL AID & DEFENDER  
ASSOCIATION**

**I. Summary**

The National Legal Aid & Defender Association (NLADA) respectfully submits the following comments in response to the proposed amendments to the Florida Rules of Civil Procedure and Florida Rules of Criminal Procedure. We believe that adopting the proposed changes at this point in time, without the benefit of research on their impact, is premature and would result in great harm to low-income and vulnerable users of the court system. We come to this conclusion based on our understanding of how courts

RECEIVED, 09/30/2021 05:29:21 PM, Clerk, Supreme Court

have or are seeking to implement broader uses of technology across the country, as well as our understanding of the delivery of legal services to low-income and other special populations, and the circumstances faced by self-represented litigants.

NLADA agrees with and adopts the comments submitted by the Florida Civil Legal Aid Association (FCLAA) and Self-Represented Litigation Network (SRLN) and the concerns set forth in those comments with regard to various issues. To avoid duplication, the comments below focus on the portion of proposed changes that relate to the use of technology in court proceedings.

As outlined below, the concerns about access, security, and justice are too high and weigh too heavily on constitutionally protected due process rights to make the proposed changes without rigorous research and evaluation of their impacts.

## **II. Introduction**

### **a. The National Legal Aid & Defender Association**

The National Legal Aid & Defender Association (NLADA) is America's oldest and largest national nonprofit organization dedicated to the excellence in the delivery of legal services for people who cannot afford to pay for counsel. We advocate for equal access to justice for all, champion effective legal assistance for people who cannot afford counsel and serve as a collective voice for civil legal aid and public defense systems, and the client communities they serve, throughout the nation. As part of this work, we regularly engage and collaborate with various local, regional and national experts, including the National Center for State Courts, Self-Represented Litigation Network, and American Bar Association.

NLADA counts among its membership more than 700 organizations that collectively represent thousands of attorneys who provide civil legal aid and public defender services to low-income and underserved individuals across the country. Notably, NLADA also counts as valued members representatives of the low-income individuals and communities eligible for legal assistance, and more

than 30 Florida-based public defender and civil legal aid organizations, representing hundreds of Florida attorneys.

**b. Expertise and Interest in the Instant Matter**

As part of our membership, NLADA's Technology Section convenes representatives from legal services providers, vendors, and other partners who are experts in the use of technology for the delivery of legal services. The section is comprised of those advocates and members who are especially interested in new legal technologies and their implications for low-income litigants. Most relevant to the instant matter, NLADA recently researched and authored a report on the use of technology in various types of legal proceedings.<sup>1</sup>

As the utilization of technology in legal proceedings expanded and bred many innovations in the face of necessity over the past 18 months, NLADA and our experts across the country have been evaluating the effect these uses have on low-income and special

---

<sup>1</sup> *Ensuring Equity in Efficiency: The Civil Legal Aid Community's Views of Online Dispute Resolution*, available at <https://www.nlada.org/sites/default/files/NLADA%20Pew%20ODR%20Report%20Ensuring%20Equity%20in%20Efficiency.pdf> (last visited on Sept 24, 2021).

populations. Along with these evaluations, we are working together in developing best practices around their implementation.

This background in legal technology, our connection and collaborations with experts across the country, and our interests in access to and the achievement of justice inform the instant comments.

### **c. The Scope of These Comments**

NLADA expresses our support of, and agreement with, the entirety of the comments submitted by the Florida Civil Legal Aid Association (FCLAA) as well as those submitted by the Self-Represented Litigation Network (SLRN). We concur with FCLAA's statements, such as those on the impact these proposed rules would have on self-represented litigants' ability to access and effectively use the courts and the cyber security risks these proposed rules present. We concur with SLRN's statements, including their views on how these rule changes will impact due process, equality, and neutrality, and we agree with their emphasis that courts must examine and engage with the best practices already established in this area.

This comment will address NLADA's further concerns with the proposed rule changes, particularly as they relate to the possible increase in remote proceedings, while attempting to avoid repeating the arguments made by other commenters.

The rule changes address the use of communications technology in lieu of in-person attendance in the Florida Rules of Civil Procedure in depositions (Rule 1.310 and 1.320), mediation (Rule 1.700, 1.720, and 1.730), the taking of testimony (Rule 1.450), and others. In the Criminal Rules of Procedure, the rule changes address first appearances (Rule 3.130), Arraignments (Rule 3.160), Trials (Rule 6.140 and 7.140), Mediation, and others (Rule 9.700, 9.720, and 9.740). When we refer to "remote proceedings" generally, we are referring primarily to the aforementioned types of court functions being done over the internet opposed to in a courthouse with parties physically present.

During the COVID-19 pandemic, courts around the country increased their use of remote proceedings and technological solutions in general. Given that, NLADA recognizes this Court's need to develop consistent policies around these topics. We applaud the Workgroup for their efforts to develop a set of policies that

accounts for the realities in our court systems and to update court rules accordingly.

NLADA is aware of the many advantages that technology can provide to courts and some litigants. Remote proceedings can offer flexibility to parties and increased efficiency for courts. Some courts have seen more diverse jury pools and lower rates of non-appearance compared to previous years.

Nevertheless, NLADA is also aware of the ways that technology can present challenges for many litigants. As a national organization, we have been able to communicate with advocates and jurisdictions around the country as well as other national partners. This allows us to hear about proposed best practices, challenges, and problems in regard to the increased use of technology in our justice system. Some of these problems include issues of access, security of private information, and concerns about how these changes can negatively impact outcomes for self-represented litigants as well as the individuals whom legal aid serves.

These proposals, as currently written, lack critical safeguards for the most vulnerable users of the court system. Moreover, we

urge this Court, as we would any jurisdiction, to exercise extreme caution in implementing new rules around remote proceedings and technology-based requirements for self-represented litigants. Changes should be done on a preliminary basis, with opt-in only systems and coupled with ongoing research and evaluation.

### **III. Risks Associated with Increased Use of Technology in the Court System**

During NLADA's nationwide research on online proceedings and online dispute resolution, we identified a number of risks associated with conducting legal disputes online or remotely. We highlight them here not to suggest that no proceedings should ever be done online, but to emphasize the importance of caution as jurisdictions move forward with these new technologies.

Examining these concerns help illustrate the need for safeguards we discuss in our recommendations, such as ensuring that no litigant is forced to use such technologies over their objection.

#### **a. Diminished Access (and Results)**

As the FCLAA's comments point out, there are many people who would have a limited ability, or complete inability, to access court proceedings through remote technology. These challenges of access

may stem from a lack of high-speed internet or appropriate devices, a limited ability to work the technology, or even the lack of an appropriate space in which to have a remote proceeding.

The research suggests that these challenges are disproportionately present for those litigants who are already likely to be more vulnerable in court settings. Lower income individuals of all ages, geographic location, and race have less access to technology such as smart phones, computers, and high-speed internet.<sup>2</sup> People of color<sup>3</sup> and rural Americans<sup>4</sup> are less likely to

---

<sup>2</sup> *Digital divide persists even as Americans with lower incomes make gains in tech adoption*, available at <https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/> (last visited Sept. 22, 2021) (Showing lower technology use and access among households making less than \$30,000 in total annual income compared to those who make more).

<sup>3</sup> *Home broadband adoption, computer ownership vary by race, ethnicity in the U.S.*, available at <https://www.pewresearch.org/fact-tank/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s/> (last visited Sept. 22, 2021) (Showing lower broadband access for Black (71 %) and Hispanic (65 %) households compared to White households (81 %)

<sup>4</sup> *Some digital divides persist between rural, urban and suburban America*. Pew Charitable Trusts, available at <https://www.pewresearch.org/fact-tank/2021/08/19/some-digital-divides-persist-between-rural-urban-and-suburban-america/> (last visited Sept. 22, 2021) (Showing that, nationally, only 72% of rural Americans report having broadband internet at home, compared to 79 % of suburban and 77 % of urban

have broadband internet access at home. Those with disabilities are less likely to have access to desktop/laptop computers, smartphones, tablets, *and* high speed internet.<sup>5</sup> Meanwhile, the elderly continue to report lower rates of technology and broadband internet use.<sup>6</sup>

Beyond access to technology, many low income individuals do not have an appropriate space for a remote proceeding. Whether it is because of roommates, children, or simply a lack of space, not all litigants will have the luxury of a private and quiet location from which they can participate in court.

All of these issues suggest that remote proceedings present significant challenges of access for many litigants. We would also

---

Americans).

<sup>5</sup> *Americans with disabilities less likely than those without to own some digital devices*, available at <https://www.pewresearch.org/fact-tank/2021/09/10/americans-with-disabilities-less-likely-than-those-without-to-own-some-digital-devices/> (last visited Sept. 22, 2021) (Showing that Americans who report a disability are less likely than those who do not to own a desktop or laptop computer (62 % to 81 %), a smartphone (72 % to 88 %), or a tablet (47 % to 54 %); they were, in the same comparison, also less likely to have high speed internet (72 % to 78 %)).

<sup>6</sup> *Internet/Broadband Face Sheet*, PEW RESEARCH CENTER, (April 21, 2021), available at <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>

note that access should not be thought of as a binary. Yes, there are some litigants who will be wholly unable to access a remote proceeding, but there will be others, perhaps many more, who might join with a spotty internet connection or an outdated device, which could impact their ability to participate effectively. Others might be forced to participate from a parking lot or public library. Those individuals have “access” in the sense that they are accessing their court appearance, but it may not be meaningful or full access in the way we think of what is needed for someone to get a fair shot on their “day in court.”

The use of remote proceedings can in fact increase access for many individuals. In some cases, individuals in rural communities or those living with disability may benefit greatly from the option to have a remote proceeding. Still, there are others for whom such a proceeding would preclude them from exercising their rights. This is why NLADA does not take the position that we should ban or wholly avoid remote proceedings, but that they should not be done unless agreed upon by the parties.

#### **b. Enhanced Power Asymmetries**

In NLADA's own research, we conducted focus groups and one-on-one interviews with advocates, client communities, and technology vendors across the nation. In those conversations, legal aid advocates repeatedly expressed concerns about the way remote proceedings, and the increased efficiency they promise, risk favoring those litigants who already have more power. Repeat players, such as creditors, landlords, and others, can streamline their process, filing a large volume of cases, regardless of merit, with significantly lower effort. They are then better equipped to take advantage of the fact that their opponents have one more aspect of the court system that is new and disorienting. To be clear, in-person court does not make these power dynamics disappear, but moving court processes online has the potential to exacerbate them.

NLADA is concerned that moving court processes online could change the outcomes of cases in ways that would be harmful to low income litigants.

### **c. Safeguarding of Privacy**

Another concern that needs to be addressed is the security of the personal information of litigants. This relates not only to the personally identifiable information (PII) that must be guarded

against security breaches, but also to the hearings, mediations, and depositions themselves.

Mediations and depositions are typically private and so ensuring the confidentiality of those will present a challenge that is similar to the one of safeguarding litigants' PII. Court hearings that are to be open to the public, however, present a different sort of problem. In the past, some courts may have had more visitors than others, but when remote proceedings are streamed online, there is a considerable increase in how many people are watching. Michigan's courts, for example, gained almost 60,000 YouTube subscribers after streaming their public hearings.<sup>7</sup> Further, even if the court officially bans the recording of such hearings, it can be difficult or impossible to prevent those who tune in from doing just that. Rules that stand to increase the use of remote proceedings should include standards for how proceedings will be made available to the public (screened at the courthouse? livestreamed online?) and how these decisions will be made.

---

<sup>7</sup> Scigliano, Eric, *Zoom Court is Changing How Justice is Served*, The Atlantic, May 2021 Issue, available at <https://www.theatlantic.com/magazine/archive/2021/05/can-justice-be-served-on-zoom/618392/> (last visited Sept 22, 2021)

#### **IV. Recommendations**

Given the above concerns, our primary recommendation is that the Supreme Court refrain from issuing new rules until a more formal study can be conducted within your court system. Ideally, such a study would actively seek out the views of various stakeholder groups, including those groups who are traditionally underserved. Second, the study should help identify risks of remote proceedings as well as best practices and safeguards that can help mitigate those risks. In fact, the study can and should examine existing best practices that have already been published.

When rule changes are to be made, we recommend the following:

##### **a. Change the Proposed Rules to an “Opt-In” Only System**

At a number of places, the proposed rules allow for remote proceedings on the stipulation of the parties OR by order of the court. Some proposed rules even note factors judges should consider when a party objects to conducting a proceeding remotely.

At this juncture, NLADA strongly urges modifying the proposed rules so that any and all remote proceedings be done only upon the informed and clear consent of all parties. Given the lack of research on how these changes will impact litigants, no litigant should have their constitutionally guaranteed access to the court system modified in a way that could potentially limit or even destroy that access.

Remote proceedings should be done only upon the affirmative, complete, and informed consent of all parties. Further, those parties should be instructed that there will be no penalty for refusing to participate in remote proceedings, and the court will hold no bias against a party who refuses such.

In addition to remote proceedings, these rule changes also address, among other things, service of pleadings and documents. The proposed amendment to Rule 2.516 in Florida's Rules of Civil Procedure would create a new requirement that parties who are not represented by an attorney **MUST** serve pleadings and documents by e-mail. This requirement can only be waived if, on a motion, the self-represented litigant is able to convince the court that they have no e-mail account and lack access to the internet. This is too high a

bar. First of all, a self-represented litigant may have access to e-mail and the internet, but such access could be limited or they could be uncomfortable with using the technology for such important tasks. Second, it is patently unfair to set a new default, one that is not workable for many vulnerable litigants, and then require self-represented litigants to navigate a new court process simply to convince the court that they can effect service in the previously accepted manners.

E-mail service for self-represented litigants, like the participation in remote proceedings, should be an “opt-in” only process at this time. Self-represented litigants should not have the burden to affirmatively “opt-out” of e-mail service and prove to the court that such a requirement is untenable for them in their situation.

#### **b. Temporary Rules and Further Research**

As stated above, NLADA recommends postponing the adoption of any formal rules at this time. Even after the adoption of new rules, however, we would still urge further study. At different points in the proposed changes, the Workgroup notes “anecdotal” reports or information supporting a conclusion. Such anecdotal information

about our court systems can have tremendous value, but given the stakes for low-income litigants in these proposed changes, more robust research is necessary. Whatever rules are or must be adopted at this juncture, we would urge that they be adopted on a temporary basis for a set timeframe. At the conclusion of that timeframe, they should be reviewed along with research from an independent group who can offer rigorous evaluation of potential impacts. Independent researchers should affirmatively seek out communities and stakeholders who are most likely to be adversely impacted as well as the advocates who serve them. These conversations should be combined with quantitative data and any data or information the court system was able to gather themselves.

## **V. Conclusion**

We applaud the efforts of the Workgroup and the desire of the Florida Supreme Court to implement clear rules on remote proceedings and the use of other technology in the court system. Nevertheless, we find the proposed rules present notable concerns as it relates to litigants' constitutionally protected rights to due process and access to the legal system. Given the rights at stake, we believe the only prudent option is to commission independent

research and, until then, avoid any rule changes or, at minimum, have rules that use only “opt-in” frameworks for the use of technology. No litigant should have justify to the court why technological requirements diminishes their access to justice.

**/s/ Christopher Buerger**  
**Christopher Buerger**  
Counsel, Civil Legal Services  
National Legal Aid & Defender Association

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court on September 30, 2021, via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to all counsel of record. It was also served by e-mail (at [99orange@ninthcircuit.org](mailto:99orange@ninthcircuit.org)) to the office of the Workgroup Chair, Judge Lisa T. Munyon, Ninth Judicial Circuit, Orange County Courthouse, 425 N. Orange Avenue, Orlando, Florida 32801 and on the OSCA Staff Liaison to the Workgroup, Tina White, 500 S. Duval Street, Tallahassee, Florida 32399, [whitet@flcourts.org](mailto:whitet@flcourts.org).

**/s/ Christopher Buerger**  
**Christopher Buerger**  
Counsel, Civil Legal Services  
National Legal Aid & Defender Association

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this document complies with the appropriate font and word count limit requirements.

**/s/ Christopher Buerger**

**Christopher Buerger**

Counsel, Civil Legal Services

National Legal Aid & Defender Association