

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO THE
FLORIDA FAMILY LAW RULES
OF PROCEDURE**

CASE NO.: SC14-

PETITION SEEKING ADOPTION OF RULE 12.451

Elizabeth A. Blackburn, Chair, Family Law Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, file this petition under *Fla. R. Jud. Admin.* 2.140(e) to adopt *Fla. Fam. L. R. P.* 12.451, Taking Testimony. The proposed rule was approved by the full committee by a vote of 22-0 and by The Florida Bar Board of Governors by a vote of 39-0. The proposed rule was published for comment in the August 1, 2014 edition of the Florida Bar News. No comments were received. The proposed rule is attached in the full-page format (see Appendix A) and the two-column format (see Appendix B).

In its 2013 three-year cycle report, the Civil Procedure Rules Committee recommended adoption of *Fla. R. Civ. P.* 1.451, Taking Testimony. The proposal was approved by the Supreme Court, effective January 1, 2014. See *In re: Amendments to the Florida Rules of Civil Procedure*, 131 So. 3d 643 (Fla. 2013). (See Appendix C.) The new rule permits the use of audio or video equipment for witness testimony either “(1) by agreement of the parties or (2) for good cause shown upon written request of a party upon reasonable notice to all other parties.” *Rule* 1.451(b).

The Family Law Rules Committee considered the new civil rule at its January 24, 2014, meeting and voted 22-0-0 to adopt the rule as a Family Law Rule of Procedure. The committee also voted 21-0-0 to submit the rule to the court out-of-cycle. The main reason for the decision to submit the rule out-of-cycle was the conflict that now exists between *Fla. R. Jud. Admin.* 2.530 and *Rule* 1.451. *Rule* 2.530(d)(1) permits a judge, magistrate, or hearing officer to allow “testimony to be taken by communication equipment if all parties consent or if permitted by another applicable rule of procedure.” (See Appendix D.) The Committee believes that the requirements of *Rule* 1.451 are more suited to family law proceedings.

The Family Law Rules Committee strongly believes that the ability to move the court for permission to allow testimony to be taken electronically on a showing of good cause is appropriate in family law matters. If agreement of the parties is required to allow electronic testimony, the likelihood that this method of testimony

will be used is severely limited by the heightened level of acrimony in many family law cases. The proposed rule would prevent a party from attempting to thwart the ability of the other party to call a witness who may be otherwise unavailable without the option of electronic testimony.

The safeguard built into *Rule* 1.451(b), provides adequate protection so that the rule is not abused but is used for those circumstances when there would be no real detriment or prejudice to the objecting party. If the only way that electronic testimony could be used would be on agreement of the parties, the committee envisions that this type of testimony would be rarely used. The result would be undue financial burdens on litigants to secure the physical presence of witnesses.

The Committee respectfully requests that the Court approve the addition of *Rule* 12.451 to the Florida Family Law Rules of Procedure.

Respectfully submitted July 31, 2014.

/s/ Elizabeth A. Blackburn
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APPENDIX A

RULE 12.451. TAKING TESTIMONY

(a) Testimony at Hearing or Trial. When testifying at a hearing or trial, a witness must be physically present unless otherwise provided by law or rule of procedure.

(b) Communication Equipment. The court may permit a witness to testify at a hearing or trial by contemporaneous audio or video communication equipment (1) by agreement of the parties or (2) for good cause shown upon written request of a party upon reasonable notice to all other parties. The request and notice must contain the substance of the proposed testimony and an estimate of the length of the proposed testimony. In considering sufficient good cause, the court shall weigh and address in its order the reasons stated for testimony by communication equipment against the potential for prejudice to the objecting party.

(c) Required Equipment. Communication equipment as used in this rule means a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other simultaneously and permits all conversations of all parties to be audible to all persons present. Contemporaneous video communication equipment must make the witness visible to all participants during the testimony. For testimony by any of the foregoing means, there must be appropriate safeguards for the court to maintain sufficient control over the equipment and the transmission of the testimony, so that the court may stop the communication to accommodate objection or prevent prejudice.

(d) Oath. Testimony may be taken through communication equipment only if a notary public or other person authorized to administer oaths in the witness's jurisdiction is present with the witness and administers the oath consistent with the laws of that jurisdiction.

(e) Burden of Expense. The cost for the use of the communication equipment is the responsibility of the requesting party unless otherwise ordered by the court.

Committee Note

20--Adoption. This rule allows the parties to agree, or one or more parties to request, that the court authorize presentation of witness testimony by contemporaneous video or audio communications equipment. A party seeking to present such testimony over the objection of another party must still satisfy the

good-cause standard. In determining whether good cause exists, the trial court may consider such factors as the type and stage of proceeding, the presence or absence of constitutionally protected rights, the importance of the testimony to the resolution of the case, the amount in controversy in the case, the relative cost or inconvenience of requiring the presence of the witness in court, the ability of counsel to use necessary exhibits or demonstrative aids, the limitation (if any) placed on the opportunity for opposing counsel and the finder of fact to observe the witness's demeanor, the potential for unfair surprise, the witness's affiliation with one or more parties, any other factors the court reasonably deems material to weighing the justification the requesting party has offered in support of the request to allow a witness to testify by communications equipment against the potential prejudice to the objecting party. With the advance of technology, the cost and availability of contemporaneous video testimony may be considered by the court in determining whether good cause is established for audio testimony.

APPENDIX B

Proposed rule

Reasons for change

RULE 12.451. TAKING TESTIMONY

(a) Testimony at Hearing or Trial. When testifying at a hearing or trial, a witness must be physically present unless otherwise provided by law or rule of procedure.

(b) Communication Equipment. The court may permit a witness to testify at a hearing or trial by contemporaneous audio or video communication equipment (1) by agreement of the parties or (2) for good cause shown upon written request of a party upon reasonable notice to all other parties. The request and notice must contain the substance of the proposed testimony and an estimate of the length of the proposed testimony. In considering sufficient good cause, the court shall weigh and address in its order the reasons stated for testimony by communication equipment against the potential for prejudice to the objecting party.

(c) Required Equipment. Communication equipment as used in this rule means a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other simultaneously and permits all conversations of all parties to be audible to all persons present. Contemporaneous video communication equipment must make the witness visible to all participants during the testimony. For testimony by any of the foregoing means, there must be appropriate safeguards for the court to maintain sufficient control over the equipment and the transmission of the testimony, so that the court may stop the communication to accommodate objection or prevent prejudice.

The Committee requests that *Fla. R. Civ. P.* 12.451 be adopted as a Family Law Rule of Procedure. The Committee believes that the provisions of subdivision (b)(2), permitting the court to order taking of testimony by communication equipment for good cause shown at a party's request will be especially helpful in family law proceedings in which the acrimony between the parties may make it impossible to obtain an agreement to take testimony electronically. Obtaining the physical presence of a witness may create undue burden and expense on the parties and inability to do so may prevent the court from obtaining information necessary to make a decision in the case.

(d) Oath. Testimony may be taken through communication equipment only if a notary public or other person authorized to administer oaths in the witness's jurisdiction is present with the witness and administers the oath consistent with the laws of that jurisdiction.

(e) Burden of Expense. The cost for the use of the communication equipment is the responsibility of the requesting party unless otherwise ordered by the court.

Committee Note

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technology, the cost and availability of contemporaneous video testimony may be considered by the court in determining whether good cause is established for audio testimony.

APPENDIX C

RULE 1.451. TAKING TESTIMONY

(a) Testimony at Hearing or Trial. When testifying at a hearing or trial, a witness must be physically present unless otherwise provided by law or rule of procedure.

(b) Communication Equipment. The court may permit a witness to testify at a hearing or trial by contemporaneous audio or video communication equipment (1) by agreement of the parties or (2) for good cause shown upon written request of a party upon reasonable notice to all other parties. The request and notice must contain the substance of the proposed testimony and an estimate of the length of the proposed testimony. In considering sufficient good cause, the court shall weigh and address in its order the reasons stated for testimony by communication equipment against the potential for prejudice to the objecting party.

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(e) Burden of Expense. The cost for the use of the communication equipment is the responsibility of the requesting party unless otherwise ordered by the court.

Committee Note

2013 Adoption. This rule allows the parties to agree, or one or more parties to request, that the court authorize presentation of witness testimony by contemporaneous video or audio communications equipment. A party seeking to present such testimony

over the objection of another party must still satisfy the good-cause standard. In determining whether good cause exists, the trial court may consider such factors as the type and stage of proceeding, the presence or absence of constitutionally protected rights, the importance of the testimony to the resolution of the case, the amount in controversy in the case, the relative cost or inconvenience of requiring the presence of the witness in court, the ability of counsel to use necessary exhibits or demonstrative aids, the limitations (if any) placed on the opportunity for opposing counsel and the finder of fact to observe the witness's demeanor, the potential for unfair surprise, the witness's affiliation with one or more parties, and any other factors the court reasonably deems material to weighing the justification the requesting party has offered in support of the request to allow a witness to testify by communications equipment against the potential for prejudice to the objecting party. With the advance of technology, the cost and availability of contemporaneous video testimony may be considered by the court in determining whether good cause is established for audio testimony.

APPENDIX D

RULE 2.530. COMMUNICATION EQUIPMENT

(a) Definition. Communication equipment means a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other, provided that all conversation of all parties is audible to all persons present.

(b) Use by All Parties. A county or circuit court judge may, upon the court's own motion or upon the written request of a party, direct that communication equipment be used for a motion hearing, pretrial conference, or a status conference. A judge must give notice to the parties and consider any objections they may have to the use of communication equipment before directing that communication equipment be used. The decision to use communication equipment over the objection of parties will be in the sound discretion of the trial court, except as noted below.

(c) Use Only by Requesting Party. A county or circuit court judge may, upon the written request of a party upon reasonable notice to all other parties, permit a requesting party to participate through communication equipment in a scheduled motion hearing; however, any such request (except in criminal, juvenile, and appellate proceedings) must be granted, absent a showing of good cause to deny the same, where the hearing is set for not longer than 15 minutes.

(d) Testimony.

(1) Generally. A county or circuit court judge, general magistrate, special magistrate, or hearing officer may allow testimony to be taken through communication equipment if all parties consent or if permitted by another applicable rule of procedure.

(2) Procedure. Any party desiring to present testimony through communication equipment shall, prior to the hearing or trial at which the testimony is to be presented, contact all parties to determine whether each party consents to this form of testimony. The party seeking to present the testimony shall move for permission to present testimony through communication equipment, which motion shall set forth good cause as to why the testimony should be allowed in this form.

(3) Oath. Testimony may be taken through communication equipment only if a notary public or other person authorized to administer oaths in the witness's

jurisdiction is present with the witness and administers the oath consistent with the laws of the jurisdiction.

(4) Confrontation Rights. In juvenile and criminal proceedings the defendant must make an informed waiver of any confrontation rights that may be abridged by the use of communication equipment.

(5) Video Testimony. If the testimony to be presented utilizes video conferencing or comparable two-way visual capabilities, the court in its discretion may modify the procedures set forth in this rule to accommodate the technology utilized.

(e) Burden of Expense. The cost for the use of the communication equipment is the responsibility of the requesting party unless otherwise directed by the court.

(f) Override of Family Violence Indicator. Communications equipment may be used for a hearing on a petition to override a family violence indicator under Florida Family Law Rule of Procedure 12.650.

APPENDIX E

The Florida Bar's Family Law Rules Committee proposes to submit to the Florida Supreme Court an out-of-cycle report proposing creation of Florida Family Law Rule of Procedure 12.451. The Committee invites all interested persons to comment on the proposed amendment, which is reproduced in full below. All comments must be filed with the Committee chair, Elizabeth Blackburn, eblackburn@revisblackburnpa.com on or before August 15, 2014, with a certificate of service verifying that a copy has been served on the Bar Staff Liaison to the Committee, Ellen Sloyer, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, esloyer@flabar.org, as well as a separate request for oral argument if the person filing the comment wishes to participate in oral argument, which may be scheduled in this case.

If filed by an attorney in good standing with The Florida Bar, the comment must be electronically filed via the Portal in accordance with In re Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal, Fla. Admin. Order No. AOSC13-7 (Feb. 18, 2013). If filed by a nonlawyer or a lawyer not licensed to practice in Florida, the comment must be electronically filed via e-mail in accordance with In re Mandatory Submission of Electronic Copies of Documents, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004). Electronically filed documents must be submitted in Microsoft Word 97 or higher. Any person unable to submit a comment electronically must mail or hand-deliver the originally signed comment to the Florida Supreme Court, Office of the Clerk, 500 South Duval Street, Tallahassee, Florida 32399-1927; no additional copies are required or will be accepted.

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Committee Note

20--Adoption. This rule allows the parties to agree, or one or more parties to request, that the court authorize presentation of witness testimony by contemporaneous video or audio communications equipment. A party seeking to present such testimony over the objection of another party must still satisfy the good-cause standard. In determining whether good cause exists, the trial court may consider such factors as the type and stage of proceeding, the presence or absence of constitutionally protected rights, the importance of the testimony to the resolution of the case, the amount in controversy in the case, the relative cost or inconvenience of requiring the presence of the witness in court, the ability of counsel to use necessary exhibits or demonstrative aids, the limitation (if any) placed on the opportunity for opposing counsel and the finder of fact to observe the witness's demeanor, the potential for unfair surprise, the witness's affiliation with one or more parties, any other factors the court reasonably deems material to weighing the justification the requesting party has offered in support of the request to allow a witness to testify by communications equipment against the potential prejudice to the objecting party. With the advance of technology, the cost and availability of contemporaneous video testimony may be considered by the court in determining whether good cause is established for audio testimony.

APPENDIX F

March 31, 2014

MEMORANDUM

TO: Board of Governors
The Florida Bar

FROM: Mary Lou Miller Wagstaff, Chair
Family Law Rule Committee

RE: Board Approval of Out-of-Cycle Petition

In its 2013 3-year cycle report, the Civil Procedure Rules Committee recommended adoption of *Fla.R.Civ.P.* 1.451, Taking Testimony. The proposal was approved by the Supreme Court, effective January 1, 2014. See *In re: Amendments to the Florida Rules of Civil Procedure*, 38 FLW S836 (Fla. 2012). The new rule permits the use of audio or video equipment for witness testimony either “(1) by agreement of the parties or (2) for good cause shown upon written request of a party upon reasonable notice to all other parties.” *Rule*. 1.451(b).

The Family Law Rules Committee considered the new civil rule at its January 24, 2014 meeting and voted 22-0-0 to adopt the rule as a Family Law Rule of Procedure. The committee also voted 21-0-0 to submit the rule to the court out-of-cycle. The main reason for the decision to submit the rule out-of-cycle was the conflict that now exists between *Fla.R.Jud.Admin.* 2.530 and *Rule* 1.451. *Rule* 2.530(d)(1) permits a judge, magistrate, or hearing officer to allow “testimony to be taken by communication equipment if all parties consent or if permitted by another applicable rule of procedure.”

The Family Law Rules Committee strongly believes that the ability to move the court for permission to allow testimony to be taken electronically on a showing of good cause is appropriate in family law matters. If agreement of the parties is required to allow electronic testimony, the likelihood that this method of testimony will be used is limited by the level of acrimony in many family law cases. This rule would prevent a party from attempting to thwart the ability of the other party to call a witness who maybe otherwise unavailable without the option of electronic testimony.

The safeguard built into *Rule* 1.451(b), provides adequate protection so that the rule is not abused but is used for those circumstances when there would be no real detriment or prejudice to the objecting party. If the only way that electronic testimony could be used would be on agreement of the parties, the committee envisions that this type of testimony would be rarely used. The result would be undue financial burdens on litigants to secure the physical presence of witnesses.

The committee asks the Board of Governors to approve this rule and filing of it out-of-cycle.

RULE 12.451. TAKING TESTIMONY

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CERTIFICATE OF COMPLIANCE

I certify that this pleading complies with the font requirements of *Fla. R. App. P.* 9.120(a)(2).

I certify that these rules were read against West's *Florida Rules of Court* (2014 edition).

/s/ Ellen H. Sloyer
Senior Rules Liaison
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