



**MEMORANDUM**

To: All Interested Persons

From: Anthony R. Perri

Re: Request for Public Comment on Amending Commercial Division Rule 29  
Pertaining to the Identification of Deposition Testimony

Date: November 29, 2022

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council (“CDAC”), to amend Commercial Division Rule 29 to clarify that the objection process pertaining to the identification of deposition testimony should include presentation and consideration of objections to videorecorded deposition testimony (Exhibit A – CDAC memo).

CDAC recognizes that the use of videorecorded depositions increased during the pandemic and will continue to be widely used in the future (Ex. A). The increased use of videorecorded depositions also led to an increase in objections that were specific to videorecorded testimony, often relating to glitches that would affect the accuracy or quality of the testimony. CDAC recommends that Rule 29 (which relates to the identification of deposition testimony before trial) be modified to include reference to objections regarding videorecorded deposition testimony. CDAC also recommends deleting the requirement that the Court rule upon objections at the earliest possible time and recommends including a provision that states that the Rule does not apply to deposition testimony and video recording to be used solely for impeachment or credibility purposes. (Ex. A.)

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Persons wishing to comment on the proposal should e-mail their submissions to [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov) or write to: Anthony R. Perri, Esq., Acting Counsel, Office of Court

Administration, 25 Beaver Street, 11<sup>th</sup> Fl., New York, New York, 10004. Comments must be received no later than January 31, 2023.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

# **EXHIBIT A**

July 1, 2022

**TO:** Members of the Commercial Division Advisory Council  
**FROM:** Subcommittee on Best Practices for Judicial Case Management  
**RE:** Proposed Modifications to Commercial Division Rule 29

This memorandum provides suggested modifications to Commercial Division Rule 29 that the Commercial Division Advisory Council's Subcommittee on Best Practices for Judicial Case Management has recommended. Now, with two years of experience of the pandemic, we are particularly mindful of the potentially long-lasting impact of the pandemic on the functioning of the courts and how courtroom practices might be transformed going forward. The Advisory Council now respectfully submits the following proposed Rule revision for the Administrative Board's consideration and approval.

**Rule 29 (Identification of Deposition Testimony).**

A. Current Version of Rule 29

Rule 29. Identification of Deposition Testimony. Counsel for the parties shall consult prior to trial and shall in good faith attempt to agree upon the portions of deposition testimony to be offered into evidence without objection. The parties shall delete from the testimony to be read questions and answers that are irrelevant to the point for which the deposition testimony is offered. Each party shall prepare a list of deposition testimony to be offered by it as to which objection has not been made and, identified separately, a list of deposition testimony as to which objection has been made. At least ten days prior to trial or such other time as the court may set, each party shall submit its list to the court and other counsel, together with a copy of the portions of the deposition testimony as to which objection has been made. The court will rule upon the objections at the earliest possible time after consultation with counsel.

B. Proposed Revision to Rule 29

Rule 29. Identification of Deposition Testimony. Counsel for the parties shall consult prior to trial and shall in good faith attempt to agree upon the portions of deposition testimony to be offered into evidence without objection, **and to resolve any objections regarding the use of any corresponding video recording of such deposition testimony.** The parties shall delete from the testimony to be read questions and answers that are irrelevant to the point for which the deposition testimony is offered. Each party shall prepare a list of deposition testimony to be offered by it as to which objection has not been made and, identified separately, a list of deposition testimony as to which objection has been made **to the introduction of the testimony or corresponding video**

**recording of the deposition testimony.** At least ten days prior to trial, **or such other time as the court may set,** each party shall submit its list to the court and other counsel, together with a copy of the portions of the deposition testimony as to which no objection has been made **and, if applicable, the corresponding video recording of the portions of deposition testimony as to which no objection has been made.** ~~The court will rule upon the objections at the earliest possible time after consultation with counsel.~~ **This Rule does not apply to portions of deposition testimony and corresponding video recording to be used solely for impeachment or credibility purposes.**

C. Rationale for Revision

The use of remote, videotaped depositions soared during the pandemic and it is likely that the use of videotaped depositions at trial will also increase in the post-pandemic world. As to be expected, there were occasional technological glitches during depositions that may affect the quality or accuracy of the videotaped testimony. There were also new and different objections lodged, including (by way of example) to the use of “sharing screens” to show a witness only a portion of an exhibit. The Advisory Council recommends Rule 29 be modified to clarify that the objection process should include presentation and consideration of any objections to the introduction of the relevant portion of the videotape of the deposition testimony to be introduced. The Local Rules of the U.S. District Court for the District of New Hampshire also acknowledge the potential for objections specific to the introduction of videotaped testimony.

The Advisory Council also thought it prudent to add a provision stating that the Rule does not apply to deposition testimony and video recordings that will be used solely for impeachment or for purposes of witness credibility.

Lastly, the Advisory Council recommends deleting the requirement that the court rule upon the objections at the earliest possible time as unnecessary.

We thank you for our consideration of these proposed changes to Rule 29.