

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO THE FLORIDA
RULES OF JUDICIAL ADMINISTRATION CASE NO. SC11-52**

**REGULAR-CYCLE REPORT OF
THE FLORIDA RULES OF
JUDICIAL ADMINISTRATION COMMITTEE**

COMES NOW the Family Law Section of The Florida Bar (denoted as the “Section” hereinafter) and provides comment related to the Regular-Cycle Report of the Florida Rules of Judicial Administration Committee Case No. SC11-52. This Comment was approved by the Rules and Forms Committee of the Florida Bar Family Law Section, and subsequently approved by the Executive Committee of the Florida Bar Family Law Section on March 9th, 2011 with a vote of 5 in favor.

Before commenting, the Section would like to thank the members of the Rules of Judicial Administration Committee for their hard work and dedication.

The Section writes solely to express concern with the proposed changes in Rule 2.530 of the Florida Rules of Judicial Administration. While the Section is in agreement with the stated goal of resolving conflict inherent in the Florida Rule of Civil Procedure 1.310 and Florida Small Claims Rule 7.140, the Section is concerned that this change may actually create more conflict than it resolves. This increase in conflict would arise from the interplay of the proposed rule change

allowing the taking of testimony through communication equipment either when all parties consent or if permitted by another applicable rule of procedure, and Florida Rule of Civil Procedure 1.310(b)(7) which allows a court to order that deposition testimony be taken through the use of telephonic equipment. Rule 1.310 does not explicitly state, as Florida Small Claims Rule 7.140 (f) clearly does, that testimony by telephone may be done at the discretion of the court. The civil rule states that a court may “order that the testimony at a deposition be taken by telephone.”

Because of the difference in these two rules, it is not uncommon for a trial court to interpret that Florida Rule of Civil Procedure 1.310 (b)(7) as allowing for a deposition to be taken telephonically only when the parties consent.

Even with the amendment sought by the Committee, the question of whether Florida Rule of Civil Procedure 1.310 (b)(7) constitutes an exception to the consent requirement of Florida Rule of Judicial Procedure 2.530 is still an unanswered question prone to contrary rulings.

The Section proposes the following amendment to add clarity:

“~~A county or circuit judge~~ Judicial Officer may, ~~if all parties consent~~, allow testimony to be taken through communication equipment if all parties consent or if such testimony is explicitly authorized by another applicable rule of procedure.”

The Section changed ‘county or circuit judge’ to recognize the existence of both General Magistrates and Hearing Officers as well as Special Magistrates, and

to make the rule clear that both are authorized to take testimony through communication equipment if otherwise applicable.

The change at the end of the provision would allow for explicit delegations as is provided in Florida Small Claims Rule 7.140 (f) and provide a frame work for the Civil Rules Committee to amend 1.370 (b)(7) to explicitly allow deposition testimony to be taken via communication equipment over the objection of another party, if, that is the Committee's intent with the rule. It is not clear, at this time if the drafters of Florida Rule of Civil Procedure 1.330 intended for that rule to be utilized as a way to avoid the consent requirements of Rule 2.530 of the Rules of Judicial Administration. The Rules of Civil Procedure Committee, by now having a framework to remove a rule from this requirement of the Florida Rules of Judicial Administration, could take action to revise 1.330 to explicitly state that the trial court has discretion to order a deposition be taken through the use of communication equipment over the objection of a party if it deems prudent.

Further, considering the ability to utilize depositions at trial or hearing pursuant to Florida Rule of Civil Procedure 1.330, it is certainly possible that circumstances have changed or new discovery has been made since the taking of a deposition and a trial or hearing that could impact upon a court's determination to allow testimony through the use of communication equipment. It is unclear if the initial grant of authority to take a deposition through the use of communication

equipment would abrogate the need to file a second motion to utilize the deposition testimony at trial under a broad reading of Florida Rule of Judicial Administration 2.530 (d)(2) which requires a motion setting forth good cause to promulgate testimony by telephonic equipment. Also, it is conceivable that, in similar circumstances, a request to take a deposition telephonically would be granted while the request for a witness to appear telephonically at trial would not as the Court may desire to have the witness testify at trial in person to better gauge what weight should be afforded to that witness's testimony.

It is the position of the Family Law Section of the Florida Bar that any exception to the Florida Rules of Judicial Administration be explicit and clear. The changes suggested by the section address the need for clarity in relation to the Florida Small Claims Rules while creating a framework for other rules committees to make explicit exceptions if a particular rule will be exempt from a requirement contained within the Judicial Rules. The Section believes that this stance will be increasingly important as more judicial rules are implemented, such as e-service and e-filing, that impact many divergent areas of the practice of law.

Finally, the change from county and circuit judge to judicial officer is a small but necessary change to clarify that General Magistrates, Hearing Officers and Special Magistrates are also authorized, where appropriate, to take testimony though the use of communications equipment. Since the Supreme Court is

considered to know the various rules of procedure when implementing a rule, the deliberate exclusion of General Magistrates, Hearing Officers and Special Magistrates could be interpreted as a decision to deny those judicial officers this ability.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the original and nine copies of the foregoing have been furnished to the **Clerk of the Supreme Court**; and that a true and correct copy of the foregoing has been furnished to **Katherine Eastmoore Giddings**, Akerman Senterfitt, 106 E College Avenue, Suite 1200, Tallahassee, Florida 32301-7741, **The Honorable Walter Logan**, St. Petersburg Judicial Building, 545 1st Avenue North, St. Petersburg, Florida 33701, via U.S. mail and electronic filing this ____ day of March, 2010.

/s/ _____

Diane M. Kirigin
General Magistrate
South County Judicial Complex
200 West Atlantic Avenue
#2W-141
Delray Beach, Florida 33444
Telephone: 1-561-274-1410
Facsimile: 1-561-330-1758
Email address: dkirigin@pbcgov.org
Chair Family Law Section
The Florida Bar

/s/ _____

Matthew B. Capstraw, Esquire
Norman D. Levin, P.A.
165 West Jessup Avenue
Longwood, Florida 32750
Telephone: 1-407-834-9494
Facsimile: 1-407-260-0069
Email: mcapstraw@helpisontheway.cc
Senior Co-Chair Rules and Forms
Committee
Family Law Section
The Florida Bar