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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

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