



**COUNCIL ON JUDICIAL  
ADMINISTRATION**

---

MICHAEL P. REGAN  
**CHAIR**  
900 THIRD AVENUE  
NEW YORK, NY 10022  
phone: (212) 508-6700  
Fax: (212) 371-1084  
regan@thsh.com

**STATE COURTS OF SUPERIOR  
JURISDICTION COMMITTEE**

---

BART J. EAGLE  
**CHAIR**  
1700 BROADWAY, 41ST FLOOR  
NEW YORK, NY 10019  
Phone : (212) 586-0052  
Fax : (212) 586-5491  
bje@barteaglelaw.com

**LITIGATION COMMITTEE**

---

JOHN M. LUNDIN  
**CHAIR**  
26 BROADWAY  
NEW YORK, NY 10004  
Phone : (212) 344-5400  
Fax : (212) 344-7677  
jlundin@schlamstone.com

December 18, 2020

**By Email**

Eileen D. Millett, Esq.  
Counsel  
Office of Court Administration  
25 Beaver Street, 11th Floor  
New York, NY 100041  
[rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov)

**Re: New York City Bar Association Response to Request for Public Comment on a Proposed New Commercial Division Rule to Allow Virtual Evidentiary Hearings and Non-Jury Trials on Consent**

Dear Ms. Millett:

We write in response to your October 22, 2020, request for public comment regarding a proposed new Commercial Division rule to allow virtual evidentiary hearings and non-jury trials on consent (the “Proposal”).

The City Bar’s Council on Judicial Administration and State Courts of Superior Jurisdiction and Litigation Committees have considered the proposed new Commercial Division rule permitting remote video evidentiary hearings and non-jury trials on consent. As discussed below, we have concerns regarding several aspects of the proposed rule. 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.

There is general agreement that the Courts should, where appropriate, conduct evidentiary hearings and non-jury trials using remote video technology. The pandemic has accelerated the introduction of remote video proceedings in the state courts, and in many cases the benefits of employing remote video technology to conduct conferences, hearings, and bench trials—even after the pandemic no longer requires remote participation—are clear. Judges have deftly adopted

remote video proceedings. As a result, the status quo, even without the Proposal, is that remote video evidentiary hearings and bench trials already are being conducted.

Best practices regarding remote video proceedings are continuing to quickly develop, as courts and attorneys continue to adapt to improve efficiency, productivity, access, and fairness to the parties. Moreover, because courts already have exercised their discretion to conduct conferences, arguments, hearings and trials through remote video means, we see little harm in holding the Proposal in abeyance to allow continued evaluation of remote video proceedings. This deferral would permit the City Bar to address any issues that arise in the coming months, and to propose changes to the Proposal that would more thoroughly address potential drawbacks of remote video proceedings.

As an example of a point of discussion within the committees, there was considerable, but not universal, belief that that the Proposal should be modified to remove the requirement that all parties consent to remote video proceedings. As written, the Proposal gives one party the right to veto the court's determination that remote video proceedings would more efficiently resolve a hearing or bench trial. The rule might be more effective if it instead provided that prior to conducting remote video proceedings, courts should permit parties to be heard (but not necessarily to engage in formal motion practice) regarding whether proceedings should be conducted in-person or by remote video. There are many reasons parties and judges may prefer in-person proceedings in particular cases, including to properly cross-examine and adequately weigh the credibility of witnesses. Further, under present circumstances, where many courts are simply unable to conduct in-person proceedings, the right of one party to refuse consent could interfere with the courts' administration of their docket. On the other hand, in certain cases remote proceedings may be inappropriate and prejudicial to one party if there is a significant disparity between the capabilities and resources of the parties or law firms. Courts have and will continue to evaluate the aptness of remote video proceedings in pending cases. If the Proposal is not immediately adopted, courts and litigants will have additional opportunities over the coming months to evaluate whether this unilateral ability to refuse consent should be replaced with alternate procedures.

Another example was over whether it should distinguish between evidentiary hearings and bench-trials, and whether different procedures should be adopted for each. For example, remote video proceedings may be suitable for certain types of evidentiary hearings but ill-suited for bench-trials involving numerous fact witnesses. Delaying adoption of the Proposal may provide additional guidance on these issues, as well as additional concerns that may arise over the coming months, that could be incorporated in a final comment to the Proposal.

Eileen D. Millett, Esq.  
Office of Court Administration  
December 18, 2020

In sum, we believe the advantages and drawbacks of remote video proceedings 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.

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