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**IN RE: AMENDMENTS TO FLORIDA RULE  
OF CRIMINAL PROCEDURE 3.220, FLORIDA  
RULE OF CIVIL PROCEDURE FOR  
INVOLUNTARY COMMITMENT OF SEXUALLY  
VIOLENT PREDATORS 4.310, AND FLORIDA  
RULE OF JUVENILE PROCEDURE 8.060**

**SC22-312**

**JOINT COMMENT FROM THE CRIMINAL PROCEDURE RULES  
COMMITTEE AND THE JUVENILE COURT RULES COMMITTEE**

Alan Scott Apte, Chair of the Criminal Procedure Rules Committee (CrimPRC), Candice Kaye Brower, Chair of the Juvenile Court Rules Committee (JCRC) (jointly “the Committees”), and Joshua E. Doyle, Executive Director of The Florida Bar, respectfully file this joint comment on the petition filed by the Criminal Court Steering Committee (CCSC).

The Committees file this comment to express opposition to proposed changes to Rule 3.220 (Discovery) and Rule 8.060 (Discovery). Specifically, the Committees are opposed to new subdivision 3.220(h)(4), Visual Recording and Photographs, and 8.060(d)(9), Visual Recording and Photographs. These new subdivisions, in criminal and delinquency proceedings, require audio-visual recording of all children depositions as opposed to audio-visual recording of children depositions on demand of a party and prohibit visually recording depositions for all adults. The proposed changes are a significant shift in a habit that has occurred even prior to litigants’ common use of Zoom or other audio-visual communication technology software since Covid. The new suggestion by the CCSC to eliminate the ease of recording depositions through audio-visual communication technology for adults, would result in a reversion to requiring witnesses to appear physically for depositions. In both criminal and juvenile practice, there has been no apparent need to prohibit video-recording of all adults and to require audio-visual recording of all children coupled with contemporaneous stenography. It will not just become burdensome but, in some places, it will stall progress of cases due to the limited resources.

In practice, many in-person depositions and audio-visual depositions occur without being stenographically recorded simultaneously. Instead, the deposition is recorded using an audio only recording device or audio-visual communication technology and the parties later seek to have a transcript prepared by a court reporter, if desired. The Committees are particularly concerned with an anticipated increase of costs to obtain reporter services as, under the suggested amendments, parties would be required to “record stenographically at the same time as the [audio-visual] deposition.” The availability of court reporters is limited, especially in rural areas. Many areas do not have the ability or resources for contemporaneous stenography. Recording depositions can be simple but adding a requirement for contemporaneous stenography of depositions is costly and burdensome. Thus, the Committees believe that litigants may have to pay extra for court reporting services for audio-visual recorded depositions or face delays in conducting the deposition.

Another reason the Committees believe that the rule change would cause litigants to forego the use of audio-visual depositions altogether is that it would be difficult and costly for parties to obtain permission from the court to record an audio-visual deposition. Under the proposed rule, if the adult witness does not consent to the visual recording of the deposition, the party seeking the deposition would have to seek an order from the court, which may require a hearing before the court. As hearing time is limited, it may take weeks or months for a litigant to obtain an order to conduct an audio-visual deposition that records the witness. As well, there could be increased costs of litigation on the manner of conducting the deposition in every case instead of in limited cases where parties may seek a protective order for cases where recording would cause legitimate harassment or hardship for the witness. Litigants may have to expend resources preparing motions and appearing in court on the matter, re-noticing depositions, and incurring costs of last-minute changes regarding the deposition.

Delays in conducting and concluding discovery is of particular concern for the JCRC, as children do not have the same rights to bail or pretrial release as adults, so the expeditious handling of

serious delinquency cases is crucial to protecting their best interests. With the passage of HB 7029 regarding pre-adjudicatory detention care in section 985.24, Florida Statutes, children can now remain in secure detention indefinitely prior to adjudication. The added litigation related to pre-adjudicatory depositions, that these requirements are sure to cause, will lead to increased time in detention for many children, delaying the disposition of their cases and their crucial post-adjudicatory care.

Since the rule amendments may encourage many to forego audio-visual depositions, litigants would not be able to have depositions when appropriate that contain the deponent's demeanor, mannerisms, tone of voice, facial expression, nervousness (or lack thereof), and general attitude. The Committee members have experienced that the ability to have audio-visual recorded depositions have helped resolve cases because of these added benefits that do not exist in a cold transcript or simple audio recording. In the rare instances where an adult believes that recording of the deposition would be harmful to him or her, the burden should be on that witness to request a court order prohibiting it.

In addition, the Committees do not believe a current problem exists. The stated reason in the CCSC's petition for these rule amendments seems to be the desire to be proactive in protecting officers from having their image displayed unnecessarily now that audio-visual depositions are becoming more common. The Committees note that there has been an increased use of audio-visual deposition since the pandemic began over two years ago. However, at the same time, the Committee notes that officers are also being recorded more than ever through body-cams, dash cams, media footage, or cell-phone camera recordings by the public. The proponents of the rule cannot point to an audio-visual deposition causing any harm to officer or public safety. Further, the officer or adult witness would be required to testify in an open court room, where many would be able to see the officer or witness and sometimes record the witnesses. The Committees believe it would be unfortunate to prohibit use of a technology for conducting audio-visual depositions that provides crucial information to the fact

finder, and that is readily available and is low cost, when the risk of harm to the public is minimal or non-existent.

On the other hand, the Committees also believe it is not necessary to require depositions of all children be recorded. Depositions of those under 18 are commonplace, especially in the juvenile courts. While children may benefit from the special protection of having the deposition recorded, the sheriff's association did not express children's depositions as being an area of concern and those that conduct these depositions are mindful of the rule when it becomes necessary to audio-visually record a child's deposition. It is unclear from the CCSC's petition why the recording of the deposition for children upon demand would no longer be appropriate. It concerns the Committees that the additional requirements would require extra expenses and may cause delays when no problem existed within current practice. Finally, the Committee does not agree with eliminating the language regarding the provisions protecting those with fragile emotional strength and intellectual disabilities. This language is necessary to emphasize the special protections of fragile witnesses in accordance with section 92.55.

WHEREFORE, the Committees respectfully request that the Court not adopt the amendments filed in this case.

Respectfully submitted on May 16, 2022.

/s/ Candice Kaye Brower  
Candice Kaye Brower, Chair  
Juvenile Court Rules Committee  
Office of Regional Counsel  
235 S Main St Ste 205  
Gainesville, FL 32601  
352/377-0567  
Candice.brower@rc1.myflorida.com  
Florida Bar No. 114588

/s/ Joshua E. Doyle  
Joshua E. Doyle  
Executive Director  
Florida Bar  
651 E. Jefferson St.  
Tallahassee, FL 32399  
850/561-5600  
jdoyle@floridabar.org  
Florida Bar No. 25902

/s/ Alan Scott Apte  
Alan Scott Apte, Chair  
Criminal Procedure Rules Committee

PO Box 2286  
Orlando, FL 32802  
321/282-3572  
alan@florida-mediate.com  
Florida Bar No. 983756

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was furnished by e-mail, via the Florida Courts E-filing Portal, on May 16, 2022 to:

Krys Godwin  
651 E. Jefferson St.  
Tallahassee, FL 32399  
kgodwin@floridabar.org  
Florida Bar No. 2305

Jason Stearns  
201 N. Franklin St. Ste. 3550  
Tampa, FL 33602  
jstearns@freeborn.com  
Florida Bar No. 59550

Carter Hillstrom  
612 SE 5<sup>th</sup> Ave. Ste. 4  
Fort Lauderdale, FL 33301  
carter@shlawfl.com  
Florida Bar No. 26211

Pamela Marsh  
317 E. Park Ave.  
Tallahassee, FL 32301  
pmarsh@floridafaf.org  
Florida Bar No. 57400

Paul Hawkes  
3785 Wentworth Way  
Tallahassee, FL 32311  
hawkes.paul@gmail.com  
Florida Bar No. 564801

Robert Evans  
906 N. Monroe St.  
Tallahassee, FL 32303  
revans@anblaw.com  
Florida Bar No. 198862

Jennifer Pritt  
2636 Mitcham Dr.  
Tallahassee, FL 32308  
jpritt@fpca.com

Garrett Berman  
107 W. Gaines St. Ste. L-047  
Tallahassee, FL 32399  
gberman@yourfpaa.org  
Florida Bar No. 30053

Howard Dimmig  
P.O. Box 9000 Drawer Pd.  
Bartow, FL 33831

Jason Cromey  
101 S. Jefferson St. Apt. C  
Pensacola, FL 32502

rdimmig@pd10.org  
Florida Bar No. 255491

Avron Bernstein  
500 S. Duval St.  
Tallahassee, FL 32399  
bernsteina@flcourts.org  
Florida Bar No. 103640

Rene Landa  
6130 Sunset Dr.  
South Miami, FL 33143  
rlanda@southmiamifl.gov

Mary Ann Klein  
100 Eslinger Way  
Sanford, FL 32773  
MAKlein@seminolesheriff.org

Brenda Mezick  
1350 NW 12th Ave  
Miami, FL 33136  
brendamezick@miamisao.com  
Florida Bar No. 4730

Judge Debra Riva  
PO Box 48927  
Sarasota, FL 34230  
driva@jud12.flcourts.org  
Florida Bar No. 879703

Katherine Fernandez Rundle  
1350 NW 12th Ave  
Miami, FL 33136  
katherinefernandezrundle@miamisao.com  
Florida Bar No. 240303

jason@cromeyslaw.com  
Florida Bar No. 15955

Judge Hope Bristol  
201 Se 6th St.  
Fort Lauderdale, FL 33301  
jbristol@17th.flcourts.org  
Florida Bar No. 816329

Sherriff Dennis Lemma  
100 Eslinger Way  
Sanford, FL 32773  
DLemma@seminolesheriff.org

Virginia Hamrick  
1700 N. Monroe St. Ste. 11-140  
Tallahassee, FL 32303  
vhamrick@floridafaf.org  
Florida Bar No. 1025012

Arthur Jacobs  
961687 Gateway Blvd. Ste. 2011  
Fernandina Beach, FL 32034  
ajacobs@comcast.net  
Florida Bar No. 108249

Bart Schneider  
500 S. Duval St.  
Tallahassee, FL 32399  
schneidb@flcourts.org  
Florida Bar No. 936065

Justin Grosz  
10360 W. State Rd. 84  
Fort Lauderdale, FL 333324  
justin@justiceforkids.com  
Florida Bar No. 98400

**CERTIFICATE OF COMPLIANCE**

I certify that the report was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045(b).

/s/ Mikalla Andies Davis  
Mikalla Andies Davis, Rules Attorney  
The Florida Bar  
651 East Jefferson Street  
Tallahassee, FL 32399-6584  
850/561-5663  
midavis@floridabar.org