

**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

**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**

**COMMENT OF THE FLORIDA ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS**

The Florida Association of Criminal Defense Lawyers (FACDL) opposes the proposed changes to Rule. 3.220 and Rule 8.060. The proposed rule changes in criminal and delinquency proceedings would ban the audiovisual recording of all adult witness depositions and mandate the audiovisual recording of all witnesses under 18 years of age. The proposed rule related to adult depositions allows for an audiovisually recorded deposition upon agreement of the parties and witness, or by court order. The proposed rule change would also require that a stenographer be present to transcribe any audiovisually recorded deposition.

The current criminal discovery rule defers to Fla. R. Civ. Proc. 1.310, Depositions Upon Oral Examination, for the rules on recording depositions through audiovisual technology. According to

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the current version of 1.310(b)(4), the deposition of any witness may be audiovisually recorded without leave of court or consent of the parties, so long as the party taking the deposition satisfies certain notice requirements: (1) the notice of taking deposition must state that the deposition is to be audiovisually recorded; and (2) the notice must identify the method for audiovisually recording the deposition, including the name of the person operating the audiovisual equipment, if applicable. Therefore, any time a criminal defense attorney intends on recording a deposition in a criminal case using audiovisual technology, they will have to place the prosecution on notice of their intent. Should a prosecutor, after receiving the notice of taking deposition that conforms with the requirements of 1.310(b)(4)(A), want to prevent the recording of the deposition, they may seek relief by way of a motion for protective order pursuant to Fla. R. Crim. P. 3.220(l). The rule provides that a court, upon a showing of good cause, shall “make such order as is appropriate to protect a witness from harassment, unnecessary inconvenience, or invasion of privacy...” Therefore, the current rules are sufficient to prevent the audiovisual recording of a deposition where appropriate. Notice must be provided to the prosecution and they have a

mechanism by which they can challenge the defense's ability to audiovisually record the deposition.

One of the arguments made in support of the proposed amendments is that there is a need to be pro-active in addressing the future possibility of the dissemination of audiovisually recorded depositions. It is suggested that now that remote technology is used throughout the State in criminal cases, the likelihood of improper dissemination has greatly increased, and will continue to do so. However, there are Florida Bar rules already in place to address any improper dissemination by defense attorneys. If an attorney were to intentionally alter or edit a recorded deposition and then present that false and misleading evidence to the trial judge or a jury, the attorney would be in violation of Rule 4-3.3 of the Rules of Professional Conduct, Candor Toward the Tribunal. Similarly, if an attorney attempted to disseminate an audiovisual recording of a deposition in advance of trial in an effort to "undermine the sanctity of the actual court proceedings," they would be in potential violation of Rule 4-3.6 of the Rules of Professional Conduct, Trial Publicity. As the rule states, "[a] lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of

public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.” The comment to the rule recognizes that preserving the right to a fair trial “necessarily entails some curtailment of the information that may be disseminated about a party prior to trial...” Finally, if an attorney disseminated an audiovisual recording of a deposition with the sole intent of harassing the witness, there are criminal laws that could be used to prosecute the attorney for the attempted harassment. See Sec. 914.22, Florida Statutes (2021), Tampering with or harassing a witness, victim, or informant; penalties.

Another argument initially presented by the Florida Sheriffs Association was that the ban on audiovisual recording of depositions was necessary for the safety of law enforcement officers. FACDL disagrees, and no evidence has been presented by any interested party establishing that a safety issue even exists. The majority of law enforcement officers who are subpoenaed for depositions in criminal and delinquency cases serve in the capacity of road patrol. Their daily duties bring them into contact with the citizens of the State of Florida.

The individuals they come into contact with can see their faces – these deputies do not wear masks while on patrol. Recently, the Fourth District Court of Appeals held that a citizen is allowed to videotape a deputy who is in performance of his lawful duties while out in public without violating a criminal statute. *Ford v. City of Boyton Beach*, 323 So. 3d 215 (Fla. 4th DCA 2021). The court found that when law enforcement is working in public they do not have a reasonable expectation of privacy. It does not seem to be consistent to say that when a deputy is out in public making an arrest he has no expectation of privacy and can be recorded, but at the same time it is necessary to have an absolute ban of their image being captured in an audiovisually recorded deposition. While there are certain officers who work in an undercover capacity whose identities may need to be kept secret, the current rules would allow the prosecution to seek a protective order barring the audiovisual recording of that undercover officer's deposition.

Not only are these law enforcement officers on the street and visible to the communities that they serve, they also provide live in-court testimony. FACDL is concerned that this proposed rule amendment, which came into existence based upon the initial

recommendation of the Florida Sheriffs Association, will lead to the creation of other rules related to the in-court testimony of law enforcement officers. In his letter dated March 30, 2021, Sheriff Dennis Lemma also suggested the following:

For court hearings, no party should be permitted to maintain their own copy of a video hearing of a law enforcement officer. Any copy requested from the official court record should not be provided without the facial image being redacted or at a minimum, restricted to prevent further disclosure.

If the rules are amended to provide for an absolute bar on the audiovisual recording of a law enforcement officers deposition in any criminal or civil case, a precedent is being set to allow law enforcement to essentially exist without any concern for public scrutiny, even in an open and public criminal trial.

Finally, FACDL is also concerned about the additional costs that will be incurred if audiovisually recorded depositions must also have a court reporter present. Whether the cost for these court reporters will be paid by the defendant, by the Justice Administrative Commission, or out of the budgets of public defender's offices, it is unnecessary to mandate that such a cost be incurred. The current rules do not require that a deposition being taken in person with a

court reporter also be audio recorded, even though transcription can go missing. There is no need for a court reporter in addition to the digital recording. Modern technology is simple and extremely reliable.

There is neither a present need to amend Rule 3.220 and Rule 8.060 as proposed, nor evidence presented to support a concern for the need to amend the rules as requested in the future. The current rules are not broken, and do not need to be fixed. Wherefore, FACDL respectfully requests that the Court not adopt the amendments filed in this case.

Respectfully submitted,

/s/ Jason Cromey, Esq.  
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on this the 16th day of May, 2022.

/s/ Jason Cromeey, Esq.  
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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing amended comment of the Florida Association of Criminal Defense Lawyers has been prepared using Bookman Old Style 14-point font.

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