**IN THE SUPREME COURT OF FLORIDA**

**IN RE: AMENDMENTS TO THE FLORIDA RULES OF JUVENILE PROCEDURE** **CASE NO.: SC09-141**

**COMMENTS OF THE FAMILY LAW RULES COMMITTEE TO PROPOSED AMENDMENTS TO FLA. R. JUV. P. 8.257**

Robyn L. Vines, Chair, Family Law Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, file these comments to proposed amendments to *Fla. R. Juv. P.* 8.257 in the above case.

The Family Law Rules Committee of the Florida Bar voted to oppose the recommended changes to *Fla. R. Juv. P.* 8.257 by a vote of 29 to 1. The comments were reviewed and approved by the Executive Committee of The Florida Bar Board of Governors by a vote of 10-0.

*Florida Rule of Juvenile Procedure* 8.257 is patterned after *Florida Family Law Rule* 12.490, both of which provide the procedure by which one may seek "appellate review" of a general magistrate's recommendations to the trial judge. In its current form, the rule requires the person seeking review to provide the trial judge either a written transcript of the proceedings or a written stipulation of the parties identifying the evidence that was presented to the magistrate. The transcript or stipulation must be provided to the court before the exceptions hearing.

The proposed rule change would allow the party seeking review to submit an electronic recording of the proceedings before the general magistrate in lieu of a written transcript or written stipulation of the parties. The proposed rule change does not specify which types of electronic

recordings are permissible, does not specify the format in which the electronic recording should be provided to the court and opposing litigant, does not require certification that the electronic recording is an accurate recording of the proceedings before the general magistrate, and appears to overlook the additional workload created by the proposed change, the costs associated with the proposed change, and the likely deprivation of procedural due process created by the proposed change. For these and other reasons set forth more specifically below, the Family Law Rules Committee opposes the proposed changes to *Rule* 8.257.

## Rule Change Would Create Unnecessary Work for the Judiciary and Opposing Litigant and Would Promote Inefficiency

### I. Additional Judicial Labor Required by Proposed Change

If, as the proposed rule change would allow, a litigant were able to seek review of exceptions based on a record containing merely an electronic recording, the judiciary and opposing litigant would be required to perform work which is unnecessary under the existing rule. The time required to perform this unnecessary work is burdensome and unreasonable.

Proceedings before magistrates may span as little as 15 minutes or, more often, as in the case of a trial, the proceedings may span multiple hours or days. Under the existing rule, either a written transcript of the proceedings or a written stipulation of the parties (as to what evidence was presented to the magistrate) is required to be filed with the court prior to the exceptions hearing. Under either scenario, generally, only the relevant portions of the transcript or evidence are identified for the judge's review. In the case of a written transcript, the litigants are able to identify, by citation to page and line, those portions of the proceedings that are relevant

to the judge's review. The existing process focuses the judge's and the opposing party's attention and labor on only the relevant portions of the proceedings, and avoids requiring the judge to review the entire proceeding, thus preventing unnecessary waste of judicial effort. The proposed rule change eliminates this efficiency because there would be no effective means to direct the court's attention to the relevant portion of the electronically recorded proceedings.

Because one cannot cite to a page and line number in an electronic recording as one would if a written transcript were used, the proposed rule change would require the judge and opposing litigant to review the entire electronic recording of the proceedings (potentially days of electronic recording) to locate, and then review, the part of the recording to which the exceptions have been taken. This may result in hours or potentially days of unnecessary review. The existing procedure prevents this waste of judicial resources. Judicial efforts should never be wasted, and certainly not in the current fiscally challenged times.

Although the cost to procure the electronic recording (hypothetically, the litigant could record it himself or herself) may be less than that to procure a transcript or stipulation of the parties, the cost to procure a written transcript of, or stipulation of the parties as to, the relevant portions of the proceedings does not outweigh the excessive labor costs to the judiciary created by the proposed changes to the rule.

II. Inefficiency

The preceding discussion highlights that the proposed rule change would unnecessarily create additional work for the judge and opposing litigant because review could not be limited to only relevant portions of the

proceedings. This part of the comment focuses on the virtual inability of the court to provide that additional judicial effort due to time constraints.

The proposed changes not only create additional work for the judiciary and opposing litigant (as described above), but also provide an insufficient time within which to accomplish the newly created additional work. As written, the electronic recording of the proceedings before the general magistrate must be submitted to the trial judge and may be submitted as few as 48 hours prior to the exceptions hearing. Providing what would now be a longer "record" (because one cannot identify the relevant portions of the electronic recording) only as few as 48 hours before the exceptions hearing deprives the court and the opposing party of sufficient time to adequately review the electronically recorded proceedings (particularly if the recorded proceedings spanned multiple hours or days), and essentially provides only cursory, if not illusory, notice. Said differently, the court and the opposing litigant must now accomplish more (a review of a complete, rather than excerpted, proceeding) in an insufficient time frame.

The 48-hour deadline does not appear to contemplate the time required to review the "full length" electronic recording when faced with the court's then existing caseload or the time demands of the opposing litigant. This promotes inefficiency, and may lead to increased appeals from the judge's ruling on the exceptions. The proposed rule change would place unreasonable time constraints on the trial judge and opposing litigant and likely prevent both from adequately preparing for the exceptions hearing.

Technological Challenges Prevent
Efficient Use of Judicial Resources

Permitting the use of electronically recorded judicial proceedings as the record for appellate review, even at the trial court level, would create a

plethora of technological challenges and a veritable conundrum for the courts unless uniform parameters are established. The proposed changes to the rule fail to establish such parameters and, if the rule changes are accepted, innumerable challenges to the administration of justice will likely result.

III. Play back Devices

The proposed rule change allows the litigant to submit, as his or her "transcript" of the proceedings before the general magistrate, any type of electronic recording whether *cassette* tape, *microcassette* tape, *reel to reel*, *dictaphone*, *compact disc*, *jump drive*, *microdiskette*, etc. Given the myriad of forms for submission, the judges and opposing litigant cannot know which electronic play back equipment will be necessary until the electronic recording is received. The judge or litigant cannot request the appropriate play back equipment in advance because he or she cannot know which device is needed until the recording is received. Indeed, the failure to establish uniform parameters for the submission of electronic recordings will likely serve to deprive the judge and the other litigant of any real ability to review the electronic recording in the 48 hours before the exceptions hearing.

Further, the judicial system should not be required to acquire the variety of electronic 'play back' devices to enable the judges, let alone the opposing litigants, to review the electronic recording in advance of the exceptions hearing. More realistically, Florida's significant funding issues preclude the allocation of precious resources to acquire such equipment.

IV. Expediency

As discussed above, although a writing can be referred to by line and page number, there is no such method for citation and location of

information within an electronic recording. This issue is magnified by the myriad of electronic recording formats. For example, digital or computer generated voice recordings may not have "number counters" generally found with cassette recordings or they may "count" the recording differently. Consequently, the litigant may not be able to effectively communicate the location of the relevant information within the electronic recording. This requires the judge and opposing litigant to review the entire recording.

V. Further Appellate Review

Although the proposed rule change addresses only exceptions hearings before the trial judge, a reasonable person would pause before recommending this approach to the courts of appeal or the Supreme Court. However, once the trial court rules on the exceptions based on an electronic recording serving as the "transcript," if a litigant appeals the ruling on the exceptions, wouldn't the appellate court have to have the ability to review the electronic "transcript" reviewed by the trial court to determine if error occurred? If so, the lack of uniformity of electronic submissions and the requirement for a multitude of play back devices would extend to the courts of appeal as well.

## Practical Challenges Presented by the Proposed Rule Change

VI. Environmental Issues

The proposed rule change requires the party seeking exceptions to file the electronic recording with the court; however, the Committee queries whether this is well considered. For example, how does one file a *cassette* tape, *microcassette* tape, *reel to reel* recording, *Dictaphone* recording, *compact disc*, *jump drive*, *microdiskette*, etc. with the court? Will the electronic data be destroyed by magnets, temperature, or other

environmental considerations while housed in the clerk's offices? Will the electronic data be destroyed by magnets, temperature, or other environmental considerations while it is being served, possibly by U.S. Mail, to the other litigant? Will the electronic data be there when playback is attempted due to these concerns? What happens if the electronic data is not there when presented to the judge or the opposing litigant? The 48-hour submission time frame does not leave a suitable reaction time. This would severely impair the judge's and the opposing litigant's ability to prepare for the hearing, and would raise significant due process concerns. Other serious concerns include:

- Who would be responsible for transcribing the electronic recording if there are further appeals if electronic recording is not accepted by the appellate courts?

- Who will fund or otherwise provide the appropriate "play back" devices to the trial judge and opposing litigant so as to make the "provision" of the "transcript" meaningful, rather than merely illusory?

- What quality control considerations are present to ensure the electronic recording is audible and that one can discern who is speaking at any given time?

## Inconsistency within the Proposed Rule Changes

### VII. Partial versus Complete Recordings

Finally, an inconsistency in the rule arises, and another inefficiency appears to be created, if the proposed rule changes are accepted. In the rule's current form, a written transcript of only the "relevant proceedings" is required for review of exceptions. *Rule* 8.257(e)(2). However, under the proposed changes to subdivisions (e)(2) and (g)(1) & (2) the entire transcript

(or electronic recording) must be provided to the court. This change increases the costs to the litigant who chooses to provide a written transcript for review of exceptions because excerpts of the proceedings would no longer be permissible. Further, the changes proposed in subdivisions (e)(2) and (g)(1) and (g)(2) which appear to require a full transcript or recording, seemingly conflict with subdivision (g)(3), which provides for "less than a full transcript of electronic recording." Although expedient, and perhaps more cost effective, providing less than a complete electronic recording could easily lead to tampering and questions concerning the accuracy and reliability of the electronic recording.

Lack of Certification for Electronically Recorded Proceedings

IIX. Assurances of Accurate Record

The proposed rule changes do not identify a means by which the purported electronic recording of the proceedings before the magistrate is certified as being complete and accurate. Indeed, there is no verification that the electronic recording actually submitted is indeed an untainted recording of the proceedings before the magistrate.

A court reporter certifies that a written transcript is an accurate written recording of the proceedings. Similarly, in the case of a written stipulation, the parties (or their counsel) are certifying by stipulation to the evidence presented to the magistrate. The proposed changes to the rule do not provide any similar assurances for electronic recordings despite the fact that, of the three methods of submitting "transcripts," the electronic recordings are seemingly the most mutable.

As with written transcripts and stipulations, a method of verification must be established before a trial court could conceivably rely upon an

electronic recording of proceedings. Indeed, even the rules of evidence require basic authentication.

A brief search of the internet, or one's youth's bedroom computer or telephone, would reveal the multitude of "post your own" sound, video, etc. websites. In order to post sound recordings, one must be able to create and edit the recordings. If our youth find "mixing" a common activity, ("even a child can do it") it would be imprudent, if not reckless, to accept electronic recording of proceedings before the general magistrate as "the record" in a litigation matter without first implementing adequate procedures to ensure the accuracy of the recording relied upon to determine questions of law between litigants.

In sum, the Committee strongly recommends against the currently proposed changes to Rule 8.257 in the interests of preservation, conservation and good stewardship of judicial labor and resources, fiscal costs to the litigants, and assurances of due process particularly considering the balancing of constitutional rights frequently occurring in the proceedings governed by these rules of procedure.

Respectfully submitted _____.


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## CERTIFICATE OF SERVICE

I certify that a copy of these comments were provided by U.S. Mail on _____ to

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