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December 11, 2020

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VIA ELECTRONIC MAIL

Eileen D. Millet, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004
Email: rulecomments@nycourts.gov

Re: Proposed New Commercial Division Rule Regarding Remote
Depositions

Dear Ms. Millet:

Enclosed please find the Comments of the Commercial and Federal
Litigation Section of the New York State Bar Association with respect to
on the proposed new Commercial Division rule regarding remote
depositions.

We appreciate the opportunity to comment on these proposed rules.

Very truly yours,

Jonathan B. Fellows, Chair

Cc: Catherine Carl, Sections and Meetings Liaison
ccarl@nysba.org

TO: New York State Unified Court System, Office of Court Administration
FROM: New York State Bar Association, Commercial and Federal Litigation Section
DATE: December 2, 2020
RE: Proposed New Commercial Division Rule on Remote Depositions

The Commercial and Federal Litigation Section of the New York State Bar Association (the “Section”) is pleased to submit these comments in response to the Memorandum of Eileen D. Millett, counsel to the Chief Administrative Judge Lawrence K. Marks, dated November 20, 2020, seeking public comment on the proposed new Commercial Division Rule on remote depositions and a remote deposition protocol (the “Proposal”).

I. EXECUTIVE SUMMARY

The Section recommends adoption of the Proposal with some revisions as set forth in Point III below. The Section applauds the initiative, but we think that it should continue to apply with a relaxed standard of undue hardship after the emergency caused by Covid-19 recedes. Due to significant advancements in technology, remote depositions should continue to be used after the pandemic where they are more efficient and less costly than in-person depositions. Additionally, while video technology must be used for the deposition, the parties should still have the option whether to video-record the deposition.

II. SUMMARY OF PROPOSAL

The Proposal is set forth in the Memorandum of the Commercial Division Advisory Council Subcommittee on Procedural Rules to Promote Efficient Case Resolution (attached as Exhibit A) and the proposed Stipulation and [Proposed] Order Concerning Protocol for Conducting Depositions (attached as Exhibit B). The Proposal provides for:

- (a) a remote deposition upon consent of the parties or upon a showing of undue hardship, including: (i) most importantly, the safety of the parties and witness; (ii) the distance, time, and cost of travel; (iii) the likely importance or significance of the testimony; and (iv) whether the witness is a party;
- (b) any oath or affirmation not to be challenged on the grounds that the court reporter is not present or not a notary public in the state where the witness is located;
- (c) a statement of the right and procedures in the protocol for the witness and defending attorneys to review exhibits at the deposition;
- (d) no waiver of a timely objection or instruction not to answer that cannot be interposed due to technical difficulties;
- (e) a reservation of the issues of whether a court may compel testimony of a non-party witness or whether a remotely deposed witness is unavailable under CPLR 3117; and

- (f) a form protocol to replicate, insofar as practical, in-person depositions and eliminate any potential for prejudice.

The form protocol covers: (1) video recording (which is required); (2) technical problems (use best efforts to provide sufficient connectivity and suspend if there is a technical issue); (3) security arrangements (at least use a password); (4) private communications between the witness and counsel (prohibited during questioning on the record, except to determine if a privilege should be asserted); and (5) exhibits (shared as paper documents in advance of the deposition or digitally in real time).

III. RESPONSE AND SUGGESTIONS TO FURTHER THE PROPOSAL'S GOALS

The Section strongly endorses the Proposal with three suggestions.

While the Section recognizes that the case law has previously allowed remote depositions only upon a showing of undue hardship, *Johnson v. Time Warner Cable New York City LLC*, 2020 N.Y. Misc. LEXIS 2323 at *4–5, 2020 WL 2769117, at *2 (N.Y. Sup. Ct. May 28, 2020), the Section believes that advances in technology and the experience gained during the pandemic show that remote depositions should be permitted more routinely. The cost and time savings due to decreased travel by witnesses and counsel and efficiencies in presenting exhibits more than makes up for any increased cost due to video recording of the deposition, especially in complex, commercial litigation where depositions recorded on video media have often been used. Accordingly, the Section suggests that the proposed rule be modified to include an explicit consideration of the relative costs of a remote deposition compared to an in-person deposition as one of the factors in determining undue hardship.

On October 28, 2020, the Section adopted a report entitled *Virtual Depositions – Can't Look Back Now* (attached as Exhibit C), which included a form of stipulation. That report, including the stipulation, covered almost all the same issues as the Proposal's form protocol and recommended similar solutions.

One difference is that the Proposal's form protocol requires that "each deposition be video-recorded." The Section recommends that the parties retain the less costly option to have the deposition recorded only by stenographic means while using video-conferencing technology to display the witness and counsel during the deposition. Indeed, we are hopeful that in the future the rules and technology will allow the parties to click on a record button to preserve the testimony in an admissible and cheaper manner.

Another difference is that the Proposal's protocol provides for the videographer to monitor the audio and video transmission and stop the record if a participant has been dropped or is otherwise incapable of participating by reason of technical problems. The Section's report does not place the burden on the videographer, because it contemplates situations where there will be no video recording. Instead, the Section's report generally permits the deposition to be recessed should technical issues prevent the court reporter, witness, or counsel from reliably seeing one another, hearing one another, or, in the case of the court reporter, transcribing the testimony at any point during a deposition.

Commercial Division Committee

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EXHIBIT A

MEMORANDUM

TO: Subcommittee on Procedural Rules to
Promote Efficient Case Resolution
("Subcommittee")

FROM: Michael Carlinsky, Susan L. Shin

DATE: September 26, 2020

RE: Proposal for New Rule on Remote Depositions

INTRODUCTION

This memorandum recommends a new Commercial Division rule clarifying the authority of the courts to order remote depositions. CPLR 3113(d) authorizes remote depositions by stipulation but does not directly address remote depositions upon motion. New York Courts have ordered remote depositions, upon motion, upon a showing of "undue hardship." This memorandum advises that the Commercial Division adopt a rule explicitly authorizing and regulating remote depositions.

PROPOSED RULE

We recommend that the Commercial Division Advisory Council propose the following Commercial Division Rule (the "Rule"):

- a. The court may, upon the consent of the parties or upon a motion showing undue hardship, order oral depositions by remote electronic means, subject to the limitations of this Rule.
- b. Considerations upon such a motion, and in support of a showing of undue hardship, shall include but not be limited to:
 1. The distance between the parties and the witness, including time and costs of travel by counsel and litigants and the witness to the proposed location for the deposition; and

2. The safety of the parties and the witness, including whether counsel and litigants and the witness may safely convene in one location for the deposition; and
3. Whether the witness is a party to the litigation; and
4. The likely importance or significance of the testimony of the witness to the claims and defenses at issue in the litigation.

For the avoidance of doubt, the safety of the parties and the witness shall take priority over all other criteria. .

- c. Remote depositions shall replicate, insofar as practical, in-person depositions and parties should endeavor to eliminate any potential for prejudice that may arise as a result of the remote format of the deposition. To that end, parties are encouraged to utilize the form protocol for remote deposition, which is reproduced as Appendix __ to these rules, as a basis for reaching the parties' agreed protocol.
- d. No party shall challenge the validity of any oath or affirmation administered during a remote deposition on the grounds that
 1. the court reporter or officer is or might not be a notary public in the state where the witness is located; or,
 2. the court reporter or officer might not be physically present with the witness during the examination.
- e. Witnesses and defending attorneys shall have the right to review exhibits at the deposition independently to the same degree as if they were given paper copies.
- f. No waiver shall be inferred as to any testimony if the defending attorney was prohibited by technical problems from interposing a timely objection or instruction not to answer.
- g. Nothing in this rule is intended to: (i) address whether a remote witness is deemed "unavailable," within the meaning of CPLR 3117 and its interpretive case law, for the purposes of utilizing that witness' deposition at trial; or (ii) alter the Court's authority to compel testimony of non-party witnesses in accordance with New York law.

FACTUAL BACKGROUND

The COVID-19 pandemic has forced rapid and widespread changes in the practice of law: not least among these, the shift to virtual and remote proceedings. The technology for

remote legal proceedings, such as depositions, is not new – in many instances, the technology used was already commonplace in personal use. Remote depositions are explicitly authorized in the Civil Practice Law and Rules and courts have ordered their use before the pandemic.

Whereas, however, remote depositions were previously the exception, they are now the rule.

And although the near-universal shift to remote depositions has been forced upon counsel and litigants by the pandemic, remote depositions are not without their virtues. There is good reason both to regulate remote depositions and to encourage their continued use, as circumstances warrant, after the pandemic is brought under control. The Commercial Division, in its role as one of the nation’s leading courts for the resolution of business disputes, must continue to carry out its vital functions through the pandemic, and should welcome the opportunity to innovate in ways that may improve the practice of law after the crisis is controlled.

LEGAL DISCUSSION

New York courts have the authority to order remote depositions, either by stipulation or upon a showing of undue hardship. CPLR 3113(d) (“The parties may stipulate that a deposition be taken by telephone or other remote electronic means”); *Johnson v. Time Warner Cable New York City LLC*, 2020 N.Y. Misc. LEXIS 2323 at *4–5, 2020 WL 2769117, at *2 (N.Y. Sup. Ct. May 28, 2020) (authorizing remote depositions by motion upon a showing of undue hardship); *Chase-Morris v. Tubby*, 2020 N.Y. Misc. LEXIS 4015 at *6, 2020 WL 4516920 at *3 (N.Y. Sup. Ct., Westchester Cnty. August 3, 2020) (“It is settled law in New York that the court’s discretion to compel a virtual deposition can be invoked upon a showing of undue hardship.”)¹. Courts

¹ New York district courts interpreting the Federal Rules of Civil Procedure engage in the same analysis. Federal Rule of Civil Procedure 30(b)(4) provides that the parties may stipulate to, or the court may order, a remote deposition. Like CPLR 3113 and CPLR 3103, the FRCP 30(b)(4) provides no standards for determining the circumstances under which a remote deposition may be ordered. Accordingly, in interpreting FRCP 30(b)(4) New York district courts have found that judges should balance claims of prejudice and hardship, along with engaging in a weighing

have sometimes ordered that depositions take place remotely as a form of protective order pursuant to CPLR 3103(a). *See, e.g. Provident Life and Cas. Ins. Co. v. Brittenham*, 283 A.D.2d 629, 630 (2d Dep't 2001) (affirming Supreme Court order directing out of state depositions to be conducted by videoconference pursuant to a motion made under CPLR 3103(a)); *Goldstein v. Berenbaum*, 2020 WL 5209508 at *1 (N.Y. Sup. Ct. Sept. 1, 2020) (“it is undeniable that forcing a party to appear for an in-person deposition would create an undue hardship considering the circumstances surrounding the ongoing pandemic”) (ordering remote depositions as a form of CPLR 3103(a) protective order).

Undue hardship sufficient to support a court order to conduct a remote deposition has been found in a myriad of cases. The COVID-19 pandemic constitutes an undue hardship sufficient to order a remote deposition. *Chase-Morris v. Tubby*, 2020 WL 4516920 at *3 (N.Y. Sup. Ct., Westchester Cnty., August 3, 2020) (ordering parties to appear for remote deposition during the pandemic rather than adjourning depositions until depositions could be safely taken in-person after the pandemic) (gathering cases); *Fields v. MTA Bus Co.*, 2020 WL 4760424 at *3, 2020 N.Y. Misc. LEXIS 4375 at *11 (N.Y. Sup. Ct., Westchester Cnty. August 17, 2020) (same); *Johnson v. Time Warner Cable New York City LLC*, 2020 WL 2769117 at *3, 2020 N.Y. Misc. LEXIS 2323 at *6–7 (N.Y. Sup. Ct., N.Y. Cnty. May 28, 2020) (“To delay discovery until a vaccine is available or the pandemic has otherwise abated would be unacceptable. It goes without saying that business as usual is no longer the normal.”).

Outside the pandemic, undue hardship has generally been found in circumstances where travel would be difficult or impossible. *See, e.g., Yu Hui Chen v. Chen Li Zhi*, 81 A.D. 3d 818,

of the relevant facts. *Rouviere v. Depuy Orthopaedics, Inc.*, 2020 U.S. Dist. LEXIS 122184 at *6–7 (S.D.N.Y. July 11, 2020).

818–819 (2d Dep’t 2011) (finding of undue hardship for deposition of plaintiff who resided in China); *but see Rodriguez v. Infinity Ins. Co.*, 283 A.D.2d 969, 970 (4th Dep’t 2001) (“As a general rule, a non-resident plaintiff who has invoked the jurisdiction of New York State by bringing suit in its courts must stand ready to be deposed in New York unless it is shown that undue hardship would result”) (denying remote depositions for seasonal agricultural workers generally resident in Mexico). Other considerations when finding undue hardship may include caregiving duties and employment considerations. *See Rogovin v. Rogovin*, 3 A.D.3d 352, 353 (1st Dep’t 2004) (finding undue hardship where defendant resided in Kansas and was the sole caregiver for a nonagenarian grandmother and 10-year-old daughter); *see also Kozak v. Marshall*, 808 N.Y.S.2d 918, 918 (N.Y. Sup. Ct., Suffolk Cnty. 2005) (finding undue hardship where defendant resided in California and could not travel to New York without risking his employment).

Remote depositions are not legally different from in-person depositions with respect to interstate practice and non-party discovery. The Rule proposed to the Commercial Division does not, and is not intended to, change the authority of New York State courts with respect to depositions of persons who reside outside New York State or persons who are not parties to the case. Parties and witnesses may agree or stipulate to remote depositions of an out of state non-party witness.

CPLR 3101 authorizes “full disclosure of all matter material and necessary in the process or defense of an action[,]” including specific provisions regarding disclosure by persons outside New York State. *See* CPLR 3101(a)(3)-(4) (discovery may be had from persons outside New York State, including “any . . . person” upon notice). Nonetheless, obtaining discovery from a non-party witness who resides outside New York State is generally subject to the laws of the

state in which the witness is found. *See 23/23 Commc 'ns Corp. v. Gen. Motors Corp.*, 660 N.Y.S.2d 296, 296 (N.Y. Sup. Ct., N.Y. Cnty. 1997) (“The law is well settled that the service of a subpoena outside [New York] [S]tate is beyond the court’s power.”) (citing N.Y. Judiciary Law §2-b (New York courts have authority to enforce subpoenas upon a “person found in the state”)); *see also In re 91 St. Crane Collapse Litig.*, 159 A.D.3d 511, 512 (1st Dep’t 2018) (“CPLR 3119, which adopted the Uniform Interstate Deposition and Discovery Act, provides a mechanism for disclosure in New York for use in an action that is pending in another state . . . not the other way around. Thus it is not applicable . . . to an action pending in New York [regarding] discovery from out-of-state witnesses.”); *Lewis v. Baker*, 279 A.D.2d 380 (1st Dept. 2001) (Court lacks authority to compel appearance of out of state non-party for deposition).

CPLR 3101 likewise provides for discovery from persons who are not parties to the case. *See* CPLR 3101(a)(3)-(4) (authorizing discovery by persons who could not be expected to appear at trial and “any other person” upon notice). Discovery from non-parties can be had by service of a subpoena. *See also Kapon v. Koch*, 23 N.Y.3d 32, 34 (2014) (discovery may be had from non-parties by service of a subpoena). Parties to the case are, of course, under the personal jurisdiction of the court (subject to any personal jurisdiction defenses that are presumably addressed or waived at the outset of the case) and may be deposed by notice rather than subpoena, regardless where they reside. *See* CPLR 3107 (parties to the case may be examined pursuant to notice).

Ordinarily the court reporter or officer administering the oath to the witness at a remote deposition “shall be physically present at the place of the deposition[.]” CPLR 3113(d). However, the parties may stipulate that this requirement shall not be enforced. *Id.* Moreover, any objections as to the oath or affirmation at the deposition are waivable. CPLR 3115(b)

(objections as to the oath or affirmation are waived unless made promptly). It is therefore not a requirement of the CPLR that the court reporter or officer must be physically present with the witness. The Rule proposed here, as well as paragraph 8 of the proposed form protocol, provides that the parties shall not challenge any remote deposition taken pursuant to this Rule on the ground that the officer administering the oath was not physically present with the witness or was not a notary public in the state where the witness took the deposition from. Any objection to the remote administration of the oath shall be waived if the deposition proceeds upon stipulation or impliedly overruled if the court finds undue hardship and orders the deposition to proceed remotely. Courts have explicitly contemplated such a waiver in the ordering of remote depositions. *See Cesari S.R.L. v. Peju Province Winery L.P.*, 2020 U.S. Dist. LEXIS 151184 at *4 (S.D.N.Y. Aug. 20, 2020) (“[T]he court reporter will not necessarily be physically present with the witness whose deposition is being taken. The Court will not sustain any challenge the validity of any oath administered by the court reporter, even if the court reporter is not a notary public in the state where the deponent resides.”); *Joffe v. King & Spalding LLP*, 2020 U.S. Dist. LEXIS 137085 at *4 (S.D.N.Y. July 9, 2020) (“Plaintiff and Defendant agree not to challenge the validity of any oath administered by the court reporter, even if the court reporter is not a notary public in the state where the deponent resides.”).

PRACTICAL CONCERNS

The concerns litigants have raised to resist remote depositions are not frivolous. However, these issues can be effectively addressed through planning by counsel and by the stipulation or order of a remote deposition protocol. This memorandum briefly discusses some of the practical considerations that bear upon remote depositions and appends a proposed exemplar or form remote deposition protocol. It is expected that the protocol may be amended as necessary from case to case. A remote deposition protocol is particularly important because

depositions ordinarily proceed without direct judicial involvement. The use of a protocol therefore reduces avoidable motion practice and addresses some of the practical considerations that are better resolved from case to case rather than by the generally-applicable Rule.

Technical Issues

The most common concern regarding remote depositions is technological failures or problems. All participants must have sufficient bandwidth and sufficient hardware, such as computers or tablets equipped with cameras. Counsel are encouraged to test remote deposition software before any remote deposition occurs. No witness or litigator should access the software for the first time at the start of the deposition.

There is always a risk that the parties could suffer connectivity issues. As technology is ever-evolving, it is unwise for a protocol to specify a minimum strength or quality of connection because such a designation could quickly become outdated. However, parties should be required by a protocol to use their “best efforts” to guarantee “sufficient connectivity”. In the event that a connectivity issue does occur, the parties should agree in the protocol that the deposition will be suspended, as is reflected in paragraph 15 of the proposed form protocol. The time consumed by such suspension should not count toward any applicable time limitations. Moreover, above the level of the protocol, the Rule itself requires that any objection or instruction not to answer that cannot be timely interposed on account of technical problems (such as a dropped connection or an audio failure) shall be deemed to have been timely if made as soon as practicable (i.e. after the connection is restored). Regardless of the requirements of the Rule and the proposed form protocol, participants to the deposition should endeavor to establish back-up systems of communication (such as e-mail or landline) to alert the court reporter if there is a technical problem, particularly a technical problem that is not immediately apparent to all parties (e.g. if one participant’s audio transmission fails).

Finally, depending on whether exhibits are shared digitally or in hard copy, witnesses and counsel participating in the deposition should be prepared for uncommonly heavy demands on their screen space: their monitor or tablet will need to support not only the videoconferencing software for the deposition but also the exhibit(s). Some videoconferencing software will automatically pause participants who open a second screen or another application on the device and discovering such problems in advance (and planning around them) will be an essential part of any “dress rehearsal” for the software.

The proposed form protocol aims to address some of these issues in paragraph 20.

Security Issues

Remote depositions are vulnerable to eavesdropping in ways that traditional in-person depositions are not. The specific encryption and security for each deposition should be determined by the parties and their counsel and technical advisers. At a minimum, however, the parties should require that remote depositions be secured by passwords. Cases involving trades secrets or confidential medical information or personal financial information (particularly the financial information of non-parties) may require higher degrees of security. Some vendors offer specific “HIPAA-compliant” versions of videoconferencing software. Although full end-to-end encryption may not be necessary for all depositions, most videoconferencing software offers at least password-protection to prevent unauthorized entry.

Private Communications

Participants to the deposition should sometimes be permitted to communicate privately and should sometimes be prohibited from communicating privately. The witness and defending

counsel may well need to engage in confidential conversations regarding claims of privilege; teams of attorneys may similarly need to communicate with each other privately.

The witness should not, of course, be coached or guided during the questioning. As the parties will not be in the same physical place as the deponent, there is a potential risk that the deponent could privately communicate with counsel or other individuals during the deposition. A deposition protocol should address this concern by placing the responsibility on counsel to eliminate this risk. The protocol should instruct counsel not to privately communicate with the deponent during the questioning on the record, except for the purpose of determining whether a privilege should be asserted. *See Cesari S.R.L. v. Peju Province Winery L.P.*, 2020 U.S. Dist. LEXIS 151184 at *3 (S.D.N.Y. Aug. 20, 2020). An example of such an instruction can be found in paragraph 6 of the proposed form protocol. In addition, the protocol could require the witness to shut off all electronic communication devices during the deposition while on the record. *See Joffe v. King & Spalding LLP*, 2020 U.S. Dist. LEXIS 137085 at *9 (S.D.N.Y. July 9, 2020) (requiring the deponent to turn off all personal communicate devices in the room, except for their personal cell phone, which must be on vibrate with the screen turned away from the deponent). Parties can also agree that the “chat” feature of the platform used to conduct the remote deposition be disabled, except for the sharing of exhibits with all participants. The questioning attorney should also feel free to ask the witness under oath to verify that the witness is not engaged in private communications and does not have chat software open on the computer or device.

To encourage appropriate private communications, some videoconferencing software allows for break-out rooms within the software, as is contemplated in paragraph 7 of the proposed form protocol. Courts have explicitly allowed for such rooms to be used to facilitate

permissible private conversations. See *Cesari S.R.L. v. Peju Province Winery L.P.*, 2020 U.S. Dist. LEXIS 151184 at *3 (S.D.N.Y. Aug. 20, 2020). If no such “room” is possible within the software, then the defending attorney and the witness may need to disconnect or step away from the software and communicate privately through a different medium, such as by phone call or through another videoconferencing app or service. They can briefly discuss claims of privilege. This is not significantly different from the existing common practice at in-person depositions. Moreover, New York courts have allowed the witness and defending attorney to participate in the remote deposition from the same place, with the taking attorney participating from a separate location. See *Melkonian v. Albany Medical Center*, 2020 WL 5294231 at *2, 2020 N.Y. Misc. LEXIS 5462 at *4 (N.Y. Sup. Ct., Albany Cnty. June 3, 2020); see also *Johnson v. Time Warner Cable New York City LLC*, 2020 WL 2769117 at *3, 2020 N.Y. Misc. LEXIS 2323 at *6–7 (“Although [defendant’s] counsel feels that he will be prejudiced by not being able to physically sit next to the Remote Witnesses during their depositions, this order does not prohibit him from doing so. To the extent that the law and social distancing guidance allow, [defendant’s] counsel... may be in the same room sitting next to these Remote Witnesses while Plaintiff’s counsel appears by remote means.”).

Exhibits

While the sharing of exhibits in real time can be more difficult during a remote deposition, it is manageable. See *Rouviere v. Depuy Orthopaedics, Inc.*, 2020 U.S. Dist. LEXIS 122184 at *9–10 (S.D.N.Y. July 11, 2020) (finding that an argument a deposition would be document intensive was not sufficient to prevent a remote deposition from going forward, as parties could exchange hard copy exhibits prior to the deposition, or utilize technology to share documents during the deposition). Paragraph 20 of the proposed form protocol details the

potential ways in which parties can share agree to disseminate full exhibits during a remote deposition. Exhibits at a remote deposition can be shared as paper documents in advance of the deposition, or digitally in real time. The advantage to paper documents is their familiarity and the general avoidance of technical problems that might plague the dissemination of digital files. However, paper exhibits must be shared and therefore decided upon in advance, which may inhibit the general free-flow of questioning and as discussed below, reveal attorney work product. Although, parties can combat this by agreeing to allow for the electronic sharing of exhibits when necessary and by instructing the witness to disregard and not examine certain files that the attorney decides to skip.

Some attorneys may also feel concern about sharing their proposed deposition exhibits with the witness or opposing counsel before the deposition, as doing so reveals attorney work product. The proposed form protocol addresses these concerns by obliging the recipients of paper exhibits to refrain from opening or reviewing the exhibits before being directed to do so, on camera, by the taking attorney.

Parties should be encouraged to share exhibits digitally. Digital exhibits can be withheld from adverse parties before the deposition, which obviates the concern about revealing work product. Exhibits can be shared instantaneously through the “chat” feature of the remote deposition software, or through other instantaneous electronic distribution such as file sharing software. This enables all individuals to have instantaneous access to the exhibits, while providing them with the ability to review the document in its entirety at their own control.

Digital exhibits can be shared by “screensharing” (i.e. when the video transmission displays the questioning attorney’s computer screen rather than the questioning attorney herself). However, screensharing alone does not allow the witness and defending attorney to review the

document independently and fully and are held captive to the view shared by the questioning attorney. Furthermore, screensharing does not easily provide the witness with the ability to review the entire exhibit prior to being questioned on it, as they are entitled to do. Accordingly, the draft form protocol recommends using screensharing as a visual aid to questioning, rather than a the sole means for sharing an exhibit.

CONCLUSION

Remote depositions have, by necessity, been occurring with increasing frequency. It would benefit both litigants and the courts in the Commercial Division to more clearly regulate remote depositions. By adopting the proposed Rule, the Commercial Division will also have the ability to guide litigants in the creation of their remote deposition protocol, which will be used to solve the problems that otherwise could be associated with remote depositions. This proposed new rule will serve litigants and courts in the Commercial Division well, not only for the duration of the COVID-19 pandemic, but for the future. Even once the undue hardship of COVID-19 is over, litigants may very well elect to participate in remote depositions by a matter of preference. We now know, from experience, that remote depositions can be quicker, easier, less costly, and more efficient than in-person depositions. By crafting this new rule, the Commercial Division will be prepared for the new future of litigation.

EXHIBIT B

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

XXXX, Plaintiff(s), - against - XXXX, Defendant(s).	Index No. ____/____
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**STIPULATION AND [PROPOSED] ORDER CONCERNING
PROTOCOL FOR CONDUCTING REMOTE DEPOSITIONS**

The Plaintiff(s) and Defendant(s) (collectively, the “Parties”) jointly stipulate to the following protocol for conducting depositions via remote means in the above-captioned manner:

1. All depositions shall be conducted remotely using videoconference technology, and each deposition shall be video-recorded.
2. Insofar as practicable, the remote deposition shall be similar to an in-person deposition.
3. The Party that notices the deposition shall contract with a court reporting service for court reporting, videoconference, and remote depositions services. An employee or employees of the service provider shall attend or be available at each remote deposition to video record the deposition, troubleshoot any technological issues that may arise, and administer the virtual breakout rooms.
4. The Parties agree that these video-recorded remote depositions may be used at a trial or hearing to the same extent that an in-person deposition may be used at trial or hearing, and the Parties agree not to object to the use of these video recordings on the basis that the deposition was taken remotely. The Parties reserve all other objections to the use of any deposition testimony at trial.

FORM REMOTE DEPOSITION PROTOCOL

5. The deponent, court reporter, and counsel for the Parties may each participate in the videoconference deposition remotely and separately. Each person attending a deposition shall be clearly visible to all other participants, their statements shall be audible to all participants, and they should each use best efforts to ensure their environment is free from noise and distractions.

6. No counsel shall privately communicate with any deponent during questioning on the record, except for the purpose of determining whether a privilege should be asserted, and only after the witness has stated on the record that he or she needs to consult counsel regarding a question of privilege. Deponents shall shut off electronic devices, other than the devices that the deponent is using for the videoconferencing software and to display and access the exhibits, and shall refrain from all private communication during questioning on the record.

7. During breaks in the deposition, the Parties may use a breakout-room feature, which simulates a live breakout room through videoconference. Conversations in the breakout rooms shall not be recorded. The breakout rooms shall be established by the court reporting service prior to the deposition and controlled by the remote deposition or relevant service provider.

8. Remote depositions shall be recorded by stenographic and videographic means; but, the court reporter might not be physically present with the witness whose deposition is being taken. The Parties agree not to challenge the validity of any oath administered by the court reporter, even if the court reporter is not a notary public in the state where the deponent resides.

9. The court reporter will stenographically record the testimony, and the court reporter's transcript shall constitute the official record. The videographer will record the audio and video of the deposition and preserve the recording. The court reporter may be given a copy

of the recording and may review the recording to improve the accuracy of any written transcript.

The court reporter shall mark and preserve exhibits used at the deposition.

10. The Parties agree that the court reporter is an “Officer” as defined by CPLR 3113(b) and shall be permitted to administer the oath to the witness via the videoconference. The deponent will be required to provide government-issued identification satisfactory to the court reporter and this identification must be legible on the video record.

11. The Party that noticed the deposition shall be responsible for procuring a written transcript and video record of the remote deposition. The Parties shall bear their own costs in obtaining a transcript and/or video record of the deposition or any real-time transcript functionality.

12. The Party that noticed the deposition shall provide the remote deposition or relevant service provider with a copy of this Stipulation and Order at least twenty-four hours in advance of the deposition.

13. At the beginning of each deposition, consistent with CPLR 3113(b), the videographer or stenographer shall “put the witness on oath” (CPLR 3113(b)) and begin the deposition with a statement on the record, consistent with 22 NYCRR 202.15(d), that shall include: (i) the officer’s name and address; (ii) the name and address of the officer’s employer; (iii) the date, time, and place (or method) of the deposition; (iv) the party on whose behalf the deposition is being taken; and (v) the identity of all persons present.

14. At the beginning of each segment of the deposition, consistent with 22 NYCRR 202.15(d), the videographer shall begin that segment of the remote deposition by announcing the beginning and end of each segment of the remote deposition.

15. The videographer shall monitor the audio and video transmission and shall stop the record if he or she determines that any participant has been dropped from the remote deposition or is otherwise incapable of participating by reason of technical problems. The monitor, videographer and/or court reporter shall stop the record as soon as he or she becomes aware that a participant has been dropped from the remote deposition or cannot participate by reason of technical problems.

16. The defending attorney shall make objections and interpose instructions not to answer in substantially the same manner as he or she would at an in-person deposition. If the defending attorney is unable to make objections and interpose instructions not to answer by reason of technical difficulties, such a failure to object or to instruct shall not be construed as waiver and the defending attorney shall have an opportunity to object or to instruct as soon as the technical problem has been remedied. Objections and instructions not to answer shall be regarded as timely if made as soon as practicable.

17. The Parties agree to work collaboratively and in good faith with the court reporting agency to assess each deponent's technological abilities and to troubleshoot any issues at least 48 hours in advance of the deposition so any adjustments can be made. Counsel and deponents may test remote deposition software before any remote deposition. The Parties also agree to work collaboratively to address and troubleshoot technological issues that arise during a deposition and make such provisions as are reasonable under the circumstances to address such issues. This provision shall not be interpreted to compel any Party to proceed with a deposition where the deponent cannot hear or understand the other participants or where the participants cannot hear or understand the deponent. Any period on the record during which a deponent or

questioner could not hear or understand the questions or answers due to technical difficulties shall not count toward time limitation under CPLR 3113(b).

18. Counsel shall use best efforts to ensure that they have sufficient technology to participate in a videotaped deposition (e.g. a webcam and computer or telephone audio and sufficient internet bandwidth to sustain the remote deposition). Counsel for the deponent shall likewise use best efforts to ensure that the deponent has such sufficient technology. In the case of non-party witnesses, counsel noticing the deposition shall supply any necessary technology that the deponent does not have.

19. The Parties agree that this Stipulation and Order applies to remote depositions of non-parties under CPLR 3101 and shall work in a collaborative manner in attempting to schedule remote depositions of non-parties. The Party noticing any non-party deposition shall provide this Stipulation and Order to counsel for any non-party under CPLR 3101 a reasonable time before the date of the deposition.

20. The Parties agree that any of the following methods for administering exhibits may be employed during a remote deposition, or a combination of one or more methods:

- (i) Counsel noticing the deposition may choose to mail printed copies of documents that may be used during the deposition to the deponent, the deponent's counsel, counsel for other parties that will appear on the record, and the court reporter. In that event, noticing counsel shall so inform the recipients prior to mailing the documents and shall provide tracking information for the package. Such documents shall be delivered by noon (local-time) the day before the deposition. Recipients shall confirm receipt of the package by electronic mail to Counsel noticing the

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deposition. If printed copies are mailed, every recipient of a mailed package shall keep the package sealed until the deposition begins and shall only unseal the package on the record, on video, and during the deposition when directed to do so by the counsel taking the deposition. Recipients shall proceed to open the documents and review the documents only upon the instruction of the noticing attorney. This same procedure shall apply to any physical copies of documents any other counsel intends to use for examining the witness.

- (ii) Counsel noticing the deposition may share exhibits digitally, such as by e-mailing a compressed zip folder or sharing a link. The exhibits shall be shared to the deponent, the deponent's counsel, the other Party's counsel, and the court reporter, and any other attorneys who have appeared on the record at the deposition. Every recipient of a digital exhibit shall not open the digital exhibit until directed to do so by the counsel taking the deposition. If sending documents digitally, counsel will be mindful of file size limitations, which presumptively should be less than __ MB. Such file transfers shall be password-protected.
- (iii) If the software for the videoconference supports uploading and sharing digital files in real time (e.g., such as the Chat feature on Zoom), then such function may be equivalently used to distribute exhibits to the deponent and participants in real time. Counsel appearing on the record at the deposition and the court reporter shall confirm receipt of the documents to Counsel noticing the deposition. The method of transferring the

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documents shall be password-protected, and counsel taking the deposition shall supply the password immediately prior to the commencement of the deposition.

- (iii) Regardless which method of document-sharing is used, the witness and the defending counsel shall have the right to private copies of the exhibits that allow the witness and defending counsel to independently and fully navigate the exhibit while the deposition is on the record.

Dated:

SO ORDERED:

[_____, J.]

Justice of the Supreme Court of the State of New York

Stipulated to:

[ATTORNEY SIGNATURE BLOCKS]

Exhibit C

VIRTUAL DEPOSITIONS – CAN'T LOOK BACK NOW

Covid-19 has substantially changed the landscape of federal and state litigation. Depositions, for example, are now primarily being conducted virtually using audio and video technology (such as Zoom, WebEx and Skype) to avoid the spread of infection that may occur from an in-person deposition (with numerous individuals, gathered in tight quarters, for extended periods of time). Virtual depositions are likely to become more ingrained in federal and state litigation once the pandemic is over because of significant advancements in technology, the ease with which virtual depositions can be conducted, and the cost efficiencies they generate.

The proliferation of virtual depositions in such a short period of time means litigants are navigating novel issues on a daily basis, including establishing a framework for consistent rules and procedures to govern them. The purpose of this report is to enumerate best practices when conducting virtual depositions. Accordingly, below is a list of provisions that may be incorporated into stipulations between counsel for parties and non-parties governing virtual depositions.

- Court Reporter. The stipulation should provide that: (i) a court reporter may administer the oath to a witness remotely (even if the court reporter is not in the physical presence of the witness);¹ (ii) the transcripts and video recordings may be used by or against all parties in the litigation;² (iii) the recorded video provided in digital form by the court-reporting service may be used as if it were recorded by a certified videographer and each side waives objections based on authenticity;³ and (iv) the individual administering the oath to the witness shall ask the witness to swear that the witness is who the witness claims to be.
- Cooperation. The stipulation should provide that the parties and any non-parties involved in the virtual deposition will cooperate on technical issues regarding the digital file (*e.g.*, assuring audio and video quality, displaying exhibits, ascertaining that only those portions of the deposition that are on record should be recorded, and affixing time stamps) and work collaboratively in good faith with the video-conferencing service to assess each witness's technological abilities and to troubleshoot any issues in advance of the deposition. Federal Rule of Civil Procedure 30(b)(4) provides that a remote deposition in a federal proceeding is permitted by stipulation of the parties or order of the court. Non-parties would be subject to this stipulation or order because they generally may not refuse to proceed with a deposition merely on the grounds that they object to the manner of recording set forth in the subpoena, although in rare circumstances they may seek a protective order.⁴ The

¹ This would comply with Federal Rule of Civil Procedure 28 and New York Civil Practice Law and Rules 3113(d).

² This would be in accordance with Federal Rule of Civil Procedure 30(b)(5) and New York Civil Practice Law and Rules 3117.

³ This would be under Federal Rule of Civil Procedure 29(a) and 22 NYCRR 202.15.

⁴ According to the 2005 Advisory Committee Note to Federal Rule of Civil Procedure 45, "A subpoenaed witness does not have a right to refuse to proceed with a deposition due to objections to the manner of recording. But under rare circumstances, a nonparty witness might have a ground for seeking a protective order under Rule 26(c) with regard to the manner of recording or the use of the deposition if recorded in a certain manner."

stipulation should further provide who will bear the burden of ensuring that the witness has the proper software, hardware, and other relevant equipment to attend a deposition by video conference; when that technology will be made available to the witness; and a mechanism for a “test run,” if needed.

- Vendor. The stipulation should provide for the name of the court reporting service and platform used to record the deposition. Unless otherwise agreed, the stipulation should require that the witness and all counsel be displayed on the platform at all times during the deposition, except when one or more counsel must be taken off to display an exhibit. The stipulation should also state that counsel may elect to have a technical specialist attend the deposition to address technical issues and administer any virtual breakout rooms or an exhibit specialist to ensure that exhibits are properly displayed during the deposition. The stipulation should provide that confidential information may be disclosed to any such specialists involved in the deposition without violating any confidentiality restrictions.
- Exhibits. The parties may stipulate to the timing under and means by which deposing counsel could send the witness and defending counsel exhibits to be potentially marked during the deposition. Such means may include: (a) sending them, pre-marked, by overnight courier in a sealed envelope or banker’s box(es) in advance of the deposition; (b) making them available through a pre-arranged FTP or file-sharing site or emailing pre-marked exhibits to the witness, defending counsel, all attending counsel, and the court reporter in advance of the deposition; (c) using a video-conferencing platform or other electronic application for presenting exhibits which will enable deposing counsel to share exhibits with the witness, court reporter, and all counsel attending; or (d) any other means agreeable between counsel. For hard-copy exhibits transmitted in advance, the stipulation should provide that the sealed exhibits must remain sealed and unopened until the deposition begins and the witness is instructed on the record to open a sealed hard-copy exhibit (at which time others in possession of sealed exhibit folders may open the sealed exhibit, as well). The parties should also provide for a mechanism to address last-minute exhibits not provided to the witness or defending counsel in advance.
- Witness Notes. Witnesses should testify on the record that they do not have any notes or documents available to them while the deposition is pending, except that which they disclose and provide to all parties. Any documents reviewed, or notes made, by witnesses while on the record shall be preserved and made available to all parties, appropriate non-parties and counsel.
- Witness Communications. The stipulation should provide that there should be no unrecorded conversations between the witness and any counsel involved in the case during a remote deposition while the witness is on the record. All counsel may be asked to confirm on the record and at the beginning and end of each deposition that they will not communicate and have not communicated with the witness while the witness is on the record other than in the presence of the court reporter and videographer. However, nothing in the stipulation should prevent a witness from seeking advice regarding the application of a privilege or immunity from testifying during the course of a deposition, nor should the stipulation prevent defending counsel from initiating a private communication off the record with a witness for the purpose of determining whether a privilege should be asserted or for another authorized purpose, so long as defending counsel first states his or her

intention on the record before initiating such communication. Nothing in the stipulation should prevent the questioner from asking the witness at any time who else, if anyone, is in the room with the witness.

Virtual depositions are becoming more prevalent in federal and state litigation every day, causing a major shift in the manner in which cases are litigated on a rapid basis. It is important that litigants adapt and embrace technology permitting the use of virtual depositions in place of in-person ones. In anticipation of a virtual deposition, parties and non-parties should enter into a clear stipulation to ensure the deposition is streamlined, minimizes the risk of technical problems, focuses on maintaining the integrity and reliability of the record, and governs the conduct of the parties and non-parties involved. A copy of a model stipulation incorporating is set forth in Exhibit A to demonstrate how these objectives may be achieved.

October 28, 2020

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Federal Procedure Committee

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Persons marked with an asterisk are principal authors of the Report.

EXHIBIT A
REMOTE DEPOSITION STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for Plaintiffs, on the one hand, and counsel for Defendants, on the other hand, that:

Purpose of this Stipulation. In light of the ongoing Covid-19 pandemic, the Parties and Non-Parties shall meet, confer, and cooperate with one another regarding the scheduling of Depositions and the procedures for taking Depositions. Parties agree to take reasonable steps, in good faith, to enable witnesses, Deposing Counsel, Defending Counsel, and Attending Counsel to complete Depositions in a manner that takes into account and accommodates, as necessary, the needs of dependent care and personal health and safety.

Definitions

“Attending Counsel” means any legal counsel for a Party or Non-Party that is attending a Deposition, other than Deposing Counsel or Defending Counsel.

“Court Reporter” means an individual retained by the Party or Parties taking a Deposition to transcribe the Deposition who is authorized to administer oaths under either federal or state law.

“Defending Counsel” means the legal counsel for the Party, Parties, Non-Party, or Non-Parties being deposed who is principally defending the Deposition. For a witness who is represented by personal and company counsel for the purpose of his or her Deposition, both personal and company counsel shall be treated as “Defending Counsel.”

“Deposing Counsel” means the legal counsel for the Party or Parties noticing a Deposition.

“Deposition” means any deposition upon oral examination taken pursuant to Federal Rule of Civil Procedure 30 or any court order in the litigation.

“Exhibit” means any document or electronically stored information that is marked as an exhibit at a Deposition.

“Party” or “Parties” means any plaintiff, any defendant, and any of their current or former employees, executives, officers, or directors.

“Non-Party” or “Non-Parties” means all natural or legal persons that are not Parties from whom a Party is seeking a Deposition in the litigation.

In-Person Depositions

Nothing in this Stipulation shall prevent a Deposition from proceeding in person if Deposing Counsel, Defending Counsel, and the witness agree.

If the noticing Party, the responding Party or Non-Party, and the witness agree, a Deposition may take place in person at an agreed upon location with the noticing Party, responding Party or Non-Party, witness, court reporter, and videographer appearing in person.

All Parties and appropriate Non-Parties should confer in advance to ensure that only those attorneys who plan to question or represent the witness will appear in person. Any other Party may participate in any in-person Deposition by telephone or via video conference.

Deposing Counsel and Attending Counsel intending to participate by telephone shall cooperate in good faith to facilitate such participation.

Remote Depositions

Notice of Remote Deposition: Any Party may notice a Deposition to be taken remotely pursuant to the terms of this Stipulation by so indicating in the notice of deposition. All objections to the use and admissibility of the transcript or video of a Deposition taken pursuant to this Stipulation based solely on the fact that the Deposition was taken by remote means are deemed waived. The Party that noticed the Deposition shall be responsible for procuring a written transcript and video recording of the Deposition. The Parties and any Non-Parties shall bear their own costs in obtaining a transcript or video recording of the Deposition and copies of any Exhibits.

Notice of Change from In-Person to Remote Deposition: If a Deposition was previously anticipated or agreed to be an in-person Deposition, the witness or that person's attorney may request the Deposition be changed to a remote Deposition. Such a request to change the format for the Deposition should be provided as soon as reasonably practicable, but no later than seven days in advance of the Deposition. The Parties and any appropriate Non-Party will work cooperatively and timely to arrange for the necessary logistics required for the change in format of the Deposition.

Remote Administration of Oath and Recording of Video: The Parties agree that a Court Reporter may administer the oath to a witness remotely, even if the Court Reporter is not in the physical presence of the witness. Further, if a Court Reporter is not authorized to take oaths in the place of examination pursuant to Federal Rule of Civil Procedure 28, the Parties agree that (i) extenuating circumstances warrant proceeding with the administration of such oaths remotely and (ii) the transcripts and video recordings may be used by or against all Parties in the litigation to the same extent that would otherwise be permissible under applicable court orders, rules of court, rules of procedure, and rules of evidence, including Federal Rule of Civil Procedure 30(b)(5). The Parties further stipulate, pursuant to Federal Rule of Civil Procedure 29(a), that the recorded video provided in a digital file by the court-reporting service or platform vendor may be used as if it were a recording prepared by a certified videographer and that each side will waive any objections based on authenticity. The individual administering the oath to the witness shall ask the witness to swear that the witness is who the witness claims to be, and, if appropriate, have the witness show identification.

The Parties and any appropriate Non-Party will cooperate on technical issues regarding the digital file (*e.g.*, assuring audio and video quality, displaying exhibits, ascertaining that only those

portions of the deposition that are on record should be recorded, and affixing time stamps). The time shown on the transcript and video shall be the local time in the place where the witness is located. Absent a special need, the witness will not have access to or use of a real-time feed from the Court Reporter at any time during the Deposition. Both the Court Reporter and the Deposition vendor or videographer will maintain an official record of the Deposition. Accordingly, both will need to agree when proceedings are on or off the record. Once proceedings go on the record, absent extenuating circumstances, all Parties and appropriate Non-Parties must agree before the record stops.

Video-conferencing: Where the witness, Defending Counsel, or the Deposing Counsel are appearing for the Deposition remotely, then a video-conferencing service will be used, and such video may be recorded for later use in proceedings in this case, including trial. The video-conferencing software must have sufficient security features in place to prevent the public disclosure of protected information designated under the Confidentiality Order in the litigation. The Parties and any appropriate Non-Parties will discuss any further details related to the video-conferencing service in advance of the Deposition, and, if there are any disagreements, will raise those with the Court. To the extent possible, the video-conferencing service should display the witness, Defending Counsel, and Deposing Counsel on the video screen at all times, unless one or more counsel must be taken off screen to display an Exhibit; however, the witness should always be on screen. Statements by the witness, Deposing Counsel, Defending Counsel, Attending Counsel, the Court Reporter, and the videographer shall be audible to all participants, and they should each strive to ensure their environment is free from noise and distractions.

The Parties and any appropriate Non-Party will cooperate on technical issues regarding the digital file (*e.g.*, assuring audio and video quality, displaying exhibits, ascertaining that only those portions of the deposition that are on record should be recorded, and affixing time stamps). Deposing Counsel and Defending Counsel shall meet, confer, and cooperate to ensure that the witness has technology sufficient to attend a Deposition via remote means. If necessary, this shall include arranging for the witness to participate in a “test run” of the Deposition video-conferencing software at least three business days or five calendar days before the scheduled date of the Deposition (whichever is longer).

Vendor and Platform

Plaintiffs are using _____ for court reporting, videography, and remote video deposition services in this case. _____ intends to use the _____ platform, which allows for the witness, Attending Counsel, Deposing Counsel, Defending Counsel, Court Reporter, and videographer to participate in a Deposition without attending the Deposition in person. Defendants are using _____ for court reporting, videography, and remote video deposition services in this case. _____ intends to use the _____ platform, which allows for the witness, Attending Counsel, Deposing Counsel, Defending Counsel, Court Reporter, and videographer to participate in a Deposition without attending the Deposition in person. _____’s and _____’s cost structures for the services being rendered are attached to this stipulation. To the extent any Deposition will proceed using a service other than as set forth above, details regarding the video conferencing to be used for each Deposition will be made available to all Parties and any appropriate Non-Parties at least five business days before the Deposition.

Deposition Recording

In addition to recording the Deposition by stenographic means, the deposing Party may record the Deposition by video. The video recording shall be limited to the witness; however, this provision is separate from, and does not supplant, Section __ above as to the individuals that should be *displayed* (rather than recorded for the official Deposition video) during the Deposition. Deposing Counsel is responsible for ensuring that the remote means used for a Deposition allow for the Court Reporter to accurately record the witness's testimony. Either Deposing Counsel or Defending Counsel may elect to have a technical specialist attend a Deposition taken by remote means to ensure that technical issues are dealt with in a timely manner and to administer any virtual breakout rooms. Deposing Counsel may also elect to have an exhibit specialist attend a Deposition taken by remote means to ensure that Exhibits are properly displayed during the Deposition. If Deposing Counsel uses an exhibit specialist, Deposing Counsel will act in good faith to make their exhibit specialist available to assist the Defending Counsel or other Parties or appropriate Non-Parties to present any Exhibits to the witness during cross-examination or redirect. For purposes of clarity, Confidential or Highly Confidential information may be disclosed to such technical or exhibit specialists during the course of a Deposition without violating the Court's Confidentiality Order, and such technical and exhibit specialists shall be bound by the Confidentiality Order.

Exhibits

Generally: Deposing Counsel shall be responsible for ensuring that any Exhibits that they wish to mark and use at the Deposition can be shown to the witness and Defending Counsel in a manner that enables the witness and Defending Counsel to independently review the Exhibits during the course of the Deposition. Such means of marking and using Exhibits for the Deposition shall include, by way of example: (a) using a video-conferencing platform or other electronic application for presenting Deposition Exhibits (*e.g.*, Remote Counsel/Cameo, eDepoze, or Zoom screen-sharing) which enables Deposing Counsel to share Exhibits with the witness, Court Reporter, Defending Counsel, and Attending Counsel; (b) sending via overnight courier sealed courtesy copy or pre-marked Exhibits to the witness (and Defending Counsel, if requested) in advance of the Deposition; (c) making available via a pre-arranged FTP or file-sharing site or emailing pre-marked Exhibits to the witness, Defending Counsel, Attending Counsel, and the Court Reporter in advance of the Deposition; or (d) any other means to which the Deposing Counsel and Defending Counsel agree. If the remote means used do not permit marking of Exhibits remotely, Deposing Counsel shall either pre-mark Exhibits or direct the witness and other attendees as to how Exhibits should be marked.

Electronic Exhibits: A Party may use electronic Exhibits in connection with a Deposition so long as the Party provides notice to the witness and Defending Counsel and arranges for the technology to permit the presentment of the electronic Exhibit at the Deposition to the witness, Defending Counsel, and Attending Counsel. The Parties will provide electronic copies of Exhibits introduced during the course of a Deposition, either via email, deposition exhibit software, or via a pre-arranged FTP or file-sharing site, to ensure that Defending Counsel and Attending Counsel may participate in the Deposition. Similarly, where an Exhibit is used electronically and was not

provided in hard copy before the Deposition, the Parties will provide electronic copies of that document by the same means described in the previous sentence. Deposing Counsel shall not begin questioning a witness concerning an electronic Exhibit until that Exhibit has been received by Defending Counsel and Attending Counsel.

Hard-Copy Exhibits: At the sole discretion of the noticing Party, a remote Deposition may be conducted using sealed, pre-marked, hard-copy paper Exhibits as the official Exhibits. Such hard-copy Exhibits shall be transmitted so that they are received at least by noon of the business day before the Deposition (with tracking information available upon request) to the witness, Defending Counsel, and the Court Reporter. Upon delivery, each recipient shall confirm by email to Deposing Counsel receipt of the Exhibits. Anyone receiving sealed hard-copy Exhibits agrees pursuant to this Stipulation that the sealed Exhibits must remain sealed and unopened until the Deposition begins and the witness is instructed on the record to open a sealed hard-copy Exhibit (at which time others in possession of sealed exhibit folders may open the sealed exhibit, as well). Deposing Counsel may ask the witness and others receiving sealed exhibits to confirm on the record that no exhibit was opened prior to the time they are opened during the Deposition. At the conclusion of a Deposition, any unused exhibits will remain sealed and, within two business days, shall be returned, unopened, to the counsel who provided those exhibits with a prepaid, self-addressed return shipping label or envelope. All counsel planning on questioning the witness with an Exhibit will attempt in good faith to include in their hard-copy set all the exhibits on which they plan to question the witness; however, nothing in this Stipulation is intended to prevent, nor in fact prevents, counsel from preparing for the Deposition until the time that it occurs or from introducing during the Deposition additional Exhibits not previously transmitted in hard copy.

Courtesy Hard Copies for Depositions Conducted with Electronic Exhibits: Upon request by the witness or Defending Counsel, courtesy hard copies of Exhibits will be provided to the witness and Defending Counsel at an agreed upon time (*e.g.*, 48 hours) prior to the Deposition. Voluminous exhibits upon which only a portion of the document will be the subject of questioning (beyond authentication and evidentiary questions) need not be transmitted in hard copy and may be presented electronically, but Deposing Counsel will provide excerpts of key portions of the document as part of the hard-copy courtesy set. If these hard copies are delayed in arriving, the Parties and any appropriate Non-Parties will meet and confer on rescheduling the Deposition, if necessary. All counsel planning on questioning the witness with an Exhibit will attempt in good faith to include in the courtesy hard copies all the Exhibits on which they plan to question the witness. For the avoidance of doubt, the official Exhibit will remain the electronic copy presented to the witness and all participants.

Last-Minute Exhibits: The Parties recognize that there may be last-minute Deposition Exhibits, which are not able to be provided to the witness or Defending Counsel in advance. Nothing in this Stipulation is intended to prevent, nor in fact prevents, Deposing Counsel from preparing for the Deposition until the time that it occurs or from introducing during the Deposition additional Exhibits not previously transmitted in hard copy. Questioning about a last-minute Exhibit shall not commence until Defending Counsel has received a copy of the exhibit electronically via one of the electronic methods specified in this Stipulation.

Witness Notes

Witnesses will testify on the record that they do not have any notes or documents available to them while the Deposition is on the record, other than any that are disclosed and provided to all Parties and appropriate Non-Parties. Any documents reviewed, or notes made, by witnesses while on the record shall be preserved and made available to all Parties, appropriate Non-Parties and counsel. Upon conclusion of the Deposition, the Court Reporter will make available or circulate the Exhibits to all counsel attending the Deposition.

Witness Communications

There should be no unrecorded or unnoted conversations between the witness and any counsel involved in this case (including Defending Counsel) during a remote Deposition while the witness is on the record, and Deposing Counsel may ask the witness and Defending Counsel to certify, on the record, that no such conversations have taken place. Further, witnesses in Depositions taken pursuant to this Stipulation shall not use or consult any means of communications while on the record during the Deposition (other than audio and video communications used to conduct the Deposition itself), including, without limitation, electronic communications (email, text, social media, or the chat function in a video-conferencing system) and other communications (telephone). All counsel attending the Deposition will also stipulate, on the record and at the beginning and end of each Deposition, that they (and any individual working with them) will not communicate and have not communicated with the witness orally, in writing, or electronically (including, but not limited to, emails, texts, or posts). Nothing in this Stipulation prevents a witness from seeking advice regarding the application of a privilege or immunity from testifying during the course of a Deposition taken pursuant to this Stipulation. Nothing in this Stipulation prevents Defending Counsel from initiating a private communication off the record with a witness for the purpose of determining whether a privilege should be asserted or for another salutary purpose (e.g., admonishing the witness to answer the question asked), provided Defending Counsel first states Defending Counsel's intention on the record before initiating such communication. Nothing in this Stipulation shall prevent Defending Counsel from being physically present in the same room as the witness regardless of whether a Deposition is treated as in-person or remote under this Stipulation.

During breaks in the Deposition, the Parties may use a breakout room feature provided and controlled by the video-conferencing service, which simulates a live breakout room and may be used to discuss a topic the deponent should not hear. Conversations in the breakout rooms shall not be recorded. Off-the-record communications are or are not discoverable to the extent permitted under the rules and practices in the court where the case is pending.

Technical Audio or Visual Issues

Should technical issues, such as audio or video issues, prevent the Court Reporter, witness, Deposing Counsel, or Defending Counsel from reliably seeing one another, hearing one another, or, in the case of the Court Reporter, transcribing the testimony at any point during a Deposition taken pursuant to this Stipulation, the Deposition shall be recessed until the technical issue is resolved. Should technical issues prevent the Court Reporter from reliably hearing or transcribing the testimony at any Deposition taken pursuant to this Stipulation and such technical issue cannot be remedied in a timely manner, Deposing Counsel, Defending Counsel, and Attending Counsel shall meet, confer, and cooperate with one another to address the problem, including, but not limited to, rescheduling or continuing the Deposition. These provisions shall not be interpreted to compel any Party or appropriate Non-Party to proceed with a Deposition where the witness cannot hear or understand the other participants or where the participants cannot hear or understand the witness. The Parties and any appropriate Non-Parties will also act in good faith to account for any time lost to technical issues to permit the deposing Party to use the full time it is permitted for the Deposition.

If a technical issue prevents Defending Counsel from hearing a question or interposing a timely objection on the record, then Defending Counsel shall notify the Deposition attendees as soon as possible (*e.g.*, by using the chat features of the video conference or emailing counsel). Defending Counsel's objection to that question is preserved if (i) the objection is asserted promptly on the record after the technical issue is resolved, or (ii) if the technical issue cannot be resolved and the Deposition is continued, the objection is asserted in writing to Deposing Counsel, Attending Counsel, and the Court Reporter within three business days of receiving the rough or final transcript, whichever comes first, that includes the question at issue.



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January 19, 2021

By Email

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Re: New York City Bar Association Response to Request for Public Comment on a Proposal to Promulgate a New Commercial Division Rule on Remote Depositions and a Remote Deposition Protocol

Dear Ms. Millett:

We write in response to your November 20, 2020, request for public comment on a proposal to promulgate a new commercial division rule on remote depositions and a remote deposition protocol (the “Proposal”).

The City Bar’s Council on Judicial Administration and State Courts of Superior Jurisdiction and Litigation Committees have considered the Proposal. As discussed below, we support the concept embodied by the Proposal but also have concerns regarding certain aspects of the Proposal. Ultimately, rather than suggest changes to the Proposal, we recommend that the Proposal be held in abeyance for at least six months so that it can be considered in light of rapidly and robustly developing practical experience of the Commercial Division in this area.

Lawyers have been doing remote depositions by telephone and video for decades, but as the Proposal notes, the pandemic has given rise to additional complexity and concerns when conducting remote depositions and have made remote depositions the “rule” rather than the “exception.”

As best we can ascertain, the Commercial Division justices and counsel have adapted with little difficulty to the increased use of remote depositions. As a result, the status quo, even without the Proposal, is that remote depositions are being – and will continue to be - conducted largely without incident. Thus, we see no immediate need for a rule to further guide the court and parties in this developing area of practice.

The Proposal addresses many issues that arise in in connection with remote depositions and we think the idea of having a model remote deposition protocol is a very helpful one. However, best practices regarding remote video proceedings are continuing to evolve. Deferring comment and decision on the Proposal would permit commenters to address any issues that arise in the coming months, and perhaps to propose changes to the Proposal that would more thoroughly address potential drawbacks of remote depositions.

As an example of a point of discussion within the committees, the Proposal might be more effective if it allowed for remote depositions by consent without requiring that the court order the deposition. It is not clear why a court order is required when the parties agree to do a remote deposition.

Another concern about the Proposal is the requirement for motion practice if the parties cannot agree on whether or how to do a remote deposition. Discovery disputes routinely are disposed of in the Commercial Division without the need for formal motion practice and it is not clear why the rule should be different when it comes to remote depositions. We also question whether “good cause” might be a more appropriate standard for determining whether a remote deposition should take place when there is a dispute regarding a remote deposition.

A strength of the Proposal is that the considerations in paragraph 1.b. are neither mandatory nor exclusive, allowing Commercial Division justices to exercise their discretion in resolving discovery disputes, as they now do. Additional considerations might also include the witness’ access to the equipment and internet service necessary for the deposition efficiently to take place, as well as the need for interpreters.

Delaying adoption of the Proposal would allow the City Bar and others to consider additional issues that may arise over the coming months, and to convey further input in final comment letters to the Proposal.

Eileen D. Millett, Esq.
Office of Court Administration
January 19, 2021

In sum, we believe the advantages and drawbacks of remote depositions continue to be evaluated by courts and lawyers. The pandemic has effectively provided a laboratory of necessity in which the evaluation continues and there are likely additional lessons to come out of this period. Deferring adoption of the Proposal would provide the legal community additional opportunities to take advantage of these lessons. If deferral is not possible, we respectfully request that the concerns we have raised above be considered in the final formulation of the rule. As always, we stand ready to assist and would be pleased to discuss these comments with you in further detail if that would be helpful.

Respectfully,

Michael P. Regan, Chair
Council on Judicial Administration

Bart J. Eagle, Chair
State Courts of Superior Jurisdiction Committee

John M. Lundin, Chair
Litigation Committee

Cc: Maria Cilenti, City Bar Senior Policy Counsel
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