From: Jerry Madden
To: RulesCommittee Secretary
Subject: Response to Request for Comments on Emergency Rule
Date: Friday, May 08, 2020 2:29:29 PM

I am an appellate attorney and am aware of the varying degrees to which courts have weened themselves off of parties sending in hard copies of briefs, appendices, etc. Some courts are virtually digital in this regard, such as the Sixth Circuit. There should be no reason for parties send hard copies of filings, let alone multiple copies. A virtual clerk's office could function much more efficiently than continuing to require paper copies that are wasteful and inefficient.

Jerry Madden
THE MADDEN LAW GROUP PLLC
(office)
(direct)
(cell)
https://TheMaddenLawGroup.com
Bio

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From: Davidson, George
To: RulesCommittee Secretary
Subject: Civil Rule 43(a)
Date: Wednesday, May 20, 2020 4:04:36 PM

Dear Advisory Committee:

I suggest that the Advisory Committee as a matter of urgency consider amending Rule 43(a), which contains an unduly restrictive standard for permitting live testimony from a remote location: "For good cause in compelling circumstances and with appropriate safeguards the court may permit testimony in open court by contemporaneous transmission from a different location." In an age in which arbitration tribunals routinely permit such testimony and state courts routinely conduct arraignments and other steps in criminal proceedings by video, Rule 43(a) is an anachronism. In the present health emergency where the pandemic seems likely to inhibit travel for some time to come, Rule 43(a) is even more out of step. I suggest that at least in the case of a witness who cannot be compelled to appear in the courtroom, Rule 43(a) should permit remote testimony without a showing of good cause or compelling circumstances. (I note that I speak for myself and not for the firm in which I am senior counsel and not for any other organization with which I am affiliated.)

George Davidson | Senior Counsel

Hughes Hubbard & Reed LLP

| bio

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From: Stewart Weltman
To: RulesCommittee Secretary
Subject: Electronic Depositions during the crisis and thereafter while social distancing
Date: Thursday, May 07, 2020 12:51:01 PM

Since depositions are the means by which civil cases proceed to summary judgment and trial, there has to be a safe means of taking them. Since travel is now out of the question and may be out of the question for many attorneys who are at risk for at least a year if not years to come, video or phone depositions are going to be necessary.

I have been taking electronic depositions as a matter of preference for about the last 6 years and have gained considerable experience in the process that is required. Taking and defending (which I chose not to do pre-crisis for reasons explained below) present different problems.

First - there is the cost. A problem for both. I litigate large civil matters so cost is not an issue. But for smaller cases or for parties who just cannot afford the expense, there should either be some sort of expense relief or telephonic depositions should be used.

TAKING DEPOSITIONS REMOTELY:

The there is one logistical problem that exists with taking video depositions: the management and presentation of documents for the witness' review during a deposition. Most attorneys defending depositions object to their clients reviewing documents on a computer screen for obvious reasons - when it comes to large documents - having a hard copy allows a witness to review a document for completeness and for quick skimming - things that are not readily available in an electronic format on a screen. Perhaps if the witness can word search pdf documents on the device on which the document is presented could assuage this concern for those defending?

My solution is somewhat cumbersome but it has worked. I send the court reporter complete sets (in duplicate) of pre- marked hard copies of documents in separate Manila folders so that the reporter can pull out any particular document upon request to give to the witness and their counsel. But if there were some means to require witnesses and their counsel to accept electronic review with word searching capability that would be a solution to the only cumbersome process for taking depositions and it may provide a solution for defending the deposition too.

DEFENDING DEPOSITIONS REMOTELY:

While I prefer taking depositions remotely, defending them presents issues that have caused me to eschew defending them remotely. Mostly it has to do with not being physically present for the witness and the court reporter.

The inability of the witness to see the attorney's body language as they choose to object to a question presents the most serious problem for defense of depositions. Answers may come out before the attorney can lodge an objection and result in testimonial records that become muddled. This, of course, happens when an attorney is present but it will likely become more prevalent if the defending attorney is not physically present.

Perhaps there could be a required delay of 5 seconds or so between each question and answer

as a solution to this problem? Perhaps more liberality could be extended to errata sheets submitted by witnesses such that if they do change an answer due to confusion during the deposition, the fact that the change occurred could be admissible at trial? And if this approach were adopted and changes are made, perhaps the deposing party could be allowed to take a supplemental deposition - over the phone -to keep expenses down - to be able to inquire as to the reasons for any material changes and allow judges the discretion to rule as to whether the change is admissible based upon the court's determination that the explanation for the change is not due to confusion.

Moreover, after 41 years of doing this there is no doubt that in person defense of depositions is preferred for other reasons including the attorney being able to gauge a witness' confusion or worse yet the witness becoming tired. But perhaps these are problems that will just have to be dealt with due to the fact that depositions are the sorely needed to proceed to the resolution of civil cases.

I am sure that others have deduced that the logistics of depositions are going to have to change if civil cases are to be resolved. I hope this is read by someone and that it provides some needed insights. I am happy to assist in any way.

Stewart Weltman

Sent from my iPad

20-CIV-03

Labaton Sucharow

Ira A. Schochet
Partner
[redacted] direct
[redacted] main
[redacted] fax

New York Office

June 1, 2020

VIA EMAIL
RulesCommittee_Secretary@ao.uscourts.gov

Honorable David G. Campbell, Chair, and Members
U.S. Courts Committee on Rules of Practice and Procedure

RE: Public Input on Possible Rule Amendments

Dear Chairman Campbell and Committee Members:

Labaton Sucharow LLP respectfully submits this response to the Committee on Rules of Practice and Procedure (the "Committee") and its five advisory committees' invitation for public input on possible rule amendments that could ameliorate the effects of future national emergencies on the operations of the courts and on litigants.

Our firm is a member the National Association of Shareholder & Consumer Attorneys ("NASCAT"), which submitted its response on this date. We join in the proposals provided by NASCAT, and hereby submit additional suggestions.

Suggested Amendments to the Fed R. Civ. P. Relating to Emergencies

I. Service of Summons

During the period of a declared emergency, personal service should be obviated. Fed. R. Civ. P. 4 (e)(2) and 4(h)(1) should be amended to provide that during a declared national emergency, or in a state where an emergency has been declared, service by registered or certified mail to the defendant's last known address is sufficient.

II. Service of All Other Papers, Including Discovery Responses:

FRCP 5(b)(2)(E) should be amended to eliminate the need for consent to service by other electronic means during a period when an emergency has been declared. The rule already provides that service is "not effective if the filer or sender learns that it did not reach the person to be served". If an email address is incorrect, it usually triggers a bounce-back message. This is similar to a returned

mailed envelope marked "wrong address" or "unknown address" when service is attempted by mail (which is permitted under Rule 5(b)(2)(C)).

III. Extensions of Time

Rule 6(b) should be amended to provide that upon the declaration of an emergency by an authorized state or federal official, there should be an automatic extension of time for all filings and service requirements, whether for twenty-one (21) days or otherwise. At such time, a person who may be dealing with the immediate impact of a situation resulting in such an emergency declaration should not have to worry about having to secure a court order for an extension of time. Alternatively, and at the least, "good cause" and "excusable neglect" should be defined to include emergencies.

Suggested Amendments to the Fed. R. App. P. Relating to Emergencies

I. Oral Argument and Appeal Conferences

Fed. R. App. P. 34(b) should be amended to allow alternative means for the Court to conduct oral argument, and to allow parties to request such alternative means in extraordinary circumstances. In particular, it should state: "In extraordinary circumstances, the Court in its discretion, or upon request by one or more of parties, may hear oral argument using telephone, video conference, or other contemporaneous electronic means".

Further, Fed. R. App. P. 33, provides as follows: "The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement". This should be modernized and made more flexible regarding the means for holding the conference. In particular, it should provide that such conferences may held by video conference, or other contemporaneous electronic means.

II. Extensions of Time

Similar to the suggested amendment to FRCP 6, Fed. R. App. P. 26(b) should be amended to provide for automatic extensions of time when there is a declared emergency, using the same language in the suggested amendment to FRCP 6(b) above, as a new Fed. R. App. P. 26(b)(3), or, at the least, adding an Advisory Committee Note that "good cause" is defined to include a declared national emergency or if the parties are in a state where an emergency has been declared.

III. Requirement to File Paper Copies

Fed. R. App. P. Rule 25 concerns filing and service of papers generally. Rule 25(e), titled "Number of Copies," should be amended to provide as follows: "In its discretion a court may dispense with the requirement to file or furnish paper copies by standing order or by order in a particular case".

We thank the Committee for its careful attention to these matters.

Respectfully submitted,

Ira A. Schochet

Labaton Sucharow
Ira A. Schochet | Partner
140 Broadway, New York, New York 10005
T: (212) 907-0864 | F: (212) 883-7064
E: ischochet@labaton.com | W: www.labaton.com

From:	ischochet
To:	RulesCommittee Secretary
Cc:	Hallowell, Serena; Gardner, Jonathan
Subject:	Public Input on Possible Rule Amendments
Date:	Monday, June 01, 2020 7:28:45 PM
Attachments:	2394649_1.pdf

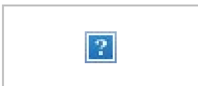
Dear Sir/Madame:

Please provide the attached submission to the Chairman and Members of the Committee on Rules of Practice and Procedure.

We appreciate your kind attention to this matter.

Sincerely,

Ira A. Schochet



Ira A. Schochet | Partner

T: | F:

E: | W: www.labaton.com

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From: Roberts, Stephen T.
To: RulesCommittee Secretary
Subject: RE: Comment on Emergency Rulemaking
Date: Monday, June 01, 2020 12:21:01 PM

Thank you.

My letter should have noted that I am the Co-Chair of the Federal Procedure Committee of the Commercial and Federal Litigation Section of the New York State Bar Association.

From: RulesCommittee Secretary [mailto:RulesCommittee_Secretary@ao.uscourts.gov]
Sent: Monday, June 01, 2020 8:53 AM
To: Roberts, Stephen T.
Subject: RE: Comment on Emergency Rulemaking

Thank you for your comments on emergency rulemaking. Substantive comments received will be posted on the Judiciary's website under Invitation to Comment on Emergency Rulemaking. Personal information beyond the name of the submitter – such as physical address, email, and phone – will be redacted for privacy.

Based on comments from the bench, bar, and general public, the Committee on Rules of Practice and Procedure and its five advisory committees on appellate, bankruptcy, civil, criminal, and evidence rules will determine whether to transmit amendments to the Judicial Conference for potential adoption by the Supreme Court and Congress.

We appreciate your interest in the rulemaking process. More information about rulemaking can be found on uscourts.gov under About The Rulemaking Process.

RULES COMMITTEE SECRETARY
Rules Committee Staff | Office of the General Counsel
Administrative Office of the U.S. Courts

From: Roberts, Stephen T. <S>
Sent: Thursday, May 21, 2020 9:15 PM
To: RulesCommittee Secretary <RulesCommittee_Secretary@ao.uscourts.gov>
Cc: 'laurelkretzing' () <>
Subject: Comment on Emergency Rulemaking

To the Committee:

In response to the invitation for public comment extended by the Committee on Rules of Practice and Procedure and its five advisory committees for the appellate, bankruptcy, civil, criminal and evidence rules on challenges presented by the COVID pandemic and whether the committees should consider amendments to the rules in light of the challenges presented thereby, https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment/invitation-comment-emergency-rulemaking, the Commercial and Federal Litigation Section of the New York State Bar Association takes this opportunity to provide its input. The Committee suggests possible amendments to the Federal Rules of Civil Procedure to address exigent

circumstances presented by future emergencies.

The Executive Committee of the Section has authorized me to forward the attached Report to you.

Stephen T. Roberts

REPORT OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION OF THE NEW YORK STATE BAR ASSOCIATION

In response to the invitation for public comment extended by the Committee on Rules of Practice and Procedure and its five advisory committees for the appellate, bankruptcy, civil, criminal and evidence rules on challenges presented by the COVID pandemic and whether the committees should consider amendments to the rules in light of the challenges presented thereby, https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment/invitation-comment-emergency-rulemaking, the Commercial and Federal Litigation Section of the New York State Bar Association takes this opportunity to provide its input. The Committee suggests possible amendments to the Federal Rules of Civil Procedure to address exigent circumstances presented by future emergencies.

First of all, we assume that any National Emergency that would be addressed by any contemplated rules changes would be similar to the one with which we are dealing now: nationwide in scope, and of a sufficient severity to cause the closure of public access to the federal courts. We make our suggestions with this in mind.

We are aware that the Chief Judges in many federal district courts have entered emergency orders that have regulated or suspended appearances in court and/or deadlines in pending cases. However, these Orders have not been entirely consistent. A good overview of the variance, at least as of March 18, 2020, may be found at https://www.lawfareblog.com/federal-courts-begin-adapt-covid-19.

While some of the variations may be attributable to state and local authority directives, even courts within a state may address challenges differently when faced with the current pandemic. For example, while SDNY Chief Judge McMahon has ordered that all criminal and civil trials are continued, In re Coronavirus/COVID-19 Pandemic, M-10-468 (CM),20mc197, (April 20, 2020), she has left it up to the individual judges to enforce compliance with any trial-specific deadlines as they see fit and to take such actions that may be lawful and appropriate to ensure the fairness of such proceedings. The presiding judges are encouraged to hold hearings by telephone and videoconference where practicable, In re Coronavirus/COVID-19 Pandemic, M-10-468 (CM),20mc154, (March 13, 2020), even though the Courthouses are largely closed for business. As of this writing, no court conferences are being conducted except remotely, other than emergency motions to seal or for applications for a TRO, which shall be conducted on the papers. https://www.nysd.uscourts.gov/sites/default/files/2020-04/courthouseoperations.asofapril13.pdf.

The Northern District of New York, while continuing civil and criminal trials that were scheduled to commence through May 15, has directed continued consideration of civil and criminal motions that can be resolved without oral argument or by telephone or video conference. In re Coronavirus Covid-19 Public Emergency, General Order #58, Revised April 29, 2020.

In the Western District of New York, the Courthouses in Buffalo and Rochester, subject to certain other restrictions, remain open. Trials are continued for 60 days, however, judges are only encouraged to reduce personal appearances for hearings, but may continue to consider matters that may be resolved without oral argument or personal appearances. Court Operations Under the Exigent Circumstances Created By COVID-19, General Order dated March 13, 2020.

While the Committee is cognizant that it is perhaps impossible to establish a single nationwide rule governing court access or the continuation of trials due to state and local edicts on social distancing or local rates of infection or other local conditions, there are certain aspects of federal civil trial practice that could be changed to make remote litigation easier and less problematic.

The problems present themselves most obviously in discovery. For example, although videotaped depositions are explicitly authorized under FRCP 30 (b)(3)(A), depositions may be taken by telephone "and other remote means" only if the parties stipulate or if the Court so orders. If a National Emergency is declared, remote depositions should be permitted if feasible under the circumstances without the need for a court order.

However, remote depositions present additional problems as the court reporter may not be in the same state as the deponent. FRCP 30(b)(3)(A) provides that "the deposition takes place where the deponent answers the questions", and makes reference to Rule 28(a) regarding the persons before whom depositions may be taken. That section requires that the such persons be authorized by law to administer oaths under federal law, or the state in which the deposition is taken, or as appointed by the Court or agreed by the parties. In the case of a National Emergency, any person authorized to administer oaths under any state law should be permitted to administer the oath to the deponent and should be treated as a person before whom a deposition may be taken.

Third party discovery should also be considered. Although not explicitly stated in FRCP 45, many courts have required personal service of subpoenas. This Committee has in the past urged the Rules Committee to explicitly permit service of subpoenas under any means allowed under Rule 4. Considering that social distancing requirements have led to the suspension of service of subpoena by U.S. Marshals under Rule 4(c), In re Coronavirus/COVID-19 Pandemic, M-10-468 (CM),20mc0153, (March 13, 2020) we believe that, in the event of a National Emergency, personal service requirements should be relaxed and the methods of service permitted under Rule 4 should be allowed.

In the case of preliminary injunction motions, where it is required that a hearing be held (the motion should not be decided on the papers), district courts should be authorized to decide the motion on the papers and oral argument, if necessary should be conducted remotely.

20-CIV-05

DIAMOND-MASSONG
Where Law and Medicine Merge

Attorneys at Law:
Maria S. Diamond
Judy I. Massong, R.N., M.S.

May 26, 2020

Via Email: RulesCommittee_Secretary@ao.uscourts.gov

Re: Comments on Emergency Rulemaking

Dear Honorable Members of the Committee on Rules of Practice and Procedure:

I am writing in response to the Committee's invitation for public input on possible rule amendments to ameliorate future national emergencies' effects on court operations. By way of brief background, I have been a member of the Washington State Bar for 37 years. During this time, my practice has been focused on civil litigation, primary in the areas of product liability, medical negligence, general personal injury/wrongful death and maritime law. I am admitted to practice in the United States District Court for the Western District of Washington and the Eastern District of Washington, and in the Ninth Circuit Court of Appeals. I have also been admitted to practice in multiple MDLs throughout the United States.

Given the necessarily short time frame for public comment, I am unable to give the Committee's invitation the extensive thought and commentary merited. Nevertheless, I would like to offer a few observations and comments based on my experience.

National public health emergencies necessitate multiple changes to the federal rules relating to discovery and the conducting of jury trials. Since the COVID-19 pandemic struck, I have had multiple cases in which opposing counsel refused to cooperate in conducting discovery remotely, effectively bringing the litigation to a halt. Depositions are typically conducted in conference rooms and inherently involve several people sitting closer than six feet away from each other, and talking, sometimes for hours. Conducting in-person depositions puts witnesses, court reports, and lawyers at risks. Changes are needed to the civil rules to allow discovery in civil cases to proceed in a manner that does not needlessly endanger participants. I suggest that the discovery rules, in particular FRCP 26 and FRCP 30, be changed to provide that there is a **presumption** that discovery will be conducted by telephonic, electronic, and other remote means to facilitate, obtain and produce requested discovery, absent good cause shown. I further suggest that FRCP 40 be changed to provide that a party's failure to conduct discovery via remote means will not constitute good cause for a trial continuance, absent a showing that such discovery could not reasonably have been completed remotely.

Further, FRCP 43 authorizes the courts to allow "contemporaneous transmission from a different location" for good cause "in compelling circumstances and with appropriate safeguards." I suggest that the rule be revised to provide during national public health emergencies, video testimony is presumptive, absent a showing of substantial prejudice. The existing rule provides courts the discretion to effective reach the same result by emergency order.

The Financial Center | [redacted] | Phone [redacted] | Fax [redacted] | diamondmassong.com

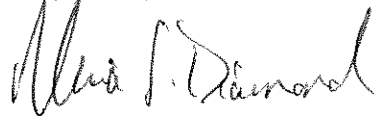
With respect to jury trials, FRCP 47 grants the courts broad authority to manage voir dire. I suggest the rule be revised to include procedures that would minimize both the length of time jurors are exposed and the number of people in the room at the same time. Such procedures could include expanded questionnaires, with an option to respond online, addressing hardship and case subject matter issues, partial video voir dire addressing hardship and case subject matter issues (e.g., on Zoom with breakout rooms for more manageable groups of jurors in a video conference), and full video voir dire by stipulation or necessity.

I believe that video jury trials could be conducted under the right circumstances. In the current COVID-19 crisis, older jurors and those others with certain medical conditions are high risk and will not be available for in-person jury trials. While video trials would pose certain risks, those risks can be addressed.

Finally, with respect to the rules of evidence, I suggest changes that would reduce trial time and, therefore, the exposure of jurors as well as all other trial participants to any health hazard. The cumulative trial time needed to authenticate and admit every exhibit can be substantial and rule changes to expedite the admission of exhibits would be very helpful.

Thank you for your consideration.

Respectfully submitted,



Maria S. Diamond
Attorney at Law

MSD:

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HARVEY J. LEWIS
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IAN F. TAYLOR
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May 28, 2020

VIA ELECTRONIC MAIL

Advisory Committee on Civil Rules
RulesCommittee_Secretary@ao.uscourts.gov

RE: ***Comment to Changes in the Federal Rules of Civil Procedure***

To Whom It May Concern:

I am a practicing attorney in New Orleans, LA and a Member of the law firm Lewis, Kullman, Sterbcow & Abramson, LLC. I primarily handle maritime-related personal injury cases on the plaintiff side. I am submitting this Comment to provide some thoughts to the Rules Committee on potential changes to the Federal Rules of Civil Procedure in light of the ongoing COVID-19 pandemic.

First, of great concern to many lawyers, is how and when jury trials will resume. The Eastern District of Louisiana (which is the courthouse that I primarily practice in) has currently suspended all jury trials through August 1, 2020. I am concerned that if the threat of the coronavirus remains by that date, and by all indications it most certainly will, most jurors are going to be extremely reluctant, if not outright refuse, to be forced into jury duty. Beyond just safety concerns, many jurors also may be in necessitous financial situations and will not be pleased with the prospect of missing days of work or otherwise having their job seeking activities curtailed to serve on a jury. I believe uniform rules need to be established that govern procedures for jury trials in all federal courts. The rules need to dictate what safety measures and protocols will be in place to protect the health of jurors. Jurors need to know that courts are making every effort to ensure their well-being if they are forced to enter the courthouse. Jurors should not just to be told to show up at the courthouse on a given date without information as to what the federal government is doing to protect them. I also believe that the daily pay rate for jurors needs to be increased significantly in order to help offset the financial burdens of jury duty, which are likely to be acutely enhanced under the present and ongoing circumstances,

Second, the issue of deadlines needs to be uniformly addressed in the event of a national emergency. There is no consistency across my cases in terms of how judges treat continuances and the extension of deadlines. I've had multiple cases continued due to the cancellation of jury trials through August 1, 2020 in the EDLA. Some judges have only continued the trial date and pre-trial conference but left all other deadlines in place. Other judges have continued all deadlines until a new trial date is picked. It seems inefficient and wasteful of resources to force parties to adhere to meaningless deadlines when a case is continued due to a national emergency. If a June 2020 trial date has been moved to February 2021 because of the national emergency, then the parties should not be forced to file pre-trial motions in limine based on the original scheduling order eight months before the new trial date. Nonetheless, some judges have adhered to that process. A rule should be in place that if a trial date is continued due to a national emergency, all deadlines in the case should also be continued until such time a new Rule 16 Scheduling Conference can be held and new deadlines established.

Thank you for your consideration of my comments in your deliberations. I am grateful for the work you are doing in these challenging times.

Sincerely,

/s/ Ian F. Taylor
Ian F. Taylor

From:	Ian Taylor
To:	RulesCommittee Secretary
Subject:	Comment to Changes in the Federal Rules of Civil Procedure
Date:	Thursday, May 28, 2020 5:44:36 PM
Attachments:	image001.png 2020.05.28 Ltr to Rules Committee.pdf

Please see the attached Comment to the Committee on Rules of Practice and Procedure in advance of the June 1, 2020 deadline.

Thank you,

Ian F. Taylor

MEMBER

| www.lksalaw.com

NELA Advocates for Employee Rights℠
National Employment Lawyers Association

20-CIV-07

May 29, 2020

TO: RulesCommittee_Secretary@ao.uscourts.gov

To the Members of the Advisory Committee:

Thank you for the opportunity to submit comments concerning possible rule amendments that could be helpful in future national emergencies. I write as the National Employment Lawyers Association's liaison to the Advisory Committee. This letter contains NELA's comments. We believe that adoption of these comments could, in general, improve cost and efficiency in discovery and certain court hearings. But, in particular, adoption of these comments would allow cases to continue forward even if the courts were closed due to a national emergency. These suggestions are meant to be neutral, i.e., their adoption should not result in giving advantages to one side.

Our procedure was to examine the existing language in certain rules and propose either new language or commentary. We begin with rules concerning discovery and continue with certain rules concerning hearings, oral arguments and bench trials.

I. Depositions and Subpoenas

Whether during an emergency or in the normal course, Rule 30 allows for depositions to be taken by telephone or video conference. Rules 28, 29 and other parts of Rule 30 should be interpreted to facilitate efficient, less costly and effective depositions by telephone or video conference.

Rule 28 sets forth the rules regarding "Persons Before Whom Depositions May Be Taken."

- *Issue:* Whether "before" requires the court reporter be in the same room with a deponent and counsel.
- *Solution:* For clarity, we suggest an Advisory Committee note stating that the requirement that depositions be taken "before" an officer does not preclude remote depositions, nor does it preclude the court reporter and/or videographer being remote from the witness or counsel.

Rule 29 states, "Unless the court orders otherwise, the parties may stipulate that: (a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition."

- *Issue/Solution:* This rule should include the same proposed Advisory Note as

Rule 28 for the same reason.

Rule 30(b)(4) (Oral Depositions By Remote Means) "*By Remote Means.* The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means."

- *First Issue:* The rule may be clarified to include video conference as an example of means already contemplated by the phrase "other remote means."

- *Solution:* Amend the rule to read: "*By Remote Means.* The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone, **video conference** or other remote means." (additional language emphasized)

- *Second Issue:* During national or certain statewide emergencies, the default means of oral depositions should be by telephone or video conference. Practically speaking, during such emergencies courts may not be in session. Because uncooperative counsel on either side should not be able to delay discovery simply by refusing to stipulate, we submit that the requirement of stipulation or court order should be eliminated during emergencies.

- *Solution:* Add this language to Rule 30(b)(4) at the end: "During a declared national emergency or in a state where an emergency has been declared, depositions may be taken by telephone, videoconference or other remote means without stipulation or order of the court."

Rule 30(b)(5)(A) (Before the Deposition): "Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28 ..."

Rule 30(c)(1) (Deposition Examination): "After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer."

- *Issue:* Courts and attorneys have and could continue to interpret the word "personally" to mean that the officer must record the testimony in the same physical place as the deponent. They could also interpret the phrases "before an officer" and "in the presence" to mean that the officer must be physically in the same place as participants in the deposition, including any person recording the deposition under the direction of the officer.

- *Solution:* Add a general Advisory Committee Note: "Unless otherwise stated in any rule, the words "appear," "attend," "before," "present" and "personally" shall not mean or connote exclusively "in person." One may also "appear" or "attend" by telephone or video conference. One may be "before" another, be

"present" or do something "personally" by telephone or video conference.

Trial depositions should not count towards the total number of depositions permitted.

Rules 30 and 31 require leave of court to take more than 10 depositions, absent a stipulation of parties.

- *Issue:* The caselaw is divided on whether trial depositions count toward the presumptive limit of 10. If an emergency or other logistical difficulty prevents a party from bringing its witnesses to trial, that party should not be forced to choose between conducting necessary deposition discovery and conducting trial depositions of its own witnesses.

- *Solution:* Amend Rules 30(a)(2)(A)(i) and 31(a)(2)(A)(i) to add the phrase, ", except that a party's trial depositions of its own witnesses shall not be counted."

The parameters of issuing a subpoena for a remote deposition, hearing or trial testimony under Rule 45 should be amended.

Rule 45(c) states under the "Place of Compliance": "(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person;" or "(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense."

- *Issue*: The rule does not give the issuer or the witness the right to a telephonic or videoconference appearance amid a declared emergency like a natural disaster or a pandemic. In those circumstances, finding an acceptable location within 100 miles of the witness or even in the state may be difficult. Travel to a trial court may be difficult or even impossible, as well.

- *Solution:* Amend the rule to permit the witness to appear telephonically or by videoconference for "good cause." Either the issuer of the subpoena or the witness could seek such an accommodation. In addition, add an Advisory Committee Note that good cause includes "a declared national or state-wide emergency such as a natural disaster or a pandemic."

II. Hearings and Oral Arguments

Whether during an emergency or in the normal course, courts have held conferences, hearings and oral arguments by telephone or video conference. The rules should be interpreted to facilitate efficient and cost-effective hearings by telephone or video conference.

Rule 16(a) (Pretrial Conferences): The rule states: "In any action, the court may

order the attorneys and any unrepresented parties to **appear** for one or more pretrial conferences...” (emphasis added)

- *Issue:* Courts and attorneys could interpret the word “appear” to mean that an attorney or party must appear “in person.”

- *Solution:* Add an Advisory Committee Note: “Unless otherwise stated in any rule, the words “appear,” “attend,” “before,” “present” and “personally” shall not mean or connote exclusively “in person.” One may also “appear” or “attend” by telephone or video conference. One may be “before” another, be “present” or do something “personally” by telephone or video conference.”

Rule 16(c)(1)- The rule states: “ATTENDANCE AND MATTERS FOR CONSIDERATION AT A PRETRIAL CONFERENCE. (1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.”

- *Issue:* Courts and attorneys could interpret the words “attendance” and “present” to each mean that an attorney, party or representative must attend or be present “in person.”

- *Solution:* Add an Advisory Committee Note: “Unless otherwise stated in any rule, the court has discretion to determine that the words “appear,” “attend,” “before,” “present” and “personally” shall not mean or connote exclusively “in person.” With the court’s permission, one may also “appear” or “attend” by telephone or video conference. One may be “before” another, be “present” or do something “personally” by telephone or video conference.”

Settlement fairness hearings could be held, at the court’s discretion, by remote means.

Rule 23(e)(2) “SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.”

- *Issue:* The rule provides that a hearing must occur before a court approves a class settlement, voluntary dismissal or compromise. Courts and attorneys could interpret this to require the ability of all or some class members, or objectors, to be physically present for the hearing.

- *Solution:* Add a sentence at the end, or an advisory note, stating, “The court in its discretion may hold class settlement, voluntary dismissal or compromise

hearings using telephone, video conference or other contemporaneous electronic means."

III. Bench Trials

Courts should be able to deem a witness "unavailable" under Rule 32 due to a declared emergency.

Rule 32(a)(4) (Unavailable Witness)- The rule states: "A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: (A) that the witness is dead; (B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition; (C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment; (D) that the party offering the deposition could not procure the witness's attendance by subpoena; or (E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used."

- *Issue:* Although subparagraph 32(a)(4)(C) of the rule deems witnesses unavailable if they cannot attend trial because of "age, illness, infirmity, or imprisonment," the rule does not address the circumstance of witnesses unable to attend trial in an emergency, whether because of a legal prohibition on travel or the practical infeasibility of travel. In such an emergency, parties presumptively should be able to use the deposition of a witness who cannot travel, without the motion and notice required by the catch-all in subparagraph 32(a)(4)(E).

- *Solution:* Amend Rule 32(a)(4)(C) to read: "that the witness cannot attend or testify because of age, illness, infirmity, imprisonment, a legal restriction on travel, or emergency conditions that render travel impracticable."

A declared emergency should constitute "good cause" to appear from a different location under Rule 43.

Rule 43 establishes the rule that witness testimony at trial must be taken in open court, but also states: "for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."

- *Issue:* The rule should confirm that "good cause" includes travel restrictions or risks related to a declared emergency such as a natural disaster or pandemic.

- *Solution:* Add an Advisory Committee note that a declared emergency such as a natural disaster or pandemic qualifies as good cause.

Rule 77(b) should permit remote hearings or trials in the normal course and/or during a state of emergency.

> **Rule 77(b)**- "PLACE FOR TRIAL AND OTHER PROCEEDINGS. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing—other than one ex parte—may be conducted outside the district unless all the affected parties consent."

- *Issue:* The rule requires a trial on the merits to be conducted "so far as convenient, in a regular courtroom," which could be read to prevent a remote trial during a declared emergency, such as a pandemic.

- *Solution:* The rule should be clarified to read, "Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. For good cause shown, the Court may conduct a bench trial using video conference or other contemporaneous electronic means. At the request of all parties and under extraordinary circumstances, the Court may conduct a jury trial using video conference or contemporaneous electronic means."

If the Committee or its staff have any questions or would like further clarification or explanation of any of the above suggestions, I would be pleased to speak with them. Thank you again for the opportunity to provide NELA's commentary.

Sincerely,

Joseph D. Garrison

Joseph D. Garrison
NELA Liaison to the Civil Rules Advisory Committee

JDG/cm

From: Karen Maoki
To: RulesCommittee Secretary
Cc: jgarrison@garrisonlaw.com; Ashley Westby
Subject: NELA Comments on Rules Amendments for National Emergencies
Date: Friday, May 29, 2020 11:17:23 AM
Attachments: NELA Comments_Rules for National Emergencies_Final.pdf

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Dear Members of the Advisory Committee:

Thank you for the opportunity to submit comments concerning possible rule amendments that could be helpful in future national emergencies. Attached is the submission of the National Employment Lawyers Association (NELA).

Should you have any questions, please do not hesitate to contact me or Joseph D. Garrison, NELA's Liaison to the Advisory Committee. Thank you again for your consideration.

Best wishes,
Karen Maoki

Karen Maoki
she/her
Interim Executive Director
National Employment Lawyers Association
[redacted]
[redacted]
[redacted] (mobile)
[redacted]
www.nela.org

[GB&W]
A LAW PARTNERSHIP

20-CIV-08

May 29, 2020

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Emergency Federal Rules for Civil Cases

Dear Ms. Womeldorf:

I am writing to offer suggestions/comments in response to the Committee's interest in potentially enacting emergency modifications to some of the Federal Rules of Civil Procedure in response to the Covid-19 pandemic and its impact on the ability of civil litigants to conduct discovery and prepare cases for trial. As a trial lawyer representing plaintiffs in civil litigation, the last few months have brought to the forefront many different problems and difficulties for all litigants and their attorneys. I appreciate the opportunity to bring to the Committee's attention several specific issues that relate to the federal rules governing depositions that would benefit from emergency relief.

For instance, Rule 30 and 31 require leave of court to take more than 10 depositions, absent a stipulation of the parties. There is a case law split on whether trial depositions count toward the limit of 10.

If a pandemic or other emergency event makes it difficult or impossible for a party to bring witnesses to testify during the trial proceedings, that party should be able to depose their own witnesses without having those depositions count toward the deposition limit. For example, in a nursing home negligence case, if a doctor expert witness is unavailable to testify because he or she is treating patients in a pandemic, then a party should be allowed to depose the expert and not have that deposition count towards the limit of no more than 10 depositions. Another example arises in a case where a witness lives in another state or would have to fly to appear in court in person, or someone who is has a pre-existing health condition or elderly and subject to heightened risk from being in a closed space with other people. Where possible, to protect people from exposure to the virus it may be beneficial to allow those witnesses to have trial depositions taken on video so that their testimony could be played in trial without them having to travel to appear in person.

A suggested rule change could address this by adding that a party's trial depositions do not count towards the 10 depositions limit. Rules 30(a)(2)(A)(i) and 31(a)(2)(A)(i) should be amended to add the following: "Except that a party's trial depositions of its own witnesses shall not be counted."

Thank you for the work of the Committee in addressing these concerns. I appreciate having the opportunity to comment on these issues

Very truly yours,

GREENE BROILLET & WHEELER, LLP

CHRISTINE SPAGNOLI

From:	Chris Spagnoli
To:	RulesCommittee Secretary
Subject:	Comment on Potential Emergency Changes to Federal Rules in Civil Cases
Date:	Friday, May 29, 2020 2:25:06 PM
Attachments:	image002.png image003.png image004.png image006.png Letter to Womeldorf 5-29-20.pdf

Please see attached correspondence related to the Committee's consideration of emergency rules changes for civil cases to address the Covid-19 pandemic's impact on federal court procedures.

In compliance with Governor Newsom's Safer at Home directive, our entire office is working from remote locations. Pursuant to Judicial Council Emergency Rule 12 to the California Rules of Court, all written materials must be sent to us electronically, rather than through physical mail and deliveries. Please bear with us during this time. Thank you, and stay well.

Christine D. Spagnoli ■ Attorney

LP

Office
Fax
Web www.gbw.law
Email

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20-CIV-09

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*Bruce M. Plaxen**
*David A. Muncy**
*Joshua A. Plaxen**
Samantha B. Dos Santos
Harry R. Adler (1957 – 2019)
**Also licensed in District of Columbia*

Of Counsel

Lambros & Lambros

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Writer's direct e-mail:

VIA EMAIL & REGULAR MAIL
RulesCommittee_Secretary@ao.uscourts.gov

May 29, 2020

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Dear Ms. Womeldorf:

I am a trial lawyer handling civil litigation and have had the opportunity to litigate cases in both the Northern Division and Southern Division of the United States District Court for the District of Maryland. It is my understanding the Committee on Rules of Practice and Procedure is considering emergency rules in light of the ongoing pandemic. Thank you for allowing me the opportunity to provide some input on potential changes that may be necessary during this emergency and unprecedented situation.

The pandemic has certainly caused unique situations that must be addressed by the Court such as jury selection, jury deliberation and almost every aspect of trials. Only recently have I realized the close proximity of all participants in a trial. Social distancing is almost impossible during a trial. Your Committee certainly has an arduous task in determining how to safely reopen the Courts.

In addition to the litigants, the lawyers, court personnel and jurors, we must also be cognizant of the health and safety of witnesses, particularly witnesses who may be old or have preexisting conditions that could make an exposure to Covid-19 that much more dangerous.

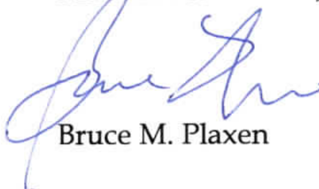
It is for that reason I write offering suggestions to make it easier for witnesses to appear and still maintain the sanctity of a court procedure. Rule 45(c) states that under "Place of Compliance"" (1) for a trial, hearing or deposition a subpoena may command a person to attend a trial, hearing or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (B) within the state …. The rule does

not provide the witness the right to appear remotely during the pandemic. Under current circumstances while Baltimore and the DC Suburbs remain a hotspot, it may not be safe to travel to a trial court now or when the court reopens. It is my suggestion that Rule 45(c) be amended to permit the witness to appear telephonically or by videoconference for "good cause". Good cause would include the pandemic, its aftermath and other issues that persons with serious health or disabilities might be faced with. In addition, I would suggest a Rule to allow expert witnesses that cannot appear in person testify remotely as well. This could include doctors or other experts that are unavailable due to the pandemic. These depositions would not court towards the limit of 10 depositions as provided in Rule 30.

While we are all anxious for courts to reopen we must assure that it be done safely and no one be put at unnecessary risk. Thank you for considering the safety of all those involved with trials and other court proceedings and thank you for reviewing my suggestions.

Very truly yours,

PLAXEN & ADLER, P.A.



Bruce M. Plaxen

BMP:pdl

From: Bruce Plaxen
To: RulesCommittee Secretary
Subject: Potential Rules Changes
Date: Friday, May 29, 2020 3:31:10 PM
Attachments: Suggested Changes Submitted to the Committee on Rules of Practice and Procedure.pdf

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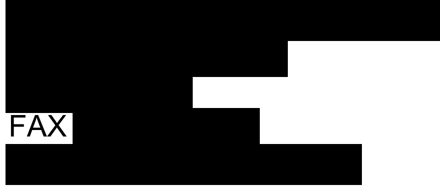
Dear Ms. Womeldorf,

Thank you for your attention and consideration of the procedures to safely reopen the courts. Thank you for reviewing my letter attached.

Bruce M. Plaxen

Plaxen & Adler, P.A.



www.plaxenadler.com

May 31, 2020

Via E-Mail

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice and Procedure
ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
One Columbus Circle, NE
Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: *Ensuring Efficient Court Operations During A Pandemic*

Ms. Womeldorf:

I write to submit suggestions for potential changes to the Rules that will better ensure court operations during a pandemic. Thanks to the Rules Committee for the opportunity to do so.

First and foremost, we must ensure that it is not *harder* for cases to be brought in national emergency situations due to limitations in the current Rules, when technology provides for practical alternatives. We must also ensure that the Rules minimize the risks to public health that litigation brings. Additionally, without changes to the current rules, there is a lot of room for delay, gamesmanship, and confusion among litigants in the case of a national emergency such as a pandemic.

For example, current Rule 45 is problematic given its multiple in-person requirements:[1]

(a)(1) - attendance at a deposition
(a)(2) - must issue from court where action is pending and be signed by the clerk
(b)(1) - service requires in-person delivery

Alternatives to in-person activity should be allowed during a pandemic. In its present form, Rule 45 includes guidelines for when quashing/modifying a subpoena is permitted. Those parameters should specifically allow for modification of a subpoena based on emergency situations. Rule 45(d) currently requires that parties issuing a subpoena must take reasonable steps to avoid imposing "undue burden or expense" on the person subject to the subpoena. This language is helpful, but could be more specific.

A separate concern during times of national emergency is that the time limits for service of process of the summons and complaint may be impossible to meet where businesses are closed. The Rules should allow for automatic extensions in such circumstances. Alternatively, perhaps e-service could be allowed as an exception to in-person delivery during a national emergency.

Next, unreasonable objections and repeated or extended requests for continuances must not delay cases. Reasonable alternatives for routine litigation activities, such as video depositions, should be encouraged. Not only would video depositions keep the parties and staff safe, they would obviate the need for travel (currently, up to 100 miles), further reducing risk of transmission.

Very truly yours,

/s/ Lori E. Andrus

---

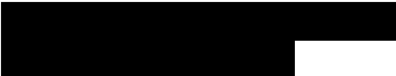
[1] Rules 30 and 31 are similarly problematic.

From: Lori Andrus
To: RulesCommittee Secretary
Subject: Comment on possible Rules changes during a pandemic
Date: Sunday, May 31, 2020 5:37:44 PM
Attachments: Comment on Rules During a Pandemic 2020.05.31.pdf

---

Thank you for the opportunity to submit my proposed changes, attached.

Kind regards,

Lori Andrus
ANDRUS ANDERSON LLP

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F:
www.andrusanderson.com

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20-CIV-11

Domnick Cunningham & Whalen

June 1, 2020

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Dear Ms. Womeldorf:

As an attorney with a civil trial practice that is nationwide, I would like to share my thoughts regarding the pending consideration of emergency civil rules in light of the Covid-19 pandemic. As we have navigated moving our cases forward the last couple of months a few things have become clear. First and foremost, all policy making must take into consideration the health and well being of all involved. With that in mind, I believe that the Courts must move forward as efficiently as possible while not placing people at risk. Lawyers, judges and court staff must work collaboratively to accomplish this goal.

Against that backdrop, I have several thoughts about how the emergency rules should be tailored:

1. Parties need predictability and courts need to maintain their dockets. Uniform rules and consistency of operations is of paramount importance during a pandemic and other emergency operations.

2. The rules need to clearly indicate that judges need to follow the same rules during a pandemic and provide for remote and virtual proceedings.

3. Rule amendments should consider making it easier for witnesses to appear and for trials to be conducted. For example, allowing for remote swearing in of witnesses has worked well in Florida. Also, allowing witnesses to appear by live video feed has worked well.

4. A declared emergency, such as a pandemic, should constitute "good cause" for a witness to appear from another location.

    a. Rule 43 establishes the rule that witness testimony at trial must be taken in open court, but also states "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."

b. Ensuring that "good cause" includes a declared emergency helps support witnesses, ensures that the docket can move forward, particularly if some parts of the country are experiencing greater risk of exposure, and helps ensure the safety of court personnel.

5. The Advisory Committee should also review Rule 77(b) Place for Trial and Other Proceedings: The rule says that "Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, anywhere inside or outside the district. But no hearing- other than one ex parte- may be conducted outside the district unless all the affected parties consent." This is too limiting and could be used to needlessly delay the docket.

   - It's possible that with social distancing rules, that courts may need to use non-courtroom space to conduct a trial, at a nearby building or government facility. The rule must be flexible enough to accommodate this.

   - Remote jury trials should only be considered in exigent circumstances if all parties agree. It may be a better option to first consider whether remote bench trials can work successfully first, before attempting a remote jury trial. The information from pilot projects on remote jury trials may show that parts of a jury trial can be adapted. Some states like Florida have already moved forward with pilot remote jury trial projects.

Thank you for the hard work you are doing in ensuring that the courts are responsive to the ongoing crisis. It is essential that the courts continue to operate as smoothly as possible. I greatly appreciate the opportunity to provide these comments and observations. I hope they are helpful.

Very Truly Yours,

/s/ Sean C. Domnick

SEAN C. DOMNICK, ESQUIRE

SCD/kds

From:	Sean Domnick
To:	RulesCommittee Secretary
Subject:	Emergency Court Rules
Date:	Monday, June 01, 2020 9:12:32 AM
Attachments:	Womeldorf ltr.docx

Dear Ms. Womeldorf:

Please find attached a letter regarding this very important issue.

Thank you for the opportunity to provide feedback.

Very Truly Yours,

Sean C. Domnick
Shareholder
DomnickCunningham&Whalen

P
E

www.dcwlaw.com

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

ATTORNEYS AT LAW

NEW YORK ● CALIFORNIA ● ILLINOIS ● LOUISIANA

June 1, 2020

Via Email

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

Re: *Request for Input on Possible Emergency Procedures*

Dear Ms. Womeldorf:

Thank you for inviting public input on possible emergency procedures. Attached as **Schedule A** please find our firm's proposals regarding areas of possible change to the Federal Rules of Civil Procedure to *inter alia* account for emergencies.

Respectfully submitted,

/s/ Jeremy P. Robinson
Jeremy P. Robinson, Esq.

cc: Salvatore Graziano, Esq.

SCHEDULE A

Proposed Changes To Federal Rules To Account For Emergencies

1. Service by Email

A. **Rule 5(b)(2)** sets forth the rules regarding service of pleadings and other papers. The rule currently includes service by email or other electronic means, but only if "the person consented" to such service in writing. The rule should be updated to account for the increased reliability and pervasive use of email, which is an especially critical means of service during an emergency.

B. **Proposal:** Amend Rule 5(b)(2) "*Service in General*" to add Rule 5(b)(2)(G) providing that a paper is served under this rule by:

> "sending it to the professional email address of the attorney of record for a party, in which event service is complete upon sending, but is not effective if the sender learns that it did not reach the person to be served."

2. Remote Depositions

A. **Rule 30(b)(4)** provides for remote depositions by stipulation or court order. During an emergency, however, the requirement of party consent or court approval can present obstacles to proceeding with depositions and/or cause delay. As such, in the context of an emergency, parties should be able to automatically proceed with remote depositions by telephone or video conference.

B. **Proposal:** Amend Rule 30(b)(4) by adding the following language at the end:

> "During a declared national emergency or where the witness, the examining party or the attorney of record for either resides in a location where an emergency has been declared, depositions may be noticed and taken by video or telephone conference or other remote means without requiring a prior stipulation or court order."

C. **Rule 45(c)** provides that subpoenas may be issued to command a person to attend *inter alia* a deposition but does not expressly authorize remote depositions. In the context of an emergency, parties should be able to automatically compel attendance at a remote deposition by telephone or video conference by subpoena.

D. **Proposal:** Amend Rule 45(c) to expressly provide for the issuance of a subpoena to compel attendance at a remote deposition in the context of an emergency by adding Rule 45(c)(1)(C):

"During a declared national emergency or where the recipient, the issuer of a subpoena or the attorney of record for either resides in a location where an emergency has been declared, a subpoena may command a person to attend a remote deposition by video or telephone conference or other remote means."

3. Remote Hearings, Conferences and Oral Arguments

A. The Federal Rules should make clear that hearings or conferences may be conducted remotely by video or telephone conference or other remote means – whether during an emergency or in the normal course.

B. **Proposals:**

i. **Rule 16(a)** (Pretrial Conferences): Amend to state, or add an advisory note stating, "The Court in its discretion may hold pretrial conferences remotely by video or telephone conference or other remote means."

ii. **Rule 23(e)(2)** (class certification settlement approval hearings): Amend Rule 23(e)(2) to add Rule 23(e)(2)(E), which states "The Court in its discretion may hold the hearing remotely by video or telephone conference or other remote means."

iii. **Rule 77(b)** (Place for trial and other proceedings): Amend to state, or add an advisory note stating, "The Court in its discretion may hold hearings remotely by video or telephone conference or other remote means."

4. Witness Unavailability

A. Courts should be able to deem a witness "unavailable" under Rule 32 when that unavailability results from a declared emergency.

B. **Proposal: Rule 32(4)** (Unavailable Witness): Allow courts to find that a witness is unavailable due to a declared emergency by amending subparagraph 32(a)(4)(C) to state "that the witness cannot attend because of age, illness, infirmity, imprisonment or ***a restriction on travel or conditions that render travel impracticable in the context of a declared emergency***."

5. Electronic signatures

A. The Federal Rules should expressly provide that authorized electronic signatures are sufficient to satisfy any signature requirement – whether in an emergency or in the normal course.

B. **Proposals:**

i. **Rule 11(a) (Signing Pleadings, Motions, and Other Papers)**: Amend to state at the end, or add an advisory note stating, "An authorized electronic signature will satisfy the signature requirement."

ii. **Rule 33(b)(5) (Interrogatories to Parties)**: Amend to state at the end, or add an advisory note stating, "An authorized electronic signature will satisfy the signature requirement."

iii. **Rule 36(a)(3) (Requests for Admission)**: Amend to state, or add an advisory note stating, "An authorized electronic signature will satisfy the signature requirement."

From:	Jeremy Robinson
To:	RulesCommittee Secretary
Cc:	Salvatore Graziano
Subject:	Request for Input on Possible Emergency Procedures
Date:	Monday, June 01, 2020 11:59:18 AM
Attachments:	6-1-20 - BLBG Letter re Rule Changes re Emergencies.docx

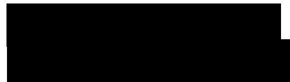
Dear Ms. Womeldorf,

Please see the attached correspondence.

Respectfully submitted,
Jeremy Robinson

____

Jeremy P. Robinson
BLB&G LLP



June 1, 2020

BY EMAIL AND BY FEDEX

Administrative Office of the United States Courts
ATTN: Rules Committee Secretary
One Columbus Circle, NE
Washington, D.C. 20544
Email: RulesCommittee_Secretary@ao.uscourts.gov

Re: ***Response to Request for Input on Possible Emergency Procedures: FRCP Proposals***

Dear Rules Committee Secretary:

The Committee on Rules of Practice and Procedure and its five advisory committees have invited public input on possible rule amendments that could ameliorate the impact of future national emergencies on court operations. Congress has directed the Judicial Conference and the Supreme Court to consider such amendments in light of the COVID pandemic or other unexpected disasters.

Rule 1 of the Federal Rules of Civil Procedure ("FRCP") provides that the federal rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Pomerantz LLP is hereby submitting suggested proposals designed to assist the courts and litigants in times of emergencies while promoting the purpose of Rule 1.

By way of background, for over 85 years, Pomerantz LLP has championed the rights of defrauded investors and consumers, recovering billions of dollars on their behalf. Only recently, Pomerantz recouped $3 billion for U.S. and other investors in connection with one of the biggest securities frauds perpetrated by Brazil's largest oil company, Petroleo Brasileiro S.A. In addition to assisting investors recover monetary losses, Pomerantz has consistently shaped the law, having won landmark decisions that have expanded and protected investor and consumer rights and initiated historic corporate governance reforms. Pomerantz has represented the interests of

tel: www.pomerantzlaw.com
NEW YORK CHICAGO LOS ANGELES PARIS

countless pensioners who lost life-savings pensions as a result of securities fraud. Those pensioners are not indifferent to the passage of time. For most of them, justice delayed is justice denied.

Suggested proposals:

Rule 4: In extraordinary emergency situations, such as during a pandemic or natural disaster, in addition to the means Rule 4 already allows for service, service should also be permitted by electronic means, such as email correspondence, where procedures exist to ensure the email was delivered and opened by the intended recipient.

Rule 5: In extraordinary emergency situations, such as during a pandemic or natural disaster, in addition to the means Rule 5 already allows for service, where circumstances permit, service should also be allowed by electronic means, such as email.

Rule 16: Rule 16 provides, *inter alia*, that "[i]n any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences . . . " "Appearances" by telephone, teleconference, videoconference, or other electronic means should also be permitted in emergency situations. Likewise, "attendance" at conferences such as scheduling and pretrial conferences should be understood to include "attendance" by telephone, teleconference, videoconference, or other electronic means.

Rule 23: The Rule states that "[i]f the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate . . . " ("Fairness Hearing"). In national emergencies or other exigent circumstances, attendance at the "Fairness Hearing" should be understood to include "attendance" by telephone, teleconference, videoconference, or other electronic means.

Rule 28: In times of national emergency or other exigent circumstances, remote administration of oaths should be considered to fulfill Rule 28 so long as the person administering the oath is authorized to do so in the state in which s/he resides, whether or not s/he is in the same room as the witness.

Rule 29: Rule 29 provides that "[u]nless the court orders otherwise, the parties may stipulate that (a) a deposition may be taken *before any person*, at any time or place, on any notice, and in the manner specified — in which event it may be used in the same way as any other deposition . . . " (emphases added). In times of national emergency or other exigent circumstances, the phrase "before any person" should be interpreted to permit depositions via videoconference or other electronic means.

Rule 30: Provision (b)(4) explicitly permits depositions by remote means, stating that "[t]he parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means." In extraordinary circumstances, such as pandemics or natural disasters, depositions by remote means should be permitted without leave of court.

Provision (c)(3) concerns depositions through written questions. It provides that "[i]nstead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim." "Service" of the written questions and "delivery" to the officer should be permitted also by electronic means, and the officer should be permitted to conduct the deposition through telephone, teleconference, videoconference, or other electronic means as well as in person.

In the absence of a stipulation by the parties, Rule 30 requires leave of court to conduct more than 10 depositions. Some courts hold that trial depositions count towards that limit. If a trial deposition is not practicable as a result of a pandemic, a national disaster, or other practical difficulties, a trial deposition should not count towards the presumptive limit.

Rule 31: "Service" of the written questions and "delivery" to the officer should be permitted also by electronic means, and in times of national emergency or other exigent circumstances, the officer should be permitted to conduct the deposition through telephone, teleconference, videoconference, or other electronic means as well as in person.

In the absence of a stipulation by the parties, Rule 30 requires leave of court to conduct more than 10 depositions. Some courts hold that trial depositions count towards that limit. If a trial deposition is not practicable as a result of a pandemic, a national disaster, or other practical difficulties, a trial deposition should not count towards the presumptive limit.

Rule 32: Provision 4(c) states that "[a] party may use for any purpose the deposition of a witness, whether or not a party, if the court finds . . . that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment." This list should include as a reason for a witness's inability to appear in person circumstances such as a pandemic or a national emergency.

Rule 43: The Rule provides that "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." The phrase "for good cause in compelling circumstances" should be interpreted to include situations where a witness is unable to appear in

court such as during a pandemic or in a national disaster or emergency, in which case permission should be freely granted.

Rule 45: In cases of a pandemic, a national disaster or in other circumstances posing significant difficulties to in-person appearances, "attendance" at trial, hearing or deposition should include virtual attendance, such as by means of telephone, teleconference, videoconference, or other electronic means. Service of a subpoena via electronic means should also be permitted, where applicable.

Rule 47: In cases of a pandemic or other national emergencies, accommodations for jury selection should be made so that a trial can proceed unabated. For example, during the pandemic certain courts have allowed jury selection to proceed by using large spaces such as auditoriums and theaters to account for social distancing guidelines. *See* The Daily Item, *Snyder, Union to select juries in school buildings*, May 26, 2020. Jury selection should also be permitted using digital medium, such as Zoom or other streaming applications. Such practice has already been implemented. For example, lawyers in an insurance dispute in Collin County District court (Miskel, Judge) picked a jury to hear the case by videoconference. *Virtuwave Holdings LLC v. State Farm Lloyds, et al*., Case number 429-04266-2018 (429th District Court, Collin County, Texas). More than two dozen potential jurors logged in by smartphone, laptop and tablet for jury selection, which was streamed live on YouTube. *Id*.

Rule 77: During a pandemic or in other national emergencies, trial courts should permit trials via zoom or other secure digital medium, or should make accommodations to account for social distancing guidelines. For example, some courts plan to conduct jury trials in the courtrooms with jurors scattered throughout the gallery instead of sitting side by side in the jury box; sidebars will be conducted in the jury room and jury deliberations in the courtroom. *See* The Daily Item, *Snyder, Union to select juries in school buildings*, May 26, 2020.

Other: Where a rule requires a notarized affidavit accompanied by an actual signature (*see*, *e.g.*, pro hac vice applications in the Southern District of New York pursuant to Local Rule 1.3), in cases of national emergencies or in other circumstances posing significant difficulties to in-person interactions with a notary, an electronic signature should suffice.

Respectfully submitted,

/s/ Jeremy A. Lieberman
Jeremy A. Lieberman
Marc I. Gross

Emma Gilmore
POMERANTZ LLP
Phone:
Email:

From: Daniel Isaacson
To: RulesCommittee Secretary
Cc: Jeremy Lieberman; Marc Gross; Emma Gilmore
Subject: Response to Request for Input on Possible Emergency Procedures: FRCP Proposals
Date: Monday, June 01, 2020 2:23:04 PM
Attachments: 00377468.pdf

Dear Rules Committee Secretary:

On behalf of Jeremy A. Lieberman, Esq., Marc I. Gross, Esq., and Emma Gilmore, Esq., please see attached.

- Would you please confirm your ability to view the attached PDF file and whether this submission is considered to timely meet the deadline?

Thank you.

Respectfully,

Daniel Isaacson
Legal Assistant
POMERANTZ LLP
[redacted]
[redacted]
Phone: [redacted]
Direct Dial: [redacted]
Fax: [redacted]
Email: [redacted]
Web: www.pomlaw.com

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A Professional Corporation
ATTORNEYS AT LAW

Michael A. Toomey

June 1, 2020

VIA Email
The United States Court's
Committee on Rules of Practice and Procedure

Re: Request for Input on Possible Emergency Procedures

Dear Sirs/Mesdames:

I am a partner of the law firm, Barrack, Rodos & Bacine ("BR&B"), and write this letter on BR&B's behalf in response to this Committee's request for public input on possible rule amendments that could ameliorate future national emergencies' effects on court operations. We respectfully include herein certain concerns regarding the Federal Rules of Civil Procedure and provide recommendations for changes and clarifications that we believe will preserve and promote the interests of justice during emergencies such as the COVID-19 pandemic that we are all currently encountering.

Since the Firm's founding in 1976, BR&B has focused much of its practice on securities fraud litigation and has a 44-year track record of successfully representing injured investors in securities class actions in federal and state courts throughout the United States. BR&B has represented public pension funds and other institutional investor clients in securities class action litigation for over 20 years, and has served as counsel to the nation's largest public pension funds in securities class action cases that resulted in some of the largest recoveries in securities litigation.

In three cases alone, BR&B, on behalf of large state pension funds, recovered over $10 billion for investors injured by securities fraud: $6.19 billion recovery in *In re WorldCom, Inc. Securities Litigation* before the Honorable Denise Cote in the Southern District of New York; $3.32 billion recovery in *In re Cendant Corp. Litigation* before the Honorable William H. Walls in the District of New Jersey; and $1.052 billion recovery in *In re McKesson HBOC, Inc. Securities Litigation* before the Honorable Ronald M. Whyte in the Northern District of California. BR&B has also achieved: a landmark $970.5 million recovery in the *In re American International Group, Inc. 2008 Securities Litigation*, in the U.S. District Court for the Southern District of New York; a $335 million recovery for the investor class in *Pennsylvania Public School Employees' Retirement System v. Bank of America Corp., et al.*, in the United States District Court for the Southern District of New York; and a $300 million recovery for the investor class in *In re Daimler-Chrysler Securities Litigation* in the U.S. District Court for the District of Delaware. BR&B has also led

and actively litigated similarly significant antitrust and consumer class actions in federal courts throughout the country.

In light of our experience redressing corporate malfeasance and in an effort to ensure that any changes to the Federal Rules of Civil Procedure are made while respecting the rights of investors and other relevant stakeholders to pursue meritorious litigation, we respectfully suggest that the following changes should be considered.

I. Depositions and Subpoenas: Whether during an emergency or in the normal course, Rule 30 allows for depositions to be taken by telephone or video conference. We respectfully suggest that Rules 28, 29 and other parts of Rule 30 should be interpreted to facilitate efficient and effective depositions by telephone or video conference. We specifically request that the Committee consider the following revisions to these rules and those other rules affecting conducting discovery by deposition.

- **Rule 28** sets forth the rules regarding "Persons Before Whom Depositions May Be Taken." For clarity, we suggest an Advisory Committee note stating that the requirement that depositions be taken "before" an officer does not preclude remote depositions, nor does it preclude the court reporter being remote from the witness or counsel.

- **Rule 29** states, "Unless the court orders otherwise, the parties may stipulate that: (a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition." This rule should include the same proposed Advisory Note as Rule 28 for the same reason.

- **Rule 30(b)(4)** (Oral Depositions By Remote Means) states, "*By Remote Means*. The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means." This rule could be clarified to include video conference as an example of means already contemplated by the phrase "other remote means." We suggest that the rule could be amended to read: "*By Remote Means*. The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone**, video conference** or other remote means." (additional language emphasized).

  In addition, during certain emergencies, the default means of oral depositions should be by telephone or video conference. As such, we suggest that the following language be added to Rule 30(b)(4) at the end: "During a declared national emergency or in a state where an emergency has been declared, depositions may be taken by telephone, videoconference or other remote means without stipulation or order of the court."

- **Rule 30(c)(1)** (Deposition Examination) states, "After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer." Courts and attorneys could interpret the word "personally" to mean that the officer must record the testimony in the same physical place as the deponent. They could also interpret the phrases "before an officer" and "in the presence" to mean that the officer must be physically in the same place as participants in the

deposition, including any person recording the deposition under the direction of the officer. We respectfully suggest that a general Advisory Committee Note should be added that states: "Unless otherwise stated in any rule, the words "appear," "attend," "before," "present" and "personally" shall not mean or connote exclusively "in person." One may also "appear" or "attend" by telephone or video conference. One may be "before" another, be "present or do something "personally" by telephone or video conference

- **Rules 30(a)(2) and 31(a)(2)** require leave of court to take more than 10 depositions, absent a stipulation of parties. The case law is divided on whether trial depositions count toward the presumptive limit of 10. If an emergency or other logistical difficulty prevents a party from bringing its witnesses to trial, that party should not be forced to choose between conducting necessary deposition discovery and conducting trial depositions of its own witnesses. We suggest that Rules 30(a)(2)(A)(i) and 31(a)(2)(A)(i) should be amended to add the phrase, "except that a party's trial depositions of its own witnesses (whether affiliated with the plaintiff, defendant, a non-party or an expert) shall not be counted."

- **Rule 32(a)(4)** (Unavailable Witness) states: "A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: (A) that the witness is dead; (B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition; (C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment; (D) that the party offering the deposition could not procure the witness's attendance by subpoena; or (E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used."

  Although subparagraph 32(a)(4)(C) of the rule deems witnesses unavailable if they cannot attend trial because of "age, illness, infirmity, or imprisonment," the rule does not address the circumstance of witnesses unable to attend trial in an emergency, whether because of a legal prohibition on travel or the practical infeasibility of travel. In an emergency, parties presumptively should be able to use the deposition of a witness who cannot travel, without the motion and notice required by the catch-all in subparagraph 32(a)(4)(E). We respectfully suggest that Rule 32(a)(4)(C) should be amended to read: "that the witness cannot attend or testify because of age, illness, infirmity, imprisonment, a legal restriction on travel, or emergency conditions that render travel impracticable."

- **Rule 45(c)** states under the "Place of Compliance": "(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person;" or "(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense." The rule does not give the issuer or the witness the right to a telephonic or videoconference appearance amid a declared emergency like a natural disaster or a pandemic. In those circumstances, finding an acceptable location within 100 miles of the witness or even in the state may be difficult. Travel to a trial court may similarly be difficult. We suggest that the rule should be amended to permit the witness to

appear telephonically or by videoconference for "good cause." Either the issuer of the subpoena or the witness could seek such an accommodation. In addition, we suggest that an Advisory Committee Note should be added that good cause includes "a declared emergency like a natural disaster or a pandemic."

II. <u>Hearings and Oral Arguments:</u> Whether during an emergency or in the normal course, courts have held conferences, hearings and oral arguments by telephone or video conference. We submit that the rules should be interpreted to facilitate efficient and effective hearings by telephone or video conference as follows:

- **Rule 16(a)** (Pretrial Conferences) states: "In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences…" and **Rule 16(c)(1)** states: "ATTENDANCE AND MATTERS FOR CONSIDERATION AT A PRETRIAL CONFERENCE. (1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement."

  Courts and attorneys could interpret the words "appear," "be present," and "attendance" in these sections to mean that an attorney or party must appear "in person." We respectfully suggest that an Advisory Committee Note be added stating: "Unless otherwise stated in any rule, the words 'appear,' 'attend,' 'before,' 'present' and 'personally' shall not mean or connote exclusively 'in person.' One may also 'appear' or 'attend' by telephone or video conference. One may be 'before' another, be 'present' or do something 'personally' by telephone or video conference."

- **Rule 23(e)(2)** states, "SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate." The rule provides that a hearing must occur before a court approves a class settlement, voluntary dismissal or compromise. Courts and attorneys could interpret this to require the ability of all class members to be physically present for the hearing. We respectfully suggest that a sentence should be added at the end, or an advisory note, stating, "The Court in its discretion may hold class settlement, voluntary dismissal or compromise hearings using telephone, video conference or other contemporaneous electronic means."

III. <u>Bench Trials and Jury Trials:</u> During an emergency such as a pandemic, the rules concerning the attendance of witnesses and the location of trials should accommodate the possibility that in person trials or testimony may be inadvisable or impossible. We specifically request that the Committee consider the following revisions to the rules affecting conducting trials.

- **Rule 43** establishes the rule that witness testimony at trial must be taken in open court, but also states: “[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.” The rule should confirm that “good cause” includes travel restrictions or risks related to a declared emergency such as a natural disaster or pandemic. We suggest that an Advisory Committee note be added that a declared emergency such as a natural disaster or pandemic qualifies as good cause.

- **Rule 77(b)** states, “PLACE FOR TRIAL AND OTHER PROCEEDINGS. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing—other than one ex parte—may be conducted outside the district unless all the affected parties consent.”

  This rule poses two potential problems: *First*, it provides that hearings may not be conducted outside the district unless the affected parties consent. Courts and attorneys could interpret this to require all parties to the hearing to be physically present in the district without consent of the parties. We suggest that a sentence be added at the end, or an advisory note, stating: “The Court in its discretion may hold hearings using telephone, video conference or other contemporaneous electronic means.”

  Second, the rule requires a trial on the merits to be conducted “so far as convenient, in a regular courtroom,” which could be read to prevent a remote trial during a declared emergency, such as a pandemic. We submit that the rule should be clarified to read, “Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. For good cause shown, the Court may conduct a bench trial using video conference or other contemporaneous electronic means. At the request of one or more parties and under extraordinary circumstances, the Court may conduct a jury trial using video conference or contemporaneous electronic means.”

***

We thank you for your attention to the concerns and recommendations we have included in this letter and request that we be permitted to participate in any additional rounds of requests for comments that may follow from this.

Respectfully,

/s/ Michael A. Toomey

Michael A. Toomey

From:	Fleischer, Blake M.
To:	RulesCommittee Secretary
Cc:	Toomey, Michael
Subject:	Request for Input on Possible Emergency Procedures
Date:	Monday, June 01, 2020 4:57:21 PM
Attachments:	Committee on Rules of Practice and Procedure(6.1.2020).pdf

Good Evening,

Please see the attached correspondence on behalf of Michael A. Toomey in regards to the above-mentioned matter. Please do not hesitate to reach out with any questions or concerns. Thank you for your time.

Best,

Blake M. Fleischer
Legal Assistant

June 1, 2020

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Invitation for Comment on Emergency Rulemaking

Dear Ms. Womeldorf:

The American Association for Justice (AAJ) submits its comment in response to the Committee on Rules and Practice and Procedure and the invitation for public input from its five advisory committees on possible rule amendments that will apply to court operations during national emergencies.[1] AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, class actions, and other civil actions, and regularly use the federal rules in their practice. AAJ members continue to litigate cases during the current COVID-19 pandemic, and this comment is based on their experiences and concerns.

During national emergencies, it is vital that the federal rules be maintained to allow courts to manage civil cases and move toward resolutions without undue influence or delay. Any revisions to the rules must not curb access to civil justice and must ensure that all proceedings be appropriately administered to permit fair and prompt adjudications.

With this purpose in mind, AAJ's recommendations focus on the Federal Rules of Civil Procedure and are designed to preserve efficient, just, and speedy determination of civil cases, while allowing for appropriate safety precautions to protect the courts and all its parties and counsel. This Comment includes general suggestions related to court administration as well as specific recommendations which are designed to update judicial discretion during emergency declarations.

[1] Invitation for Comment on Emergency Rulemaking, United States Courts, *available at* https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment/invitation-comment-emergency-rulemaking.

I. Framework for Evaluating Rules Changes

Any proposed rules change must still comport with Fed. R. Civ. P. 1, which requires that rules "be construed, administered, and employed by the parties to secure the just, speedy and inexpensive determination of every action and proceeding." A national emergency should not be used by counsel to needlessly delay or cause undue burdens on parties in contravention to Fed. R. Civ. P. 1. As the Advisory Committee on Civil Rules (Advisory Committee) begins its initial review of the Federal Rules of Civil Procedure (FRCP), AAJ urges it to bear this fundamental foundation to the rules in mind. Rules must prevent emergency declarations from being used to unreasonably increase the burdens on adverse parties or to prevent the just, speedy resolution of any pending lawsuit. Other aspects of this special rulemaking that should be considered include when such rules come into play and what tenets of court procedure require protection.

A. What constitutes an "emergency"?

Certainly COVID-19 constitutes a national emergency.[2] Federal and state courts have responded accordingly. Since the middle of March, courts have monitored the outbreak and responded by closing courthouses, suspending in-court proceedings, implementing special orders to protect public safety, and altering court operations to maintain access without endangering the public.[3] AAJ applauds these efforts and supports the Committee on Rules of Practice and Procedure in its review of existing rules and its consideration of possible rule amendments that could assist courts in maintaining operations during national emergencies.

This review must include a threshold conversation about what is included in the definition of "emergency."[4] An emergency could be a natural disaster, pandemic, or act of aggression. Consideration of an emergency should contemplate both natural and manmade disasters as well as emergencies that affect only some regions of the United States. The goal of reviewing rules for use during an emergency is to provide access to the courts and as much functionality and continued operations as possible for all parties and the court. Clarification of what defines an "emergency" for purposes of the Federal Rules is vital in ensuring that the goals of access and functionality are met, and any emergency rules developed are applied only in certain limited and temporary conditions.

B. Flexibility is paramount

Although responses to publicly-declared emergencies require uniformity to ensure appropriate safety for court staff, litigants, and the general public, flexibility is necessary

[2] On March 11, 2020, the World Health Organization characterized the novel coronavirus, SARS-CoV-2, (COVID-19) as a pandemic due its global outbreak. Two days later, President Trump declared that COVID-19 constituted a national emergency. Federal, state, and local governments have implemented orders designed to slow the spread of the virus and treat those affected, including stay-at-home orders, closures of both public and private non-essential businesses, and other preventative measures.

[3] Judiciary Preparedness for Coronavirus (COVID-19), United States Courts, March 12, 2020, *available at* https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19.

[4] Under the National Emergencies Act, any sitting President of the United States may declare a national emergency. *See* 50 U.S.C. § 1601 *et seq.*

for the unique and changing situations that arise. Maintaining appropriate court operations during all parts of a shutdown (including partial re-openings, re-openings with restrictions, and re-openings that include only part of the court system) is significant.

To that end, individual courts should not create exceptions to emergency rules. Nor should courts implement additional requirements to emergency rules unless the safety of the court, parties, or jurors require it. Flexibility is similarly paramount in allowing the courts to promptly act during an emergent situation to ensure maintained court operations tailored towards public safety.

C. Public access to courts

Access to the courts is the cornerstone of judicial integrity. In fact, public access to courts and to judicial records predates the United States Constitution itself and is a firmly established common-law right.[5] Such access is critical during a national emergency, where the public needs reassurance that the courts are there to serve as neutral arbiters to help to resolve disputes. While an emergency may instinctively justify a supposed right for less transparency, especially when the public is tending to the emergent health and safety of person and family, the courts' role in emergencies cannot be overlooked.

Fundamental to our system of justice is open and public access to courts. Even in an emergency, the press must be able to access and report on important decisions, trials, and work of the courts for the public good. The press plays an important role in the institution of the court system because it "offers a view of the functioning of the institution with an eye, though it be asleep at times, toward ensuring proper conduct -- the watchdog role."[6] In fact, "the missions of the court system and the media are different but not incompatible," instead "the two institutions depend one on the other. Trials will only be fair so long as the press is free. Both have huge stakes in the status quo."[7] Without the press delivering an accurate account of court proceedings, and watching for potential misconduct, the public cannot rely on the third branch of government to deliver justice. The judicial branch, along with the other two branches, requires accountability created by watchdog journalism. Losing this accountability allows the integrity of the court system to suffer.

II. A General Emergency Rule Should Be Created

Even during a national emergency, courts should appropriately maintain their operations and service to the public to provide swift and fair resolutions to disputes. Courts can and should update and utilize technologies that allow them to remain operational. Courts should also decrease any current requirements that risk the safety of the general public. While some delay may and can be expected, adjustments should be made to the court docket to allow it to continually move forward. National emergencies, such as COVID-19, may be ongoing for a significant period of time. Court

[5] *See, e.g.*, *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981) (commenting that right of access "antedates the Constitution"); *see also* Arthur A. Miller, *Confidentiality, Protective Orders, and Access to the Courts*, 105 Harv. L. Rev. 427, 429 (1991) (stating that "the right of public access to court proceedings and records derives from our English common law heritage").
[6] Steven Helle, *Publicity Does Not Equal Prejudice*, 85 Ill. B.J. 16, 21 (1997).
[7] *Id.*

proceedings cannot cease to exist during that time, and must have systems in place to allow business to safely continue in such circumstances.

A. Frameworks to consider

1. *Single, general "emergency" rule*

   One option is for the Advisory Committee to write a single, generalized emergency rule that applies during a national emergency. The benefit of this approach is that it may be more streamlined and direct, without leaving questions about whether the Advisory Committee intended to update certain rules and not others. A general rule also directly instructs the court to appropriate policies and procedures during national emergencies, preventing a piecemeal approach that could lead to contradictions in rules or questions of interpretation.

2. *Committee Notes*

   AAJ cautions against solely using Committee Notes to update rules. Committee Notes, while instructive, are not binding and therefore may not provide enough direction to courts and parties, or may not be applied uniformly, during a national emergency.

3. *Hybrid model*

   The most comprehensive approach would be a hybrid model that would create a specific emergency rule(s) and amend a few, specific existing rules. These changes could be supplemented by updated Committee Notes where appropriate. This approach would provide courts and parties with the most certainty during emergencies.

B. General Rules Updates Also Required

The Federal Rules require or assume certain in-person contact throughout the adjudication of an action. While in-person contact is appropriate and necessary in non-emergent settings, flexibility is required during national emergencies, especially those such as COVID-19, which are viral in nature requiring social distancing and other public health restrictions. AAJ recommends general rules related to filings, discovery, hearings, and trials to allow continued movement of cases and controversies without undue burdens of in-person contact on the parties or the court.

III. Emergency Rules Should Reflect Several Specific Areas of Concern

In addition to a general emergency rule, AAJ members recommend that the Advisory Committee review several specific rules. Clarifications should be made on terms in the FRCP that require in-person contact that may be unnecessary during an emergency declaration. Emergency rules should

encourage the use of technology and decrease the need for travel. The Advisory Committee should update rules to allow local courts to identify its special needs through increased access or additional safety precautions, so long as the rules conform with 28 U.S.C. § 2072 and § 2075. Courts should also be encouraged to provide for comfortable jury service, including explaining to potential jurors what the court is doing to ensure their health and safety and providing a point of contact for jurors with questions or concerns.[8]

A. Terms used throughout FRCP

Regardless of whether a general emergency rule approach is considered, or each rule is separately reviewed and updated, the Advisory Committee should review specific language and terms used throughout the FRCP.

1. *In-person requirements*

During a pandemic, how work is performed shifts from a combination of in-person and online to completely online. Certain terms in the FRCP, as well as local rules, may frustrate this purpose and contradict emergency rules that allows for increased flexibility during an emergent event. To avoid hindering the speedy resolution of cases, the Advisory Committee should provide clarifying edits that allow virtual lawsuit processes. For example:

Fed. R. Civ. P. 28 requires that a deposition be taken "before" an appointed person who administers an oath and takes testimony. Similar "before" language appears in Rule 30(b)(5)(A): "Unless the parties stipulate otherwise, a deposition must be conducted *before* an officer appointed or designated under Rule 28…" (emphasis added). The term "before" should be clarified to ensure that it does not preclude remote depositions, and that there be no requirement that a court reporter be in the same physical location as the witness or counsel during an emergency situation. While courts have allowed such remote practice, clarification would save the courts time and resources, as such matters would not require added litigation.[9]

[8] Since the onset of the COVID-19 pandemic, courts have communicated with jurors regarding efforts to protect the health and safety of jurors, parties, lawyers, and court staff. *See, e.g.*, E.D. Tex. Chief Judge Rodney Gilstrap Letter To All Prospective Jurors Re: Your Upcoming Jury Service in the Era of Coronavirus (May 6, 2020) (listing nine precautions utilized by the court including temperature checks, furniture adjustments to allow for social distancing, mask and hand sanitizer distribution). Courts should be encouraged to emulate similar practices and take "every reasonable precaution to maintain the [jurors'] health." *Id.*

[9] In *Hudson v. Spellman High Voltage*, 178 F. R. D. 29, 32 (E.D.N.Y. 1998), the court authorized a telephone deposition with the oath administered remotely by a notary public on the phone call. Relying on *Hudson*, the court in *Akins v. Mason*, No. 3:06-CV-248, 2008 WL 4646142, at *2 (E.D. Tenn. Oct. 17, 2008), held that a remote reporter (located in Knoxville, while the deposition was in Nashville) would not be stricken even though "procedurally flawed," because defense counsel was present and no prejudice resulted.

Fed. R. Civ. P. 30(c)(1) requires that a deposition be recorded "personally" by an officer.[10] Terms such as "personally," "in the presence," and "under the direction of" should be clarified to not specifically require the physical presence of the administrator in the same location as the participants of the deposition. Instead, current technologies could be utilized for remote oaths and affirmations that comply with the FRCP.

Fed. R. Civ. P. 16(a) states that the court may order attorneys and any unrepresented parties to "appear" for one or more pretrial conference.[11] The word "appear" should be clarified to ensure that it does not mean in person. Similarly, Fed. R. Civ. P. 16(c)(1) requires "attendance" for stipulations and admissions. To avoid any confusion as to whether attendance must be in-person, clarifications should be made to allow remote appearances.

2. *Good faith and due diligence requirements*

In other instances, the Advisory Committee should update certain good faith and due diligence requirements to ensure appropriate interpretations during a national emergency. It is especially important that standards set can be appropriately interpreted by a court using reasoning that is suitable to an emergency event. For example, **Fed. R. Civ. P. 43** establishes that witness testimony at trial must be heard in open court, but "for *good cause* in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location" (emphasis added).[12] Clarifications should be made to specify that terms such as "good cause" include travel restrictions and advisories issued by local, state, and federal government authorities. Other similar uses of good cause or due diligence throughout the FRCP should be updated to reflect these interpretational questions.[13]

B. Technology use should be encouraged during a national emergency

During a national emergency, technology can contribute greatly to ensuring continued court functions. To ensure the health and safety of the court, parties, and jurors, points of direct, in-person contact may need to be reduced. Civil rule changes should be made

[10] Fed. R. Civ. P. 30(c)(1) ("After putting the deponent under oath or affirmation, the officer must record the testimony …. The testimony must be recorded by the officer *personally* or by a person acting *in the presence and under the direction of* the officer") (emphasis added).

[11] Fed. R. Civ. P. 16(a) ("In any action, the court may order the attorneys and any unrepresented parties to *appear* for one or more pretrial conferences") (emphasis added).

[12] Fed. R. Civ. P. 43(a).

[13] There are other examples in the FRCP that should be given special attention. For example, Fed. R. Civ. P. 37(a)(1) requires "good faith" attempts to confer between parties before a motion to compel discovery; Fed. R. Civ. P. 45(e)(1)(D) permits a party to not disclose electronically stored information because of "undue burden"; Fed. R. Civ. P. 27(a)(2) requires "reasonable diligence" for petitions to perpetuate testimony; Fed. R. Civ. P. 4(m) allows extended timeline for service of a summons and complaint for "good cause"; and others.

to simplify e-filing and the use of electronic signatures. Similarly, video conferencing technology should be encouraged, and not stymied or hampered by the federal rules. While not exhaustive, suggestions include:

1. **Fed. R. Civ. P. 4** should allow service of process to continue during an emergency declaration. The Advisory Committee should consider whether additional methods of service should be added to accommodate restrictions on travel, telework, and other limitations on movement that present additional challenges for service of process.

2. **Fed. R. Civ. P. 5(3)(c)** requires that a person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. Local rules permitting nonelectronic filing, as well as specific rules issued by certain judges requiring non-electronic filing, should be prohibited.

3. **Fed. R. Civ. P. 30(b)(4)** provides that parties may stipulate, or a court may order, that a deposition be taken by telephone or other remote means. Specific reference to "video conference" could be inserted into the rule to allow online video and chat service technologies through a cloud-based peer-to-peer software platform. Further, the rules should clarify that during certain emergencies, the default means of oral depositions should be by telephone or video conference.[14] Virtual hearings and motions should be considered as routine, especially during an emergency declaration.[15] Discovery should not be held up during an emergency event unless a witness is unavailable for good cause.[16]

4. **Fed. R. Civ. P. 12 and 16** govern pretrial hearings and conferences. In most instances, such matters can be resolved virtually. Rules should clarify that virtual hearings and motions are routine in most instances.

C. Discovery should not be delayed during an emergency

Discovery is an essential part to civil litigation and most key aspects of discovery can proceed electronically without issue. In the COVID-19 emergency, AAJ members have anecdotally reported issues where defendants have used discovery to engage in unjustified and significant delay tactics. Regrettably, many defendants have used the pandemic as a default excuse for slowing or halting discovery altogether. Given the duration of the pandemic and potential for reasonable accommodation to proceed virtually, additional tools may be necessary to ensure that most discovery can proceed. For example, a pandemic or other emergency may require some additional time to complete discovery, but it should not be a bar to completion. Moreover,

[14] *See* Fed. R. Civ. P. 30(b)(4).
[15] *See* Fed. R. Civ. P. 12; 16.
[16] *See*, *e.g.*, Fed. R. Civ. P. 37, which should be adapted to compel discovery and avoid unnecessary delays during a national emergency situation.

significant extensions of timelines in the current rules are unnecessary. The rules already provide for different timelines (see Fed. R. Civ. P. 26(a)(1)(D)), and because discovery can be done electronically, specific extensions of deadlines by rule would only invite delay and are not necessary to include in emergency rulemaking. In addition, parties can easily use Fed. R. Civ. P. 37 to resolve discovery disputes with the court through telephonic or videoconferencing communication. The rules should encourage this practice. Moreover, courts may employ Fed. R. Civ. P. 16 to mandate more frequent discovery reports of the parties to ensure that discovery remains on track and the purpose of Fed. R. Civ. P. 1 is not frustrated.

IV. Getting Back to Business: Protecting Juries and Making Trials Easier to Conduct

The Seventh Amendment to the United States Constitution provides a constitutional right to a trial by a jury of peers.[17] This right is fundamental, and the Advisory Committee should prioritize rules that allow jurors, witnesses, and parties to feel safe and at ease with participation. This includes creating a safe, virtual environment for court operations.

A. Provide for remote appearances

Fed. R. Civ. P. 45(c) states that subpoenas to command a person to attend a trial, hearing or deposition may only be made "within 100 miles of where the person resides, is employed, or regularly transacts business in person," or "within the state." This rule does not outwardly provide witnesses the right to appear remotely during a declared emergency or in its immediate aftermath when travel to a court may not be feasible, or the safest alternative. This rule should be amended to permit a witness to appear by video conference (or if limited, by telephone) for "good cause" during an emergent event, its aftermath, and other issues such as persons with serious health and disabilities where travel is challenging and burdensome.

Fed. R. Civ. P. 77(b) states that "no hearing—other than one ex parte—may be conducted outside the district unless all the affected parties consent." This rule is too limiting and can be used to needlessly delay the docket. AAJ recommends adding a sentence at the end of rule: "The court in its discretion may hold a hearing or hearings using telephone, videoconference, or other remote means."

B. Provide space for witnesses

Courts should additionally provide private conference spaces with secure internet access for witnesses and/or parties who need to be deposed or interviewed remotely, but do not have adequate online access to do so. These rooms should be disinfected between uses and provide a means for witnesses without stable internet or electronic resources to be securely interviewed or deposed. While this may not seem like a rule suggestion, local rules need to accommodate witnesses and not make it more difficult for them to appear. It is vital that witnesses and parties who do not have internet access should not be disadvantaged or have their safety put at risk as a result.

[17] U.S. Const. amend. VII.

If a witness cannot appear, then in certain, limited circumstances deposition testimony may be considered in lieu of appearance. Fed. R. Civ. P. 34(a)(4) deems witnesses unavailable if they cannot attend trial because of "age, illness, infirmity, or imprisonment," but the rule does not address the circumstances of witnesses unable to attend trial in a national emergency, either because there is a stay-at-home order in place or because serious safety or other practical concerns with travel exist. During a public health emergency, witnesses that are high-risk, with pre-existing conditions, disabilities, or other barriers, should not be subjected to unneeded adverse health risks. To that end, parties and courts should work together to determine the appropriate way to proceed to ensure the safety of witnesses while still protecting the rights of parties.

V. Local Rules Must Protect, Not Hinder, Federal Rules

Local rules should not conflict with requirements issued during a national emergency and must not increase burdens on parties or jurors. Civil rule changes should clearly indicate that judges need to follow the same policies and procedures during a pandemic or other national emergency, including by emphasizing the use of remote and virtual proceedings. Unfamiliarity with technology should not be used as an excuse for failure to adhere to public emergency rules.

A. Use of local rules

It is important to recognize that local courts may have additional specific needs. Fed. R. Civ. P. 83 grants district courts the ability to create local rules so long as they conform with 28 U.S.C. § 2072 and 2075. Without imposing on the FRCP, local courts should be allowed to create additional policies and procedures that align with Fed. R. Civ. P 1 that are both relevant and logical to their districts.

For example, the Advisory Committee could look to Fed. R. Civ. P. 77 to provide updates on adjusting court hours where appropriate to allow the courts to safely keep moving through dockets during a public emergency.[18] This rule could be used by local courts to open up the clerk's office for extended hours in especially populated districts to ensure public access to the courts while maintaining adequate public health recommendations such as social distancing. These rules could also be tweaked to allow local courts to use extended set hours for virtual motion practice, civil dockets, or other docket clearing practice appropriate for that district.

B. Develop best practices

It may be advisable for local courts to work with local counsel who appear before the court to tailor best practices for the district. With the opportunity to engage in the process, counsel can recommend helpful local rules that ensure transparency and prevent unneeded delays or lack of notice of rules during an emergency event.

[18] *See* Fed. R. Civ. P. 77(c)(1), which requires the clerk's office to be open during business hours every day except Saturday, Sunday, and holidays. Through a local rule or order, an office can be open on specified hours on a Saturday or a holiday other than federal holidays as defined in Fed. R. Civ. P. 6(a)(6)(A).

VI. Conclusion

Continued public access and maintained court operations during a national emergency are vital to protecting individual rights and liberties. Civil rule changes should ensure continued public confidence in the justice system while maintaining public safety measures. By utilizing uniform technologies, digitizing court processes, and increasing judicial flexibility to react to emergent situations, the courts can implement practical solutions that deal with the COVID-19 pandemic and future public emergencies.

AAJ thanks the Advisory Committee for its inclusiveness in the review of this important issue. Please direct any questions regarding these comments to Susan Steinman, AAJ Senior Director of Policy and Senior Counsel, at [redacted] or [redacted].

Sincerely,

Bruce Stern
President
American Association for Justice

From: Brogioli, Amy
To: RulesCommittee Secretary
Cc: Steinman, Susan
Subject: AAJ Emergency Rulemaking Comment
Date: Monday, June 01, 2020 5:22:30 PM
Attachments: AAJ Comment, Emergency Rulemaking 6 1 20.pdf

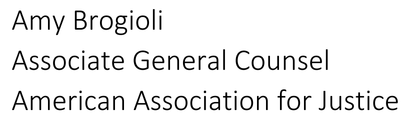
Hi Rebecca,

Attached please find AAJ's comment in response to the invitation for comment on emergency rulemaking.

Please let me know if there is anything additional you need. I hope all is well and that you and your family are staying safe.

Thank you!
Amy

Amy Brogioli
Associate General Counsel
American Association for Justice



20-CIV-16

Writer's Direct Dial: [redacted]
E-Mail: j[redacted]
Please reply to the San Francisco Office

June 1, 2020

VIA EMAIL

Rebecca Womeldorf
U.S. Courts Advisory Committee on Civil Rules
RulesCommittee_Secretary@ao.uscourts.gov

Re: Civil Rules Advisory Committee Request for Comment re: Recommendations for Rules Changes in Response to Public Crises

Dear Ms. Womeldorf:

We thank the Chief Justice for the opportunity to comment on the impact on the legal community of the national emergency declared in the United States in response to the COVID-19 global pandemic, as well as numerous state and local orders, and how potential amendments to the Federal Rules of Civil Procedure may promote efficiencies in litigation in the event of future emergency situations.

As with many aspects of American life, the COVID-19 pandemic has had a significant impact on the legal community. With respect to civil litigation, the most prominent impact has been delay. As the magnitude of the public health risk became apparent, courts were required to implement public safety measures in response to this unprecedented situation, including continuing trial dates and extending case deadlines. However, modern technology allows courts and litigants to react quickly to emergent situations, and uniform rules and guidance for utilizing this technology relieves courts from the burden of having to address – on a case by case, or court by court, basis – how to proceed when faced with an emergent situation that threatens to disrupt or delay the normal course of civil litigation.

The proposal below addresses obtaining deposition testimony through remote means during times of national crisis. It balances the goals of ensuring due process, zealous advocacy, and the just, speedy, and inexpensive determination of every action that are of paramount importance to members of the bar, their clients, and the courts. With these goals in mind, the premise of adopting changes to the federal rules that will empower parties to quickly implement technological solutions to system-wide problems, without burdening the courts, should be more broadly contemplated.

The Federal Rules of Civil Procedure have long permitted parties to conduct depositions remotely. In practice, however, certain aspects of Rule 30(b)(4) and Rule 45 work to frustrate the taking of remote depositions in times of national crisis. For example, while Rule 30(b)(4) allows for depositions to be conducted by "telephone or other remote means," this method of obtaining testimony is only available if the parties stipulate or the court so orders. Fed. R. Civ. P. 30(b)(4). Notably, the Rules do not presume that remote depositions ***shall*** be utilized, as a matter of course, even in emergency situations, where the taking of live testimony presents significant public health risks and would run afoul of public health mandates. This incongruity between the Rules and practice in times of crisis is further exemplified by Rule 45, which permits the issuer of a deposition subpoena to command a non-party to testify within 100 miles of where the deponent resides. But that authority, too, is substantively frustrated during time of crisis as the issuer is empowered to compel testimony, but not typically able to secure that testimony by means other than appearing in person, which can carry grave health risks.[1]

The absence of a means, as a matter of course, to conduct depositions remotely in emergency situations, has significant repercussions on civil litigation.

In practice, the permissive nature of Rule 30(b)(4) works to ***preclude*** the taking of deposition testimony in times like the current global pandemic, as parties frequently refuse to stipulate to participating in remote depositions, citing a preference to prepare for and defend depositions in person. As a result, an opposing party is, in effect, unilaterally able to take depositions off calendar (which is contrary to the Federal Rules), while proposing rescheduling that has little guarantee of proceeding in person if public health risks persist, resulting in further delay and uncertainty. Accordingly, needed testimony cannot be timely procured and the issuing party is left with the unenviable choice of either moving to compel during a national crisis or accepting an indeterminate delay of the litigation. Indeed, courts across the country have already faced numerous motions to compel remote depositions or to extend discovery schedules – motion practice that could be substantially diminished by affording movants the presumptive right to take testimony remotely during a public health crisis.[2]

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[1] Additionally, the mere service of a subpoena under Fed. R. Civ. P. 45(b) may be inconsistent with public health mandates, making it necessary to consider the use of service by alternative means, including e-mail if the subpoenaed person or entity is known to be represented by counsel, during an emergency.

[2] *See, e.g.*, *Revolaze LLC v. J. C. Penney Corp.*, No. 20-mc-190 (S.D.N.Y. Apr. 21, 2020) (granting motion to compel remote deposition); *Y.Y.G.M. Sa D.B.A. Brandy Melville v. Redbubble, Inc*., No. 19-cv-4618 (C.D. Cal. Apr. 16, 2020) (granting motion to compel remote Rule 30(b)(6) deposition of defendant); *Cates v. Zeltiq Aesthetics*, No. 19-cv-1670 (M.D. Fla. Apr. 6, 2020) (granting plaintiff's motion to conduct remote depositions of defendants' employees). *See also, e.g*., *SEC v Bradley*, No. 19-cv-490 (W.D.N.C. May 12, 2020) (denying request for continuance, among other reasons, because teleworking does not preclude completion of discovery and depositions can be taken by remote means); *U.S. v. K.O.O. Constr., Inc*., No. 19-cv-1535 (S.D. Cal. May 8, 2020) (granting partial extension "for the sole purpose of completing depositions remotely"); *Sweeney v. Santander Bank*, No. 19-cv-10845 (D. Mass. May 5, 2020) (granting motion for extension, but noting further extensions unlikely and that "[t]he parties should consider alternatives to live depositions as the court will not indefinitely extend discovery deadlines to avoid remote depositions"); *Thyssenkrupp Elevator Corp v. The Harlan Co.*, No. 18-cv-2100 (D. Mo. Apr. 21, 2020) (granting motions for extension, but ordering that "[i]f conditions do not allow for in-person depositions to take place by the deadlines set forth in this Order, the parties must take those depositions by remote means and otherwise comply with all deadlines in this Order"); *Berkley Vacation Resorts v. Sussman*, No. 18-cv-62372 (S.D. Fla. Apr. 17, 2020);

Technology has advanced significantly, such that numerous, secure solutions exist for efficiently, and cost-effectively, conducting depositions remotely by video. For example, remote video deposition platforms typically have minimal equipment (e.g., a laptop, iPad or other device with a camera) and remote connection requirements (e.g., normal internet bandwidth), to which most witnesses and counsel have access. These solutions also allow counsel to securely go on and off the record, and confer privately, as appropriate, during the deposition. Additionally, electronic exhibits can be introduced through these platforms without the need for hard copy documents to be exchanged. On balance, remote video depositions provide a practical, cost-effective solution for all stakeholders, and promote the interests of litigants and the court, by obviating the need for motion practice and serial extensions of case deadlines, facilitating the expeditious resolution of an action, and avoiding undue prejudice to parties and non-party witnesses.

Of course, lawyers prefer to take testimony in the time-honored tradition of confronting (or defending) a witness in-person. But crises demand flexibility; and when sufficient technology exists to secure deposition testimony without significant prejudice to the witness or any party, or by overburdening the courts with extensive motion practice directed at these issues, the rules should empower that flexibility and not hinder it.

To achieve this goal, we respectfully submit that Rule 34 should be amended to promote remote depositions as the default means by which to conduct depositions during emergency situations. Specifically, language could be added to the end of current Rule 30(b)(4), stating: "During a declared national or state emergency, depositions may be taken by telephone, videoconference, or other remote means without stipulation or order of the court." Similarly, Rule 45(c)(1) could be amended to add an alternative sub-part (C), commanding a person to attend a trial, hearing, or deposition "remotely where a state of emergency has been declared by local, state, or national authorities that prevents the person from attending a trial, hearing or deposition in person."

Were such rules to be amended, we recognize that other concerns may arise regarding related rules of civil procedure. For example, Rule 30(b)(5)(A) requires any deposition be conducted before an officer appointed or designated under Rule 28, that such officer administer an oath to the witness, and that the deposition be recorded personally by the officer, or by a person

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Harding v. Town of Needham, No. 18-cv-11242 (D. Mass. Apr. 15, 2020) (granting motion for extension, but stating "an additional extension will not be granted" and that "[c]ounsel shall confer on scheduling a telephonic or remote deposition (i.e. on Zoom) if the stay-at-home restrictions remain in place"); *Morgan Art Foundation Ltd. v. McKenzie*, No. 18-cv-8231 (S.D.N.Y. Apr. 15, 2020) (granting motion for extension, but ordering parties to complete depositions in-person or remotely as health guidelines require, within that timeframe); *James v. Tempur Sealy*, No. 18-cv-7130 (N.D. Cal. Apr. 13, 2020) (denying motions to extend settlement conference deadline to allow for in-person deposition of plaintiff and ordering defendant to take deposition remotely); *Othon v. Wesylan Univ*., No. 3:18-CV-00958 (D. Conn. Mar. 27, 2020) (granting motion for extension but stating court did not anticipating granting further extensions and encouraging parties to conduct video depositions); *AngioDynamics, Inc. v. C.R. Bard, Inc.*, No. 1:17-CV-00598 (N.D.N.Y. Mar. 20, 2020) (denying request for extension and ordering parties to conduct depositions remotely); *Crean v. Ascendium*, No. 0:19-CV-62095 (S.D. Fla. Mar. 19, 2020) (denying extension request in part and stating parties should use videoconferencing or other remote means for depositions); *BPI Sports, LLC v. ThermoLife Int'l LLC*, No. 0:19-CV-60505 (S.D. Fla. Mar. 18, 2020) (denying request for extension and stating parties should use videoconferencing or other remote means for depositions).

KESSLERTOPAZ MELTZERCHECK LLP
ATTORNEYS AT LAW

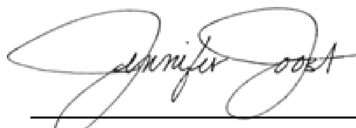
acting in the presence of such officer. To the extent those requirements can be interpreted to require the officer, the person recording the deposition, or the deponent physically be in the same place, such requirements would prevent a deposition from proceeding remotely by video. This potentially discordant result can be remedied by adding clarifying language to the rules specifically addressing depositions proceeding remotely by video in emergency situations, or in the form of an advisory committee note stating that the oath and recording requirements under Rule 30 are satisfied where an officer designated under Rule 28 administers such oath remotely on the record, and the deposition is recorded remotely by an officer participating remotely.[3]

Additionally, even if remote depositions are allowed to proceed in emergency situations without court order or stipulation of the parties, the Rules do not necessarily permit the use of such testimony at trial. For example, while Rule 32(a)(4) limits a party's use of deposition testimony at trial in civil actions where non-party deponents are located within 100 miles of the courthouse, as discussed above in the context of Rule 45, testimony from such witnesses may be difficult or impractical to compel during a public health crisis. And, while Rule 45 may be amended to compel deposition testimony by remote means, as discussed above, Rule 32(a)(4) still would not permit the use of such testimony at trial. To address this incongruity, the Rule can be amended to dispense with the notice and motion requirements of Rule 32(a)(4)(E), and an advisory committee note can be added to clarify that a national, state or local crisis constitutes "exceptional circumstances" under the rule.

We again thank the Chief Justice for the opportunity to comment and look forward to providing any additional commentary as would be helpful to the Court.

Best Regards,

KESSLER TOPAZ
MELTZER & CHECK, LLP



Jennifer L. Joost

Andrew L. Zivitz, Esq.
David Bocian, Esq.
Michelle Newcomer, Esq.

[3] The United States District Court for the Southern District of New York appears to have developed the following language to ensure that litigants can comport with this aspect of Rule 30(b): "For avoidance of doubt, a deposition will be deemed to have been conducted 'before' an officer so long as that officer attends the deposition via the same remote means (e.g., telephone conference call or video conference) used to connect all other remote participants, and so long as all participants (including the officer) can clearly hear and be heard by all other participants." *Hassan v. Fordham University*, No. 20-cv-3265 (ECF No. 6) (S.D.N.Y. May 7, 2020).

From: Jennifer L. Joost
To: RulesCommittee Secretary
Cc: Andy Zivitz; David Bocian; Michelle Newcomer
Subject: Submission by Kessler Topaz Meltzer & Check, LLP
Date: Monday, June 01, 2020 5:50:22 PM
Attachments: 2020-06-01-KTMC_LLP_Rules_Advisory_Committee_Letter.pdf

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To whom it may concern:

Attached please find Kessler Topaz Meltzer & Check, LLP's submission to the Rules Advisory Committee regarding Recommendations for Rule Changes in Response to Public Crises.

Best,

Jennifer Joost

Jennifer L. Joost

Direct Dial:
General Firm Fax:
e-mail:
internet: www.ktmc.com

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W:
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Monday, June 1, 2020

Rebecca A. Womeldorf, Secretary *via email*
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Comment on informal rule making concerning the COVID-19 emergency

To the members of the Committee on Rules of Practice & Procedure:

My name is Tom Jacob and I am writing to offer suggestions on addressing potential rules to address the COVID-19 pandemic and future emergencies. The Federal Rules of Civil Procedure should allow more flexibility in for remote discovery.

DEPOSITIONS

First, Rule 30 currently allows parties to take a deposition remotely only by stipulation or court order. Fed. R. Civ. P. 30(b)(4). The Committee should allow parties to notice remote depositions and provide them the tools to seamlessly integrate remote deposition into their practice. For example, the Committee should consider allowing the rules to expressly authorize remote swearing in of witnesses. And remote deposition rules should allow parties to take advantage of the technology available. On this last point, the use of screen sharing, and uniquely bates-

stamped documents allow parties to use documents in deposition while keeping the record clear. Parties should also have the option to show the witness impeachment evidence. The Committee should consider rules allowing parties to deliver sealed envelopes to the witness prior to the deposition, to be opened on the record.

Federal courts have entered remote deposition orders that the Committee should consider in revising the rules. *E.g.*, *Holcombe v. United States*, No. 5:18-cv-555 (W.D. Tex. Apr. 28, 2020) (Dkt. No. 213). While some raise the potential to coach witnesses, it may not be a bigger problem for remote depositions than in-person testimony. Notably, ethical rules should prevent witness coaching. *See e.g.*, Richard C. Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1 (1995). Beyond that, Courts like the *Holcombe* court required the witness to sign a declaration that he or she received no coaching. And of course, parties can also ask the witness at the end of the deposition whether they received coaching.

EXAMINATIONS

Second, the Committee should consider allowing parties to remote medical examinations. *See* Fed. R. Civ. P. 35. Multiple studies have found that the adoption of telemedicine in clinical practice effective. *E.g.*, Anne G. Ekeland et al., *Effectiveness of telemedicine: A systematic review of reviews*, 79 Int'l J. Med. Info. 736 (2010) (A meta-review finding "Twenty-one reviews concluded that telemedicine is effective, 18 found that evidence is promising but incomplete…").

Because of the remote nature of the examinations, the Committee should also consider rule changes that allow parties to record the remote examination. *E.g.*, *Schaeffer v. Sequoyah Trading & Transp.*, 273 F.R.D. 662, 664 (D. Kan. 2011) ("Videotaping the examination will provide the best evidence of whether defendants' retained expert conducted a fair examination and will also show whether plaintiff engaged in any delay or misconduct."); *Di Bari v. Incaica Cia Armadora, S.A.*, 126 F.R.D. 12 (E.D.N.Y. 1989) (requiring court-reporter transcription of medical examination).

Remote examinations particularly lend themselves to needing recording. Sometimes, technological and connectivity problems may cause the patient or the examiner miss questions and answers. Recording the examination lets them review the exam and correct these issues. And remote technologies have built in

recording capabilities making recording examinations minimally invasive and cost-free. (If there are concerns of the invasiveness of a recorded examination, parties may choose to limit to only audio-recording, instead of both video and audio recording.)

TRIALS

Finally, concerning trials, the rules should not allow remote jury trials, but should consider remote bench trials. Courts should not hold remote jury trials because the potential for jurors to get distracted and inability to sequester jurors presents difficult challenges for any court. To be clear, jurors provide a great public service by taking time out of their busy lives. Requiring them to come to the courthouse removes them from distractions of their daily lives and allows them to focus on the trial. And trials involving complicated subject matter increase the risk of juror distraction. For example, a complex intellectual property trial involving obscure technologies will almost certainly distract lay jurors in any trial. Remote trials only amplify the potential for distraction.

Moreover, courts have no way to sequester remote jurors and prevent outside research if jurors are remote. Particularly in trials involving significant expert evidence, jurors accessing outside information risks unreliable information outside the record influencing the result. During in-person trials, parties and the court can see if a juror uses his phone. Remote trials have no such check on the jury.

In addition, given that trials involve so many people, any technology problems impose delay into the lives of jurors. A technological glitch during a deposition requires the lawyers, the court reporter, and the witness to reschedule. But a glitch during trial requires the rescheduling of the jury, the court, the parties, the lawyers, and any support staff. Finally, allowing remote trials necessarily excludes jurors that cannot afford the computer technology needed for such trials.

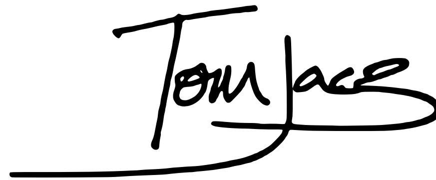
In contrast, the same considerations that prevent remote trials with juries do not apply to Judges. However, the rules should authorize remote bench trials only during times of emergency. Importantly, parties have a right to present their evidence in the most persuasive way available to them. *See e.g.*, *Old Chief v. United States*, 519 U.S. 172, 186–87 (1997) (the standard rule is that a party "is entitled to prove its case by evidence of its own choice…"). Absent emergency considerations that

prevent in-person bench trials, the committee should allow parties to exercise that right.

In sum, any changes to the rules should allow litigants and courts the flexibility and tools to take advantage of current and emerging technologies to remotely move the discovery phase of their cases forward and secure "just, speedy, and inexpensive determination" of their action. Fed. R. Civ. P. 1. But if a matter requires trial, the rules should give parties and their counsel maximum discretion in how they meet their burden of persuasion.

Thank you for your consideration of these matters. Please do not hesitate to contact me if you would like to discuss these issues further.

Sincerely,



Tom Jacob

From:	tjacob
To:	RulesCommittee Secretary
Subject:	Request for Input on Possible Emergency Procedures
Date:	Monday, June 01, 2020 7:05:43 PM
Attachments:	Remote Rule Changes.pdf

Hello,

Please find attached a letter concerning the recent request for input on possible emergency procedures.

Thank you,

—

TOM JACOB
WHITEHURST HARKNESS
BREES CHENG ALSAFFAR
HIGGINBOTHAM & JACOB PLLC

T F

HAGENS BERMAN

Lauren G. Barnes
HAGENS BERMAN SOBOL SHAPIRO LLP
www.hbsslaw.com
Direct

June 1, 2020

Via Email
RulesCommittee_Secretary@ao.uscourts.gov

Rules Committee Secretary
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E, Room 7-240
Washington, D.C. 20544

Re: Comment on Emergency Rulemaking and Proposed Changes to the Federal Rules of Civil Procedure

Dear Committee Secretary and Members,

My name is Lauren Barnes and I am a partner with Hagens Berman Sobol Shapiro LLP. I write to share thoughts regarding the Committee's evaluation of possible rule changes to ensure the effective and efficient functioning of the civil justice system in times of national or regional emergencies.[1] These comments spring from efforts to disrupt or stop discovery experienced by my colleagues and I over the past few months and ask the Committee to focus some of its efforts on rule changes to ensure discovery continues in civil cases without—or with only minimal—interruption.

As background, my practice for the greater part of fifteen years has centered on pharmaceutical marketing and antitrust litigation, alleging unlawful and/or anticompetitive conduct by pharmaceutical manufacturers and seeking recovery on behalf of private and public purchasers in class and complex litigation. Both the plaintiffs and the defendants in our cases are typically companies, some small, some multinational. Our cases are large, often involving damage estimates exceeding hundreds of millions of dollars, millions of pages of discovery, and dozens of depositions.

Discovery can largely be done without issue or interruption during times of emergency. And yet, the potential for significant delay exists if we do not have the tools in place to allow, encourage, or, in appropriate circumstances, require courts and litigants to proceed electronically. We all know the legal maxim that "justice delayed is justice denied." Delay disproportionately rewards defendants. Documents go missing. Memories fade. Plaintiffs grow sicker and die before ever seeing justice in their case.

[1] The views expressed here are my own and not necessarily those of my partners or my firm.

In the immediate aftermath of offices shuttering and working from home going into effect in March of this year, we heard from defendants in numerous of our cases that discovery should stop—that documents could not be reviewed and produced, that depositions could not occur—until COVID-19 was arrested. The facts do not bear this out. For quite some time now, the cases in which I am involved have rarely, if at all, involved combing through physical files. Nearly all documents in our cases are stored, reviewed, and produced electronically. And while the parties may sometimes prefer to attend them live, depositions have been occurring regularly in cases for many years.

Remote discovery is not just possible but is fair and effective. And it may simply be required to move the wheels of justice forward. To this end, I suggest four brief points.

First, encouraging flexibility must be a touchstone of the Committee's review of the rules and of any proposed changes. The rules should take into consideration situations where safety is an issue for in-person service, testimony, or inspection, or when documents or facilities are temporarily inaccessible due to closures—but should not permit the delay of discovery indefinitely. This may necessitate, for example, updating the in-person requirements of Rules 28, 30, 34, 35, and 45, among others. It may also require directing the parties to engage in discussions to mitigate danger or agree upon ways to proceed. Conferring has long been an important part of discovery efforts. As this Committee recognized in the pending amendments to Rule 30(b)(6), "candid exchanges" can "facilitate… efficiency and productivity." Such dialogue is even more important in the case of an emergency when courts and/or businesses may be closed.

Second, hand in hand with these updates, the rules should encourage and enable the use of virtual and remote technology by the parties and the courts. For example, urging courts to permit discovery disputes to be heard telephonically or by video conferencing—whether informally after meet and confers or formally following briefing—would save time and resources for all involved. Many courts have begun to shift to this model but it is seemingly far from the norm for civil matters.

Third, significant extensions of timelines in the current rules should not be necessary. Many of the rules already permit the parties to modify timelines by stipulation or court order. And because so much can be done electronically, blanket extensions of deadlines by rule serve no efficient purpose. They are not necessary to include in the changes the Committee may propose.

And finally, any changes to the rules as they relate to discovery should have as twin goals encouraging cooperation and preventing gamesmanship and delay. Parties should be expected to operate in good faith and with common sense.

As one court noted in March, "these unprecedented times also call upon us to find safe ways to continue to develop cases in litigation. The amount of time our work will be disrupted is

unknown and the cause of justice must continue to move forward."[2] I appreciate the Committee's shared view and willingness to examine these issues to ensure justice can continue to be served.

Sincerely,

/s/ Lauren G. Barnes

Lauren G. Barnes

[2] Order Staying Discovery & Setting Briefing Schedule at 1, *Stevens v. Ford Motor Co.*, No. 18-cv-456 (S.D. Tex. Mar. 31, 2020), ECF No. 73.

From:	Lauren Barnes
To:	RulesCommittee Secretary
Subject:	Comment on emergency rulemaking
Date:	Monday, June 01, 2020 10:03:07 PM
Attachments:	2020-06-01 - LGB to Rules Committee Secretary.pdf

To Whom It May Concern,
Please see the attached submission regarding the Committee's emergency rulemaking and proposed changes to the Federal Rules of Civil Procedure.

Should you require anything further at this time, please do not hesitate to contact me.
Sincerely,
Lauren Barnes

Lauren Barnes | Partner
Hagens Berman Sobol Shapiro LLP

Direct:

| www.hbsslaw.com

Firm News | Cases | Twitter | Facebook

Named 2019 Mass Tort Elite Trial Lawyers by the *National Law Journal* and honored by the American Antitrust Institute for Outstanding Antitrust Litigation also in 2019

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KOREIN TILLERY
Attorneys at Law
One U.S. Bank Plaza

www.KoreinTillery.com

June 1, 2020 Via Electronic Mail

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544
rulescommittee_secretary@ao.uscourts.gov

Re: Request for Input on Possible Emergency Procedures

Dear Members of the Committee,

Our law firm represents clients in a broad-array of complex, high-profile, high-stakes lawsuits. While most of our attorneys have represented both plaintiffs and defendants at some point in their careers, the firm represents plaintiffs exclusively. Our clientele runs the gamut, from individuals to governmental entities to multi-national corporations to classes of corporations or individuals.

We write to share our thoughts about possible rule amendments to facilitate the efficient and just prosecution of cases during a crisis like that created by COVID-19. A number of small steps using 21st-century technology can ensure that the court system continues functioning properly even in times of crisis.

Rules 28 and 30

Rule 28 requires a deposition to be taken "before" an authorized court reporter, and Rule 30(b)(5)(A) contains similar language. To facilitate the taking of remote depositions, the Committee should amend both Rules to clarify that the word "before" does not require the court reporter to be in the physical presence of the deponent. Likewise, Rule 30(c)(1) requires court reporter to record the testimony "personally"; the rule should be amended to clarify that the word "personally" does not require the court reporter to be in the physical presence of the deponent. So long as the court reporter has the requisite credentials and has access to a live audio feed of the testimony, it should not matter whether the reporter is in the same room or is transcribing from a live feed.

Rule 30(b)(4) permits a deposition to be taken "by telephone or other remote means." While this language could be amended to include a video conference explicitly, the committee could simply

note that the language is already broad enough to encompass video conferencing as such "other remote means." Given the substantial savings of party time and resources that remote depositions can achieve, the Committee should consider making remote depositions an option available at any time. At a minimum, however, the requirement of a court order or stipulation for remote depositions should be eliminated during times of crisis or national emergency such as a pandemic.

Rule 45

As currently worded, Rule 45 provides that "[a] subpoena may command a person to attend a trial, hearing, or deposition *only as follows*," within the state where the person resides, works, or does business or within 100 miles of those place. So while a deposition may be taken "by telephone or other remote means," testimony at a trial or hearing cannot be taken remotely. During a crisis like the COVID-19 pandemic, it may be difficult inadvisable for a witness to travel even nearby to a trial or hearing, much less at a distant forum. Rule 45 should be amended to permit trial or hearing witness appearances by telephone or videoconference for "good cause."

Hearings and Oral Arguments

Court-hosted telephonic conferences have become commonplace in many districts for a variety of pretrial proceedings. During a crisis, video and telephonic conferences should be the norm, and the Rules should be interpreted to reflect this. Rule 16(a), for instance, states that a court may order a party to "appear" for pretrial conferences, and Rule 16(c) refers to "attendance" and being "present." Rule 77(b) states that no hearing may be conducted outside the district. Both Rules should be amended to permit remote appearances and attendance for good cause.

In the same vein, to eliminate the possibility of a court or parties interpreting the rule to mean that all parties must be physically present for a hearing, the Committee should clarify that a court may hold hearings by telephone, video conference, or other electronic means without running afoul of this Rule.

Trials: Rules 32, 42 and 77

Rule 32 currently provides that a witness is "unavailable" when more than 100 miles from the courthouse or out of the country, or when the witness "cannot attend or testify because of age, illness, infirmity, or imprisonment." During a crisis, it may be either impossible, inadvisable, or unsafe for a witness to attend a trial, even if the witness is within 100 miles of the place of trial or in good health and not in prison. Rule 32 should be amended to make clear that a witness will also be deemed unavailable due to legal restrictions on travel or other emergency conditions that render in-person attendance a trial or hearing inadvisable or unsafe.

Rule 42 states that a trial witness's testimony must be taken in open court, though it provides an exception for "good cause in compelling circumstances." The rule should be amended to make clear that a crisis (like a pandemic or civil unrest or riots) qualifies as good cause.

Finally, Rule 77(b), which governs the place of trial in a "regular courtroom," could be interpreted to prohibit a remote trial. The Rule should be clarified to make explicit that, for good cause shown (including the safety of court personnel, parties, witnesses or attorneys), a court may conduct a trial using video conference technology.

* * * * *

It is true as ever that justice delayed is justice denied. Crises should not delay justice, at least insofar as modern technology makes virtual court proceedings feasible during times in-person proceedings are not a realistic possibility. We hope the Committee will adopt amendments that ensure federal court proceedings will continue in the midst of emergencies like COVID-19.

Very truly yours,

Robert King

From:	Broshuis, Garrett
To:	RulesCommittee Secretary
Cc:	King, Robert
Subject:	Request for Input on Possible Emergency Procedures
Date:	Monday, June 01, 2020 10:58:45 PM
Attachments:	June 1 2020 Letter re Rules Advisory Committee Request for Comments 0601....pdf

Dear Committee Secretary,

Please see the attached correspondence in response to the committee's request for input on possible emergency procedures.

Best,

Garrett Broshuis

Garrett Broshuis

Korein Tillery, LLC

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DWYER & COOGAN, P.C.
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PATRICK E. DWYER II

JAMES E. COOGAN

PATRICK E. DWYER III

CAROLEANN S. GALLAGHER

June 1, 2020

To the Advisory Committee on Civil Rules
Via email: RulesCommittee_Secretary@ao.uscourts.gov

To Whom It May Concern:

This is a moment of national unrest. The National Emergency declared by the President of the United States regarding the novel Coronavirus ("COVID-19") on March 13, 2020 reflected a growing concern that the easily-transmissible virus would lead to overwhelmed hospitals and enormous suffering and loss of human life.

I write to the Advisory Committee as a trial lawyer who is engaged in a civil law practice. I have experience with the Federal Rules of Civil Procedure and have represented litigants and engaged in Discovery in Federal Court.

This sort of national emergency is one that presents specific challenges to the practice of law. It impacts the ability of lawyers to represent their clients in Court before the tribunal as well as their ability to engage in Discovery in the ways they traditionally were able to (including safely meeting with clients in person, meeting with potential witnesses, in person meetings with opposing counsel, and depositions).

I want to stress to the Advisory Committee that any changes that are made to the Rules must keep one paramount consideration in mind: the ability of litigants to fully engage in the Discovery process. The unequal position of individual Plaintiffs who are suing large entities (corporations, the United States Government, insurance companies) means they are denied justice without the ability to obtain information and depose corporate witnesses (i.e. Rule 30(B)(6) witnesses). Rules should not be changed in a way that allows large defendants to evade their responsibilities to disclose information or short-circuit the discovery process.

None of that is threatened by the Courts encouraging wider use of technology. The Rules should encourage more remote presentation to the Court during times where the national emergency is based upon in-person contact (such as the present crisis). Additionally, the rules should encourage wider use of remote technology for depositions.

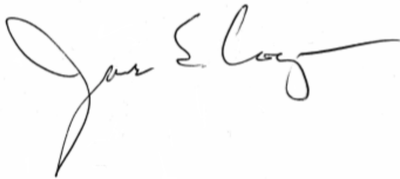
This should include additional rules for how those depositions should be conducted,

how documents should be disclosed, and how witnesses should be admonished not to engage in any improper communications during remote proceedings (like texting with another person or counsel in a way that is not seen on a video camera).

I am also encouraging the committee to determine the most-feasible way to return to holding civil jury trials. The right to trial in front of a jury is protected by the Seventh Amendment. It is a critical right for individuals in this country to continue to have the ability to try their cause in front of a jury, and not just for criminal defendants. Any restriction on trials reduces the value of Plaintiff's cases and threatens to undermine the ends of justice. Delay of trials is a denial of justice, forcing those who seek money damages to wait longer before they may get their day in Court—and the threat of trial is one of the only real meaningful drivers of settlement.

Please keep the rights of individual litigants in mind during this difficult time as you consider ways to continue with the efficient administration of justice in the face of such overwhelming challenges.

Very truly yours,



James E. Coogan

From:	James Coogan
To:	RulesCommittee Secretary
Subject:	James Coogan Comment
Date:	Tuesday, June 02, 2020 12:00:04 AM
Attachments:	image003.png Comment to Committee Re Civil Rules (6.1.2020).docx

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Please see attached.

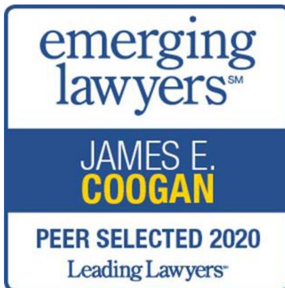
-Jim Coogan

***Our Law Firm is asking for your cooperation during the COVID-19 coronavirus Public Health Emergency to** *please correspond by e-mail, telephone and e-fax and refrain from mailing or sending packages to the maximum extent practicable* **as we intend to do the same.**

James E. Coogan
Managing Partner
Dwyer & Coogan, P.C.

P:

www.dwyercoogan.com



From: Mike Roosa [redacted]
Sent: Thursday, May 21, 2020 9:21 AM
To: RulesCommittee Secretary
Subject: RE: Response to Federal Rules Committee Request for Comments
Attachments: [EXTERNAL] JUNE 1st DEADLINE: Federal Committee on Rules of Practice and Procedure Request for Input re Possible Emergency Procedures

Good morning,

In response to the attached request for comments, I wish to relay a statement from FCCI Insurance Group's AGC:

"As opposed to state courts, federal courts I would think are less impacted by something like a pandemic because there are few personal hearings and so much gets done already through written submissions. I would think if the federal rules could be amended to provide for remote appearances, perhaps even in trials, it could be helpful in a pandemic setting.

I would be more interested to see if state courts could basically function more like federal courts in pandemic situations, when persons are not able to move about and congregate so easily. If state judges accepted motions in written form and decided them without personal appearances, that would help in pandemic settings. I think I just read of a trial that was done with everyone, including the jury, appearing remotely. I believe Jorge attended a recent mediation where everyone appeared remotely, and he said it worked fine. If courts rules could provide for such procedures that would be helpful, so that courts would have a prior designed framework in mind.

These are just some general thoughts. I think the main idea would be to try to formalize in the rules of civil procedure some of the ad-hoc processes/procedures that the court system basically had to institute on the fly because of COVID-19. Rick Piedra, Esq."

Please feel free to contact me if any further clarification is needed. Thank you!

Best Regards,

Michael Roosa, Esq.
Associate Attorney, Legal Compliance
FCCI Insurance Group
[redacted]
[redacted] – Direct

From:
Sent: Wednesday, May 20, 2020 12:05 PM
To: Mike Roosa
Subject: [EXTERNAL] JUNE 1st DEADLINE: Federal Committee on Rules of Practice and Procedure Request for Input re Possible Emergency Procedures

Security Alert: This is an external email. Do not click links, open, or download attachments from unknown sources.

Dear Member Company Representatives:

The Federal Committee on Rules of Practice and Procedure, joined by its advisory committees for appellate, bankruptcy, civil, criminal, and evidence rules, has issued a request seeking input on potential rule changes that might be necessary or helpful given the COVID-19 pandemic or possible future emergencies. The Rules Committee has asked that interested parties submit comments by June 1st. APCIA intends to submit a comment urging the Committee to guard against adopting any proposed rule amendments that change, or that might be interpreted to change, substantive law.

The Committee's request is set forth in more detail at this **link**.

Suggestions should be sent to RulesCommittee_Secretary@ao.uscourts.gov(link sends e-mail). Because this process is moving forward quickly, the Committee has requested responses by **June 1, 2020**.

If you have any questions, please contact .

Colleen Shiel
Vice President, Deputy General Counsel
American Property Casualty Insurance Association
Office:
Cell:

RUTGERS
School of Law | Newark

David L. Noll
Professor of Law
Center for Law and Justice

20-CIV-22

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Phone:
Fax:
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May 28, 2020

Committee on Rules of Practice and Procedure
Advisory Committee on Civil Rules
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: Request for Input on Possible Emergency Procedures

Dear Members of the Civil Rules Advisory Committee:

Complex civil litigation in the federal courts is a subject of intense interest to the public, academic researchers, and the individuals and businesses that it affects. But compared to other government proceedings that affect large numbers of people, complex litigation is relatively difficult for interested parties to observe and monitor.

This inaccessibility is the result of two factors. First, complex litigation is generally managed by a small group of attorneys and officers of the court, either because of the appointment of class counsel or because of the appointment of "lead" counsel in non-class proceedings. *See, e.g.*, David L. Noll, *What Do MDL Leaders Do?: Evidence from Leadership Appointment Orders*, 24 Lewis & Clark L. Rev. (forthcoming 2020). Second, existing guarantees of access to court proceedings are weak and incomplete. Although the E-Government Act of 2002, Pub. L. No. 107-347, § 205(c), 116 Stat. 2899, mandates public access to certain electronically filed documents, hearing transcripts and case management orders are not available in all cases. Moreover, PACER usage fees present a serious obstacle for many individuals seeking to monitor complex proceedings. Thus, access to complex proceedings depends on action by the presiding district court. When the court does not affirmatively order that hearing transcripts and orders be made available to the public, interested persons must "call friends, try to look through Pacer, or take other difficult steps to be kept abreast" of developments. *See* Paul D. Rheingold, Litigating Mass Tort Cases § 7:21, Westlaw (database updated May 2018). Attorneys report this is the case even for *parties* to a complex proceeding who have retained individual counsel. *See id.*

The inaccessibility of complex litigation would warrant the Committee's attention under the best of circumstances, but the problem is particularly urgent during national emergencies. The current pandemic has precipitated suits seeking the release of prisoners

and immigrant detainees, insurance coverage litigation, and suits against universities seeking refunds of tuition and fees, among other things. Given the public health and economic implications of how governments, universities, companies, and others have responded to the pandemic, the case for public oversight of this litigation is unusually strong. But changes to court procedures necessitated by the pandemic have paradoxically made public oversight difficult. For example, the shift to remote proceedings has made it more difficult for interested parties to observe ongoing proceedings and slowed the pace of press reporting. And limitations on in-person work have slowed the dissemination of what information is available through PACER. *See, e.g.*, Administrative Order of April 13, 2020, U.S. District Court for the Southern District of New York (noting the likelihood of "delays in processing filings and getting Drop Box materials to the assigned judge").

To alleviate these problems, I urge the Advisory Committee to propose a rule amendment mandating free electronic access to hearing transcripts and orders in certain complex proceedings. In effect, the proposed amendment codifies a best practice that is already followed by well-regarded courts presiding over coordinated or consolidated proceedings under 28 U.S.C. § 1407 and makes the practice applicable to an expanded category of cases. *See, e.g.*, Pretrial Order No. 1, *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Prods. Liab. Litig.* (N.D. Cal. Dec. 9, 2015); Order No. 27, *In re General Motors LLC Ignition Switch Litig.* (S.D.N.Y. Dec. 1, 2014). The amendment would be warranted even in the absence of a national emergency. But it is particularly needed when changes to the courts' standard operating procedures make complex litigation unusually difficult to monitor.

The appendix to this letter contains draft rule language for the Committee's consideration. The proposed amendment reflects several choices concerning the operation of the rule amendment that should be noted:

- **Applicability.** Because complex civil litigation raises unique concerns about the accessibility of court proceedings, the proposed amendment applies only to coordinated or consolidated proceedings where the number of parties exceeds a specified threshold, and to proceedings where the court appoints class counsel or interim class counsel under Rule 23(g). The proposed amendment is written to apply to proceedings that are coordinated or consolidated under any statute or rule. The proposed amendment uses the appointment of class counsel or interim class counsel in class actions to strike a balance between, on the one hand, extending the disclosure requirement to all proposed class actions and, on the other, extending the disclosure requirement only to cases where a class action is certified.

- **Scope of required disclosure**. In covered proceedings, the proposed amendment requires a district court, in consultation with the parties, to

establish and maintain a website that contains hearing transcripts and orders that apply to more than one case, or to a class action.

- **Temporal scope**. The proposed amendment applies to proceedings that are pending or filed after a national emergency is declared, and the disclosure requirement continues for the duration of the declared emergency. The Committee, however, would be justified in striking this provision and proposing a rule that applies at all times.

- **Costs**. The proposed amendment follows Rule 53 in providing that the costs of establishing and maintaining the required website will be paid by a party or parties, or from a fund or subject matter of the action within the court's control. The choice of mechanism is left to the district court's discretion.

- **No effect on right of public access**. The proposed amendment does not reduce or enlarge the public's right to access proceedings under the First Amendment, federal statutes, and the Federal Rules of Civil Procedure. I do not believe that rule language confirming this is necessary. The issue, however, could be addressed in a note to the proposed amendment.

As the Sixth Circuit recently noted, the accessibility of court proceedings is crucial to public confidence in the courts. *See In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 939 (6th Cir. 2019) (noting that "[t]he presumption in favor of openness of court records" rests on the public interest "in ascertaining what evidence and records the District Court and this Court have relied upon in reaching our decisions"). During national emergencies, the transparency of court proceedings is more important than ever. By helping to ensure the federal court proceedings are accessible to interested parties, the proposed amendment would improve knowledge of the legal system and public confidence in the federal courts.

Thank you for considering this suggestion.

Respectfully,

David L. Noll

APPENDIX

Rule 77, Fed. R. Civ. P. is amended by inserting a new section (e) as follows:

(e) ELECTRONIC ACCESS TO HEARING TRANSCRIPTS AND ORDERS.

(1) *Applicability*. This section applies to—

(a) coordinated or consolidated pretrial proceedings with more than [100] parties (including cases consolidated under Rule 42 and cases deemed related according to district practice or procedure);

(b) actions in which the court appoints class counsel or interim class counsel under Rule 23(g).

This section applies to proceedings in which actions are filed or pending at the time a national emergency is declared under the National Emergencies Act (50 17 U.S.C. § 1601 *et seq*.). The public access obligation created by this section applies for the duration of the declared emergency.

(2) *Required public access*. The district court, in consultation with the parties, shall establish and maintain a website that provides free public access to—

(a) transcripts of hearings and pre-trial conferences;

(b) case management orders;

(c) orders on motions that apply to more than one action, or to a certified class action;

(d) any other orders and filings identified by the district court.

(3) *Costs*. The costs of establishing and maintaining the website required by this section, including the costs of obtaining transcripts, must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of an action within the court's control.

The allocation of costs to the parties shall be governed by Rule 53(g)(3).

From:	David Noll
To:	RulesCommittee Secretary
Subject:	Input on Possible Emergency Procedures
Date:	Thursday, May 28, 2020 11:36:49 AM
Attachments:	Noll Comment to Civil Rules Advisory Comm. May 28, 2020.pdf

Dear Ms. Womeldorf,

I attach a comment for the Advisory Committee on Civil Rules that responds to the judiciary's recent request for input on possible emergency procedures. Many thanks for sharing this with the committee.

Kind regards,

David Noll

--
David L. Noll
Professor of Law
Rutgers Law School

From: Joseph D. Garrison
To: RulesCommittee Secretary
Subject: Emergency Procedures Used in Arbitration
Date: Friday, May 29, 2020 4:18:33 PM
Attachments: AAA Materials.pdf

As an employment lawyer, I have been involved in numerous arbitrations and mediations. Even during this time of COVID-19, virtual mediations have been common and virtual hearings, while not quite as common, have been occurring. I have attached the American Arbitration Association Model Order and Procedures for a Virtual Hearing. I think it could be useful for the trial court judges to see how AAA has set up its processes for hearings. Arbitrations are different from trials but there are enough similarities so a review of these Procedures may be helpful. I have also attached three different question and answer commentaries, because those are similar to focus groups except that the persons answering are experienced arbitrators. Some of those arbitrators have retired from federal judgeships. In any event, I thought their opinions might be interesting in presenting what the "boots on the ground" think. To be clear, these are not ideas for changes in the rules themselves. They may well be ideas, however, that would make virtual hearings actually work. Thank you for sharing them with the members of the Committee.

Advocates for Employee and Civil Rights

Joseph D. Garrison
Partner (view bio)

(fax)

garrisonlaw.com

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INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

AAA-ICDR® Model Order and Procedures for a Virtual Hearing via Videoconference

AAA® is providing this document as a model or template which the arbitrator and the parties can modify to fit the specific needs of their specific case. The model order may not be a good fit for every AAA case, but even in those situations it may provide guidance as to issues the arbitrator and parties could consider. Based on the circumstances of the specific case before them, an arbitrator or parties may make decisions or take actions different from those noted below.

1a. Agreement to Videoconference: [if it's been agreed to]

- **A.** The parties and the panel/arbitrator agree that the hearing in this case will be conducted via [Platform Name] videoconference. This confirms that the hearing will be deemed to have taken place in [locale/place of arbitration].
- **B.** The parties acknowledge that they have made their own investigation as to the suitability and adequacy of [Platform Name] for its proposed use for the videoconferenced hearing and of any risks of using [Platform Name], including any risks regarding its security, privacy or confidentiality, and they agree to use [Platform Name] for the hearing.

[or]

1b. Order for Videoconference Hearing: [if ordered by the arb/panel & not agreed to by all Ps]

- **A.** The arbitrator/panel hereby orders that the hearing in this case be conducted via [Platform Name] videoconference in accordance with the procedures set forth below. This confirms that the hearing will be deemed to have taken place in [locale/place of arbitration].
- **B.** The arbitrator/panel notes the [claimant's/respondent's/other parties'] objections to holding the hearing via [Platform Name]. The arbitrator/panel finds, however, that conducting the hearing via videoconference is a reasonable alternative to an in-person hearing in light of the COVID-19 pandemic, stay-at-home orders, and travel limitations. Videoconferencing technology will provide the parties a fair and reasonable opportunity to present their case and will allow the hearing to move forward on the dates previously scheduled instead of postponing the hearing to a future date.

2. Hearing Record and Recording:

- **A.** The parties and panel/arbitrator agree that the hearing [will/will not] be transcribed by a court reporter. [If yes – The parties and panel/arbitrator agree that the court reporter's transcript will be the official record of the hearing. Regardless of physical or remote attendance, the court reporter may interrupt attorneys, witnesses, or the arbitrator/panel as needed to clarify items for the record.]
- **B.** The parties and panel/arbitrator agree that the hearing's audio and video [will/will not] be recorded through [Platform Name]. [If yes – The parties and panel/arbitrator agree that the video conferencing platform's recording [will/will not] be the official record of the hearing [if a court reporter is not transcribing the hearing]. The

parties and panel/arbitrator agree that the recording [will/will not] be made available to all counsel and panel members after the hearing concludes [on request/and the Chair/host will send a link to the recording as soon as is practicable after each hearing day concludes/after the hearing concludes]. The panel/arbitrator will control when the hearing is on and off the record.]

C. The parties and counsel agree that they will not record, via audio, video or screenshot, or permit any other person to record, via audio, video or screenshot, the hearing or any part of it, except as is provided for in this Order. The parties and counsel will ensure that each additional attendee at the hearing for which that party is responsible also acknowledges and agrees to this prohibition on recording.

3. Technical Aspects:

A. Invitations to Access Hearing: The [AAA case manager/arbitrator/one of the panel members] will invite attendees via email to join the [Platform Name] hearing. To protect the security of the hearing, access to the hearing will be password-protected and limited to authorized attendees only. Hearing attendees should not forward or share the hearing link or password.

In order to facilitate e-mail invitations for the hearing, no later than XX, the parties shall circulate to the AAA a list of each attendee's name, e-mail address, and phone number (where they will be reachable on the day(s) they attend the hearing).

B. Advance Testing of System:

i. At least one week before the hearing, counsel and the panel/arbitrator will test the videoconferencing system to ensure that all arbitrators and counsel can connect and that their video and audio systems work (and noting camera settings, lighting, delays/time lags, clarity, volume, feedback, and other sound disruptions).

ii. Each party will be responsible for testing the videoconferencing system with each of their witnesses, including any third-party witnesses that party has subpoenaed, who will be attending virtually (as opposed to in counsel's offices). Each party also is responsible for ensuring that all logistical requirements of this Order are satisfied.

iii. The video conference shall be of sufficient quality so as to allow for clear video and audio transmission of all participants.

iv. Each participant should test their equipment to determine their best audio connection – whether by phone, through their computer speakers/microphone, and with or without a headset.

C. Back-Up Conference Call Line:

The parties/AAA shall reserve an optional dial-in conference call number in case one or more participants has poor quality computer audio (after trying the audio connection through the computer-- with and without a headset – and by phone).

D. Hearing Participants:

i. Each party will inform the panel/arbitrator and all other parties/counsel [XX] days before the hearing the names of all persons who will attend, participate in or will be able to hear any communications in the

hearing using [Platform Name], including any technicians assisting the party or counsel. The parties agree that no persons will attend, participate or be allowed to listen in on the hearing without the prior consent of all parties and the panel/arbitrator.

ii. If the arbitrator/any panel member plans to have a technician present with them or available to assist them in person, they will communicate to counsel [and the other panel members] the technician's name and affiliation at least [XX] days before the hearing.

iii. Each attendee of the virtual hearing shall disclose at the start of each hearing session all people in the room with the attendee. Should an individual join the attendee after the hearing session has begun, that individual should be identified to counsel and the panel/arbitrator at the earliest opportunity.

iv. During the videoconference, the participants [or the witness] shall always be in view of the camera. If two or more people are attending the hearing together in a room, they shall use a single camera, which shall be placed to provide a view of a reasonable part of, if not the entire, room.

v. At the Chair's/arbitrator's request, unknown participants shall identify themselves by showing a piece of identification to the camera or by responding to the panel's/arbitrator's questions regarding their identity.

E. Ensuring Good Audio/Video: Hearing participants shall make best efforts to ensure that there will be clear video and audio transmission during the hearing. Participants should:

i. consider steps that may be taken to establish a high-speed internet connection (*e.g.,* if possible, a hard-wired internet connection is generally preferable to a wireless internet connection);

ii. use the computer microphone, with or without a headset, for audio transmission or use a phone to dial into audio portion of the platform (or if necessary, use the back-up conference call number if the computer and platform audio are of poor quality);

iii. eliminate any background noise;

iv. consider camera positioning and lighting (e.g., avoid sitting near a window, positioning a light in front of (instead of behind) the participant);

v. access [Platform Name] via desktop or laptop rather than by smartphone or tablet;

vi. ensure computing devices are adequately charged and that power cables or back-up batteries are available as may be necessary; and

vii. not join the hearing from a public setting or using unsecured, public wifi to ensure the privacy and security of the hearing.

F. All counsel shall endeavor to speak one at a time and not while another is speaking, other than as may be required to interpose an objection to a question asked or to alert other participants of technical difficulties.

G. All participants who are not actively being questioned as a witness, asking questions of a witness, defending a witness, or providing or responding to opening statements, closing arguments, or other arguments, shall maintain their audio on mute to limit potential interruptions. The video hearing host and co-host [if any] also will have the ability to mute and unmute any participant if needed.

H. For each person participating in the video conference, there shall be sufficient microphones to allow for the amplification of the individual's voice, as well as sufficient microphones to allow for the accurate transcription or recording of the participant's speech as appropriate.

I. Each participant in the hearing shall have accessible a computer or other device with email [and a printer to which the device can print exhibits or other documents if needed].

4. Witnesses and Exhibits:

A. With the exception of the parties' corporate representatives and expert witnesses, who may attend the entirety of the hearing, all witnesses are to be sequestered until they testify. [If recording video - Witnesses shall be advised in advance by the party calling them that their testimony will be recorded.]

B. Witnesses should follow the below practices:

i. A witness shall give evidence sitting at an empty desk or table, and the witness' face shall be clearly visible in the video.

ii. To the extent possible, the webcam should be positioned at face level, relatively close to the witness (e.g., by positioning a laptop on a stack of books).

iii. Witnesses may not use a "virtual background." Instead, the remote venue from which they are testifying must be visible.

iv. Witnesses should speak directly to the camera while testifying.

v. Witnesses should avoid making quick movements.

vi. All non-party or expert witnesses shall sign-off from the [Platform Name] session at the conclusion of their testimony.

C. At any time, the Chair may ask a witness to orient his or her webcam to provide a 360-degree view of the remote venue in order to confirm that no unauthorized persons are present; any authorized persons (counsel, etc.) in the room with the witness must be identified at the start of the witness' testimony.

D. In accordance with the provisions of this Order, the Chair shall instruct each witness about: (i) what to do in the event of a disconnection or other technical failure; and (ii) the impermissibility of any unauthorized observers or recordings of the hearing.

E. Hearing exhibits:

i. Before the hearing, counsel shall provide each witness with a clean, unannotated hard copy set of exhibits to be referred to during the witness' evidence, as well as a clean, unannotated copy of his or her witness statement [if any]. At any time, the Chair/arbitrator may ask a witness to display the set of exhibits and/or witness statement and verify that they do not bear any annotations. Witnesses shall not be aided by any notes, unless permitted by the Panel/arbitrator upon motion for good cause.

ii. The parties may agree on utilizing a shared virtual document repository (*i.e.*, document server) to be made available via computers at all participants' locations, provided that the parties use best efforts to ensure the security of the documents (*i.e.*, from unlawful interception or retention by third parties). If available, a

separate display screen/window (other than the screen/window used to display the video transmission) shall be used to show and display the relevant documents to the witness during the course of questioning.

5. Hearing Schedule & Logistics:

   A. The hearing shall commence on ________, 2020, and it will be begin at 9 a.m. [time zone], with morning, lunch, and afternoon recesses at such times as the Panel determines in its discretion are appropriate, and the hearing shall continue on __________ as may be necessary. It is recommended that all participants access the virtual hearing room early [each day of hearing]. The Panel may take additional recesses and adjust the hearing schedule, in its discretion, to facilitate a smooth and efficient hearing.

   B. The hearing schedule, and the daily schedule, will take into account that extra time may be needed if there are technical problems that cause delays.

   C. Upon joining the [Platform Name] hearing, participants will be admitted to a virtual Waiting Room [if offered by the platform]. The panel/arbitrator will admit all participants to the hearing at the same time. To avoid delay and difficulty reconnecting, hearing attendees should not disconnect from the [Platform Name] meeting during any recess. However, lines may be muted during this time, and the Panel may move participants to "break-out" and/or the virtual Waiting Room.

   D. The panel/arbitrator will disable the private "chat" function in [Platform Name]. The arbitrator/panel may use a virtual "break-out" room to confer privately. The arbitrator/panel may also use virtual break-out rooms to facilitate private conversations between other case participants as may be appropriate (e.g., upon request, to allow members of a party's legal team to confer with each other directly, outside of the presence of the arbitrator/panel and witnesses).

6. Technical Failure:

   A. Should one party's or participant's videoconferencing connection fail, the panel/arbitrator will ask the counsel remaining on the videoconference to mute their audio and to turn off their video to avoid concerns regarding potential *ex parte* communications. Once the panel/arbitrator sees that the dropped participant has rejoined the videoconference, the remaining counsel should unmute their audio and turn on their video.

   B. If a participant is disconnected from the videoconference or experiences some other technical failure and connection cannot be re-established within a 5-minute interval:

      i. the arbitrator/panel may take steps to "pause" the hearing, which may include moving participants into a virtual waiting room or one or more separate break-out rooms, and the parties agree to pause proceedings as needed to accommodate any reconnections or technical issues;

      ii. such participant shall e-mail all hearing attendees, by replying all to the [Platform Name] invitation circulated by the arbitrator/panel, and shall monitor e-mail for any further instructions from the arbitrator/panel [or – The parties and participants shall use telephone communication to indicate if any party, attorney, or witness has been dropped from the hearing due to a connection problem or other technical issue. Unless agreed otherwise, _____ [name and number] _____ is the designated person and number to contact in the event that parties, counsel, or witnesses are disconnected.]

C. If the videoconferencing system fails to work such that the hearing cannot take place as scheduled, or if the panel/arbitrator determines that the videoconferencing system otherwise does not allow the parties to adequately present their case or that it would be unfair to any party to continue the hearing via videoconference, the panel/arbitrator may reschedule the hearing or take any other appropriate steps as may be necessary to ensure the fairness and integrity of the proceedings.

7. Costs of Videoconferencing: The parties agree that the costs of using [Platform Name] for the hearing will in the first instance be borne equally between them, 50% to Claimant and 50% to Respondent [if not equally split, or if more than 2 parties, need to specify how to allocate costs]. [For Consumer or Employment cases – The parties agree that the costs of using [Platform Name] for the hearing will in the first instance be borne 100% by the business/employer.]

   For the avoidance of doubt, the parties agree that those costs are included in the costs of the arbitration, as specified in the applicable Rules and are subject to allocation by the panel/arbitrator in any final award.

Best Virtual Mediation/Arbitration Platform - What are your thoughts?

By Jeffrey Zaino on April 25, 2020 1:40 PM | 10 Comments

The pandemic has created debate about the "best" virtual mediation/arbitration platform. There are several options, including Zoom, BlueJeans, Microsoft Teams, and Skype for Business, the last option exclusively selected by the New York State courts. Arbitral institutions defer to the parties' choice, with repeat use of Zoom.

Based on your experience, what are the pros/cons of these systems? If you designed a bespoke platform, what would it contain different from what is already in the market?

Please provide your thoughts/comments below.

10 Comments

Anonymous | April 25, 2020 3:32 PM | Reply

I think Zoom is the best but clearly was not designed for conducting legal proceedings.

If I could design a platform, I would want one where the platform leader (arbitrator, mediator or administrator) can set the view of how the videos are positioned for all participants to make it more like an actual hearing. For example, many eBook platforms try to replicate reading an actual hard copy of a book. I know there might be some limitations if a participant is using a phone or tablet.

Michael Orfield | April 25, 2020 4:03 PM | Reply

I have been using Zoom since March 30 for a UC San Diego course that I teach. I might have 40+ attending at any given session. It works fairly well for the way the class and I interact, but I find the sound quality a bit suspect when a student speaks, and have had some sound quality problems when sharing a screen for PowerPoint and YouTube presentations. As

Search

Search

About this Entry

This page contains a single entry by Jeffrey Zaino published on *April 25, 2020 1:40 PM*.

Disputes Post Pandemic - What are your thoughts? was the previous entry in this blog.

A Tour in the Negotiation Process - By Mohamed Sweify is the next entry in this blog.

Find recent content on the main index or look in the archives to find all content.

Categories

Monthly Archives

April 2020 (9)
March 2020 (2)
February 2020 (4)
January 2020 (3)
December 2019 (6)
November 2019 (4)

long as everyone mutes themselves except when talking, the overall experience seems to be a good one. The hand raising function seems workable in small groups and large. I believe there is no way to talk over each other as I can only hear one voice at a time. The breakout rooms are a nice feature, if the parties could trust that they are really private. I can go from room to room, and my face/initials show up to the students so it is not like I am eavesdropping. Everyone in the breakout room knows that I am there.
For security, each meeting is set up so that only students enrolled in the class can attend. But generally, you can set a filter so that only people signed in through a free Zoom account can attend. You can also make people coming on 'wait' in a waiting room until you click them into the meeting. That is an extra filter I have not used in such a large class, but might be more practical in a smaller group. The sessions can also be recorded for viewing later on. All of this would require the administrator who sets up the meeting to have a pro Zoom account, I believe.

Raoul Drapeau | April 25, 2020 4:08 PM | Reply

Another service to consider is WEBEX which claims to be the "market leader".
One critical point to consider is the quality of the audio and video. The meeting system and the participants' computers must all be high definition video and have good audio. This may involve having some kind of standards or pre-qualification of the computers being used. Also training so that there are no last-minute situation of participants trying to figure out which button to push.

Anonymous | April 25, 2020 4:54 PM | Reply

Based on my limited experience with ZOOM, unless there is no alternative, I would ask people to turn off their mobile phones during a virtual mediation as with an in-person mediation, and bar use of iPhones/cell phones for virtual mediation. They pick up too much background noise, which can be a distraction to participants in the process, and generally provide poorer visual cues than a laptop.

Nasri H Barakat | April 25, 2020 4:55 PM | Reply

Over the years arbitrators and mediators have used video conferencing for deliberations, hearing testimony and viewing depositions. Parts of several hearings I participated in were videotaped for several reasons. Therefore, the idea of shifting to virtual heatings is not a total novelty. Of course, the cost, convenience, security and confidentiality are issues to be perfected with practice. Issues might pop-up along the way but I believe that once the practice is evolved, many will realize that it is a tool that should have been implemented sometime ago! There is definitely a cost saving in this practice and a definite convenience for the participants. I believe that the practice will "take-off" and become the norm in the near future, Virus notwithstanding! It is a time of interesting changes that will affect our lives in ways we never before imagine. This certainly is a silver lining in this period of crisis. Looking forward to to what is to come.

Jerry Hoover | April 25, 2020 5:09 PM | Reply

I've had 2 arbitrations to be continued because the parties did not want to proceed to the Final Hearings using videoconferencing. However, I have conducted 6 mediations so far using Zoom,and frankly, they've worked well. The only

October 2019 (5)
September 2019 (4)
August 2019 (4)
July 2019 (5)
June 2019 (6)
May 2019 (3)
April 2019 (4)
March 2019 (5)
February 2019 (3)
January 2019 (4)
December 2018 (3)
November 2018 (4)
October 2018 (5)
September 2018 (5)
August 2018 (4)
July 2018 (5)
June 2018 (5)
May 2018 (4)
April 2018 (7)
March 2018 (7)
February 2018 (4)
January 2018 (5)
December 2017 (9)
November 2017 (4)
October 2017 (5)
September 2017 (6)
August 2017 (5)
July 2017 (6)
June 2017 (2)
May 2017 (3)
April 2017 (5)
March 2017 (7)
February 2017 (7)
January 2017 (5)
December 2016 (4)
November 2016 (4)
October 2016 (5)
September 2016 (3)
August 2016 (2)
July 2016 (4)
June 2016 (6)
May 2016 (6)
April 2016 (6)

technical difficulty I've had is where a participant may have a weak wi-fi system in their home or neighborhood, they will fade in and out which is frustrating. In those circumstances, I will just call their counsel and ask them to conference the client in and we communicate via phone. Videoconferencing is not as good as "in-person", but may be the new normal in mediations. I think the jury is still out on videoconferencing arbitrations.

David Robbins | April 25, 2020 6:17 PM | Reply

I have had the honor of being an AAA arbitrator since 1985 and over those years have seen the organization adapt to changing times. I was especially impressed at the dawning of the Internet that the AAA got the email address @adr.org. Who knew? The AAA knew. A panel that I'm on right now has an in- person hearing scheduled for late July in NYC and we have told the parties that we would prefer to have it virtual and not to postpone it because of our obligation to provide the expeditious resolution of their case. The parties are exchanging all exhibits in advance of the hearing, sending the exhibits to us and direct testimony is by affidavit, leaving the hearings largely for openings, cross-examination and summations. Recently, I "lectured" at Fordham Law School through Zoom and it was as if we were all in the classroom. We are a service organization of the highest standards and we should be able to adapt to these terrible times in a positive manner.

Judith P Meyer | April 25, 2020 7:56 PM | Reply

Zoom works well (or well enough given everything now is virtual) for mediations. Zoom does need to develop a "doorbell" function so that the mediator can ring the doorbell/knock on the door of a private caucus to ask if she may come in. Right now, the only way a mediator can gain access to a private caucus is to suddenly appear !!! or to text/call the private caucus participants a question: Would they like her to join them? There is a lot of workaround technology that we all are learning. That which works well we may keep even when we are allowed to be more than 8 feet from each other. We will re-enter the in-person world, and it will be a changed place.

Patrick Westerkamp April 26, 2020 | April 26, 2020 1:23 PM | Reply

"Newbies" to virtual ADR would do well to remember that--whatever their platform of choice--they should develop the technical and procedural skill sets to become masters of the process. This requires reading, video training, and practice. I await the day when AAA will inaugurate a Virtual ADR Certification Program.

Anonymous | April 28, 2020 11:14 AM | Reply

On this topic, I note the discussion regarding arbitrations remains shallow. What little searching I have done indicates that other nations (Britain, Singapore, etc.) seem to have progressed beyond where the US is on this subject. We need standards for the platform as well as for the remote locations' input systems, "best practices" regarding cameras, lights, microphones, etc. Protocol also needs development, which loops around back to platform as well as learned, and perhaps certified, competence. This may not be the full future of arbitration, but it will become a significant element of it and we all need to get ready, as individuals and as a group (AAA).

March 2016 (8)
February 2016 (15)
January 2016 (7)
December 2015 (9)
November 2015 (13)
October 2015 (10)
September 2015 (17)
August 2015 (34)
July 2015 (16)
February 2015 (1)
January 2015 (1)
October 2014 (4)
September 2014 (1)
July 2014 (2)
June 2014 (2)
May 2014 (4)
April 2014 (1)
February 2014 (1)
January 2014 (1)
December 2013 (3)
October 2013 (3)
September 2013 (1)
August 2013 (2)
July 2013 (1)
June 2013 (2)
April 2013 (11)

Pages

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Disputes regarding online hearings - What are your thoughts?

By Jeffrey Zaino on April 11, 2020 12:27 PM | 15 Comments

During the pandemic and beyond, how should a Tribunal handle a dispute between the parties regarding whether or not to conduct hearings online? What factors come into play?

Please provide your thoughts/comments below.

15 Comments

Robert L. Arrington | April 11, 2020 1:31 PM | Reply

I think it's a fine idea as long as security precautions are taken and there is a practice session to work out any questions.

Steven Skulnik | April 11, 2020 1:41 PM | Reply

For newer cases, where the hearing won't be held for some time, the Tribunal should defer making a decision on whether a virtual hearing will be necessary and address the issue later, if necessary.

For cases that are ready for hearings now, including those that have already been postponed, the Tribunal should solicit the views of the parties. If one party wishes to proceed virtually and the other (usually the respondent) wishes to await a COVID-19 vaccine before scheduling an in-person hearing, the Tribunal should honor the needs to avoid unnecessary delay and to have an orderly submission of evidence. I would schedule the hearing for say ninety days from now and state that if it is still not safe to meet then, the hearing will proceed virtually. I would enter a procedural order, with input from the parties, as to how the virtual hearing will proceed. I would also explore, if not already provided by a previous procedural order, that all direct evidence be submitted in written form in order to minimize the time spent videoconferencing.

Search

Search

About this Entry

This page contains a single entry by Jeffrey Zaino published on *April 11, 2020 12:27 PM*.

New To Zoom? Here Are Four Tips For Nailing Your Next Video Meeting - By Steve Herz was the previous entry in this blog.

Disputes Post Pandemic - What are your thoughts? is the next entry in this blog.

Find recent content on the main index or look in the archives to find all content.

Categories

Monthly Archives

April 2020 (8)
March 2020 (2)
February 2020 (4)
January 2020 (3)
December 2019 (6)
November 2019 (4)

Judith P Meyer | April 11, 2020 1:44 PM | Reply

Well, this is a tough one. I have hearings scheduled where one side absolutely refuses to learn or use the technology to hold a virtual hearing. No service provider is requiring the use of technology to timely hold or complete a hearing, and no one has (yet) suggested that parties do not have an absolute right to an in-person hearing. I note that our local courts have ordered parties to hold depositions by video and not use COVID-19 as a reason to delay discovery. But, video depositions have been around awhile, and lawyers are not uncomfortable with them. Suggestions: 1. There are providers -court reporter services and others - who will stage the entire hearing for you and take over all the technology controls. 2. For a mediation, there are ZOOM experts who can act as host and control all the breakout rooms and help everyone navigate the technology while staying very much in the background. 3. Become familiar with ZOOM, BlueJeans, WebEx etc yourself and gently introduce reluctant counsel to the unfamiliar. Hold practice sessions with counsel to increase confidence to the point they are willing to try technology. 4. Use iPhones - email, text and calls - as back-up to the web. You will be surprised how a little experience increases confidence enormously, along with the willingness to give technology a try. We are all in this together, and we owe each other the highest duties of care and respect in fulfilling our obligations as neutrals and as advocates. I never hankered to learn the intricate technology required to hold on-line hearings, but circumstances suggest we all step up to the plate and give it a try. We can do it. Stay safe. Stay well. Judy

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Deanne Wilson | April 11, 2020 1:57 PM | Reply

First, I would attempt to ascertain whether the one side was merely trying to delay the hearing. If so, that might temper what follows.
Second, I would ask for a detailed specification of why the one party wanted to avoid online, and as well why the other did not wish to await the opportunity of in-person hearings.
I would then, depending on the reasons given, attempt to introduce them to online vehicles so they would feel comfortable with the process. This introduction should be slow and careful; and the mediator may want to consider not charging the parties for the time spent.
If there was no apparent way I could reconcile the two, and I did not think the reluctant party desired only delay, I would in all probability opt for the waiting period attendant to the ending of the lockdown. At this nascent era of online ADR, it would be difficult to impose the process on an unwilling party.
I am also reminded of the Mike Lampert/ Steve Skulnik exchange here a week or so ago to the effect that it did not work out very well for the Vienna Vis Moot...
All of this assumes, of course, that the matter is not overly complex and that the neutral and the parties are conversant with the process...

Jeremy M. Goodman | April 11, 2020 2:18 PM | Reply

Virtual proceedings are totally appropriate--not only in the current pandemic climate, but also in the ordinary course. They may be effectively used to ensure the efficient and cost effective resolution of disputes.

To be sure, though, virtual proceedings should not to be treated identically to in person proceedings. Neutrals should carefully consider, in advance, the issues that might arise that are uniquely different in a virtual world. These include

October 2019 (5)
September 2019 (4)
August 2019 (4)
July 2019 (5)
June 2019 (6)
May 2019 (3)
April 2019 (4)
March 2019 (5)
February 2019 (3)
January 2019 (4)
December 2018 (3)
November 2018 (4)
October 2018 (5)
September 2018 (5)
August 2018 (4)
July 2018 (5)
June 2018 (5)
May 2018 (4)
April 2018 (7)
March 2018 (7)
February 2018 (4)
January 2018 (5)
December 2017 (9)
November 2017 (4)
October 2017 (5)
September 2017 (6)
August 2017 (5)
July 2017 (6)
June 2017 (2)
May 2017 (3)
April 2017 (5)
March 2017 (7)
February 2017 (7)
January 2017 (5)
December 2016 (4)
November 2016 (4)
October 2016 (5)
September 2016 (3)
August 2016 (2)
July 2016 (4)
June 2016 (6)
May 2016 (6)
April 2016 (6)

things like:

1. Confidentiality. With the ability to more easily surreptitiously record proceedings, and the ability for unknown or unwanted third parties to view proceedings, this issue should be carefully dealt with. For instance, recording may or may not be appropriate, but neutrals should make sure everybody is on the same page. Neutrals should ensure all parties understand who is, and who is not, allowed to participate in proceedings.

2. Document exchange and presentation. Neutrals should determine how this be accomplished using technology and, importantly, ensure that the processes are sufficiently secure.

3. Witnesses. Neutrals should determine how witness testimony will be presented. Will they be excluded until their testimony is needed? How can that be enforced or guaranteed?

4. Technology Failure. Neutrals should have a plan for when technology fails. It will.

These are just some of the issues parties and neutrals should consider. But, they can all be dealt with effectively with a little preparation. This should be a time when the neutral community embraces the long-term use, adaptation, and improvement of virtual technology for the improvement of dispute resolution to the fullest extent possible.

Jeremy M. Goodman
jeremy@goodmanlawpllc.com

Judge Gerald Harris | April 11, 2020 2:27 PM | Reply

First should establish whether parties agree that there is the a need for swift resolution or that need is apparent from the circumstances. If so, and no in person hearing is likely to be available for the foreseeable future an online hearing should be ordered provided:

1all parties,counsel, arbitrators and necessary witnesses can access the required equipment
2 there is the capability to share documentary exhibits
3 there appears to be no compelling need for a witness to appear live for examination.

Dale Crawford | April 11, 2020 2:35 PM | Reply

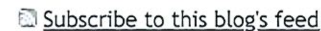
I have been a judge for forty years and believe that the only true way to judge credibility of witnesses (and attorneys) in by in person hearings.I believe AAA should never compel online hearings when one party disagrees.We should be rescheduling hearings for mid June and beyond. If there I a need to reschedule we can. If we wait until this all clears over to reschedule we will possibly have a void of several months.

Anonymous | April 11, 2020 2:48 PM | Reply

I'm debating this subject myself now in every case. All of my out of town cases have gone off. We are not just addressing new dates but methods to proceed.
An in person hearing as in a trial is always preferable. However with protection in place we can work with parties to

March 2016 (8)
February 2016 (15)
January 2016 (7)
December 2015 (9)
November 2015 (13)
October 2015 (10)
September 2015 (17)
August 2015 (34)
July 2015 (16)
February 2015 (1)
January 2015 (1)
October 2014 (4)
September 2014 (1)
July 2014 (2)
June 2014 (2)
May 2014 (4)
April 2014 (1)
February 2014 (1)
January 2014 (1)
December 2013 (3)
October 2013 (3)
September 2013 (1)
August 2013 (2)
July 2013 (1)
June 2013 (2)
April 2013 (11)

Pages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make a virtual procedure possible. At the end of the day it is ultimately up to the parties unless it is an emergent matter.

Paul Bennett Marrow | April 11, 2020 3:50 PM | Reply

If the parties can't agree on the use of video, does the arbitrator have any option other than to respect the failure of the parties to agree? It's true that a party could use the refusal just to delay when delay isn't otherwise warranted, but still, arbitration is by consent. Keep F.A.A. Section 10 (a) (3) in mind. Refusal to postpone a hearing, upon sufficient cause shown constitutes arbitrator misconduct. Why would anyone want to jeopardize an award because of a finding of misconduct?

I have one mediation where a party tried to stall claiming Zoom had a security problem, but in that case, the mediation had been ordered by a court. Before this issue, the parties had agreed to use a video format. So as mediator I acknowledged the concern but insisted that the party either comply with using Zoom or suggest an alternative and I urged the reluctant party to be mindful that the mediation had been pursuant to a court order, and that failure to reconsider or offer an alternative could have unwanted consequences. It worked out just fine. But this was an exception made possible by rules of a court.

If the AAA had a rule compelling parties to use a video format, I suspect that disputants would go to another provider.

Best to all. Stay home. Stay healthy

Judge Richard B. Klein (ret.) | April 11, 2020 3:53 PM | Reply

The adage is that lawyers are all for progress but 100% against change. I do not believe online arbitration should be mandated, but I cannot see why it should not take place with the agreement of the parties. There are some security problems, but they are overstated and can be addressed - Zoom is doing it. Certainly I agree that it is BETTER to see the parties live rather than on video. But video depositions of experts, after years of resistance, are now commonplace. Mediation should be much more likely to take place virtually. Again, it is always difficult to have a mediation if both parties don't agree. It seems today some large defendants just want to hold on to their money and refused to move toward settlements. Others, however, want to keep their people working and figure with no court dates, they can get a bargain if they settle now.

Marvin Schuldiner | April 11, 2020 4:05 PM | Reply

In arbitration, the parties are supposed to have some control over the process. After all, they opted into it. From what I'm seeing, claimants want to move forward quickly and use video while respondents want to drag out the process and would rather wait for an in-person hearing. Depending on how long the pandemic lasts, that could be a very long time and create huge backlogs on things. If you need unanimity on this topic, you will most likely always push it off for an in-person hearing.

I've done parts of arbitrations by video conference. It is workable if some rules are in place and the participants are legitimately able to use the technology (and in today's environment, I would strongly question someone who couldn't use

the technology available and would wonder how they stay in business).

A few things to keep in mind:

1. Logistics. Everyone needs to be sent exhibits in advance.

2. Swearing-in. In addition to the usual oath, witnesses all need to affirm that they are not using any other notes (that might be out of camera range) and that there is no one else in the room while they are testifying (no coaching).

3. The camera and mic must be of sufficient quality to hear clearly and ascertain body language.

4. People must also affirm that they are not recording to proceedings (if they are supposed to be confidential). Some arbs are currently recorded or have a court reporter creating a transcript. Let's not forget that with cellphones, even in-person arbs can be recorded surreptitiously.

Ruth Raisfeld | April 11, 2020 4:20 PM | Reply

Secure video conferencing is a reliable and proven process by which parties can save time and money and deliver testimony and evidence for discovery purposes and for evidentiary hearings. For some, it will not replace live in-person witnesses. However, we are living during extraordinary times with unusual pressure on judicial, arbitral and other dispute resolution mechanisms. To the extent arbitration is supposed to be a more efficient and less expensive process than ordinary litigation, if the courts are going "virtual," so too should arbitrators be doing all they can to learn to use these processes so that parties and counsel can be educated and encouraged to use "virtual" processes. I would welcome learning of the AAA's plans to take part in the dispute resolution community's timely focus on enhancing these skills by offering CLEs, Webinars, and training on teleconferencing during what may be in retrospect be the early days of this "stay home" period.

Anonymous | April 11, 2020 5:27 PM | Reply

While I have reservations about video arbitrations for a number of reasons, we are facing realities in which such may be necessary for us to conduct video hearings in times of emergencies such as pandemics as we are currently experiencing. I am currently a panelist on a large and complex case panel, one of the few of my panels that I do not chair. The matter has been set for a 6-day hearing, but the hearing has now been adjourned twice due to the lockdowns in the states in which the hearing will be held and from which the Parties, Counsel, witnesses and the Panelists are located in/come from. The most recent adjournment ruling by the Panel was over the objection of a Party who wanted to do the hearing via video. It turned out that the logistics of preparation for the hearing, scheduled later this month, were hamstrung by the various shut-down orders covering the jurisdictions involved, making the switch to video on short notice impossible. The Panel adjourned the matter to dates to be determined, with a loss of hearing dates possible for the Panelists before the Fall being less than the hearing was set for. This presents the parties with a reduction in hearing days and current uncertainty of when the hearing will be. As the country comes out of the various lock downs in place, we are going to experience a wave of hearings needing conducting nation-wide. Creativity in handling such a surge will likely be necessary, with video hearings likely being a practical necessity, at least for a while.

One issue is whether a Party can be forced to participate in a video-conference hearing over objection. Briefing has been directed in case we need to address the issue eventually in the matter in which I am currently involved. It would be helpful if the AAA Rules would specify that video-conference hearings are allowable, even over objection under specified conditions, and set out the circumstances and parameters for allowing such, even over objection. This would make video conferencing a matter of AAA Rules, meaning that parties contracting to arbitrate pursuant to AAA Rules are agreeing to the potential for video hearings, entirely or in part, at least for matters commenced after any such revision of the Rules.

The technical aspect for conducting secure, confidential video hearings needs to be addressed. For widespread use of video hearings we will need to offer/recommend secure systems. As you are aware, Zoom recently experienced a number of breaches causing it to be, currently, "off the table". Not all law firms, or arbitrators for the matter, have access to dedicated and secure video facilities. For example, I practice from a home office with a relatively secure WI-FI system, but currently use the built-in cameras in my computers for the very limited video work I do. I may need to upgrade my video, and audio, hardware, but could use direction regarding such tech. For the matter, in the discussions I have had with Panelists in my cases when we have talked about this issue, most are like me, largely unsophisticated in the tech of video conferencing. AAA could, and I submit should, be a great resource to it's arbitrators by having an office/department that will be, and stay, up to date on the tech aspects video hearings present and offer AAA video services and advice to its neutrals. Right now I've found that the AAA Case Managers are pretty much at the same stage of tech-savviness as the neutrals asking them questions. If the result is a recommendation that companies offering video hearing coverage for a cost may prove to be an important part of serving our clients, the awarding of costs regarding such should be part of any rules promulgated, as well as a requirement that such services be paid up front by the Parties so the AAA neutrals aren't having to front that expense, then invoice for it. If the latter became the construct I can assure you that neutrals, outside of those with large firms, will not order video conferenced hearings if they have to front the costs. I should be willing, within reason, be willing to incur some capital expenses to acquire hardware and software to allow me to participate in video hearings, but costs specific to a particular hearing should be a cost of it.

Summarized, the AAA's arbitrators would benefit from the AAA addressing: rules, tech, costs, training...

I would be wiling to talk with you, or anyone else with the AAA, on this subject because I believe we are on the cusp of having to do these hearings more than we have had to in the past, like to or not, and thus need to be ready to serve our customers/clients in this new, and potentially expanding, reality. The current pandemic will end, either naturally or via medical developments that provide immunity, such as vaccinations. Candidly, I do not look forward to handling hearings entirely by video, particularly those that tend to be, dare I say it, boring by nature. I believe we should not be ordering video hearings over objection absent compelling reasons, but also believe we will be faced with doing so. The question is how well will we do it.

Thomas Mitchell | April 12, 2020 11:47 AM | Reply

Teleconferencing has worked well for mediations during the current pandemic. It could be a valuable alternative to an indeterminate delay for in person arbitration hearings. Although an imperfect solution to the current problem we face, I would offer it as an option to the parties.

Anonymous | April 13, 2020 11:25 AM | Reply

Apropos your recent email to the NYSBA Dispute Resolution Section on this subject, you'll see in the news today that the U.S. Supreme Court will be holding virtual hearings in May. While appellate arguments may be more suited to virtual hearing treatment because they do not involve witness testimony, it is still significant that the most important court in the U.S. and the world will be resolving important matters without the benefit of live presentations of counsel.

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Virtual Arbitration/Mediation Hearings - What are your thoughts?

By Jeffrey Zaino on April 5, 2020 1:29 PM | 22 Comments

A lot has been discussed over the last few weeks about virtual arbitration/mediation hearings? Are they working, is this the right substitute for in person hearings, will this be the new norm? Are there big differences between conducting a virtual arbitration in comparison to mediation? Are you concerned about security and confidentiality breaches if you conduct a virtual hearing?

Please provide your thoughts/comments below.

22 Comments

Denise Presley | April 5, 2020 2:44 PM | Reply

The technology works well in reducing travel costs connected with fact witnesses whose testimony is expected to be relatively brief. However, parties should conduct tests (prior to live testimony) to ensure reasonably clear audio visual transmission from/ to the hearing site.

Nasri H Barakat | April 5, 2020 2:48 PM | Reply

In my view, virtual arbitration and mediation is inching slowly towards being the norm for future cases. For me it started with recorded video depositions, to hearing testimonies via video live feed, panel deliberations to virtual hearings. I believe that for several reasons, this could be the face of the future for arbitration and mediation. The cheer volume of the cases generated by the current events may just force the issue. As our transition, many years ago, from papers to PDF's and now, many tools we use daily, are just moving the calendar closer to the new virtual hearing mode. The tools may have to and are being streamlined and ultimately will be easier to use and perhaps even more efficient than in-person hearings. Coordination, speed and the proper tools will have to equip the arbitrator and mediator. However,

Search

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About this Entry

This page contains a single entry by Jeffrey Zaino published on *April 5, 2020 1:29 PM*.

Identifying Institutional Models for Arbitrator Appointments was the previous entry in this blog.

CONTEMPLATING LITIGATION ALTERNATIVES DURING A PANDEMIC is the next entry in this blog.

Find recent content on the main index or look in the archives to find all content.

Categories

Monthly Archives

April 2020 (2)
March 2020 (2)
February 2020 (4)
January 2020 (3)
December 2019 (6)
November 2019 (4)

when these tools are in place, the process, I predict, will be even more practical than our heretofore ways of handling our hearings.

Robert Bartkus | April 5, 2020 2:59 PM | Reply

Has anyone seen a protocol other than the Seoul Protocol by the KCAB?

Tad Decker | April 5, 2020 3:38 PM | Reply

I would prefer Final Hearings to be conducted I person as I currently believe that they provide me with a better vehicle for assessing testimony. However, in the current shutdown caused by the serious impact of the Coronavirus, we may wish to offer a video alternative to the parties in order to move our cases in a more timely manner if the current shutdown is going to last through the summer. In doing so, we along with counsel can assess whether the technology provides us with a similar ability to conduct Final Hearings in an efficient manner and to evaluate testimony and witnesses to the same degree that we would be able to do in an in-person and normal (if that term still is relevant) Final Hearing. Obviously, virtual hearings will reduce costs.

We may also want to try virtual preliminary hearings in situations that call for more detailed arguments from counsel. These could be an improvement on telephonic conferences and again provide feedback from arbitrators and counsel about their efficacy and prospects for future use in Final Hearings.

Stephen L Tatum | April 5, 2020 3:59 PM | Reply

Under the circumstances, and I agree with others who think we are going down a road the end of which will be a new normal, that is internet based arbitration. There are a number of advantages (cost, convenience, etc) and very few disadvantages given today's technology., that easily makes up for most perceived disadvantages except one.
With the availability of nationwide forum choices, I'm afraid that there will be a reputational concentration of demand that will not be as self regulated by cost and convenience as it would be if hearing location was regulated.

As much as I think that the present system works well and should not be lightly discarded, I also believe that an evolution toward virtual proceedings is powerful and inevitable, absent specific language in relevant arbitration clauses requiring in person proceedings, the move toward virtual proceedings is probably inevitable, with arbitrators willing to hold virtual proceedings rising to the top of the most sought-after list. Of course, arbitrations that can be resolved by motion practice will not be impacted.

Raoul Drapeau | April 5, 2020 4:08 PM | Reply

I think the idea is excellent. As a technologist though, I am worried about the quality of the systems that will be necessary implement it. Many of us have participated in Zoom meetings or the like, where the lighting, sound and image quality are unsatisfactory. It would be a considerable distraction to put up with lousy images and sound in a remotely-conducted evidentiary hearoing. Then there is the matter of showing graphics, audio or video to the other participants. I would want the association to set some standards and procedures to address these and the many other issues that

October 2019 (5)
September 2019 (4)
August 2019 (4)
July 2019 (5)
June 2019 (6)
May 2019 (3)
April 2019 (4)
March 2019 (5)
February 2019 (3)
January 2019 (4)
December 2018 (3)
November 2018 (4)
October 2018 (5)
September 2018 (5)
August 2018 (4)
July 2018 (5)
June 2018 (5)
May 2018 (4)
April 2018 (7)
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December 2017 (9)
November 2017 (4)
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July 2017 (6)
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March 2017 (7)
February 2017 (7)
January 2017 (5)
December 2016 (4)
November 2016 (4)
October 2016 (5)
September 2016 (3)
August 2016 (2)
July 2016 (4)
June 2016 (6)
May 2016 (6)
April 2016 (6)

wculd come up. And if the association does do that, please...please hold enough technical trials and focus groups to make sure that all the wrinkles are ironed out before it hits prime time.

Joseph DeMarco | April 5, 2020 4:16 PM | Reply

There are many benefits to virtual proceedings; from a data privacy and security point of view, it is worth considering the guidance of the AAA/ICDR/CPR/City Bar Cybersecurity guidelines promulgated in 2019, whose overarching principles squarely apply here. I am also aware that several arbitral entities are specifically developing protocols for virtual mediation and will check to see if those are out yet and can be shared. For whatever it is worth, I do think that it will be a growing trend though I think growth will be be at different rates in different areas of ADR ...

John Downey | April 5, 2020 4:28 PM | Reply

Video conferencing is the new normal, though we do not know it quite yet. I have done international video conferencing for witnesses with some in person hearing . So a hearing can be solely by conferencing or a mix of live and virtual. It saves on travel costs and negates the need for a place to go. The downside is that the ability to assess and analyze live testimony is diminished.

Michael A Lampert | April 5, 2020 4:38 PM | Reply

I was optimistic. Virtual Vis has made me pessimistic. Interested in the experience of others

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Edwin H. Stern | April 5, 2020 5:10 PM | Reply

Shortly before the present health crisis, the New Jersey Appellate Division remanded a case for consideration of whether testimony should be taken by videoconference after consideration of various factors. In that case the plaintiff was not re-admitted to the country from India. The Court recommended study of the use of video testimony administratively by a Supreme Court committee. I agree that the subject should be studied, with input from experienced attorneys for a number of reasons, including cost savings and recent United States Supreme Court long-arm decisions making it difficult for plaintiffs to bring actions in their home states. Facing witnesses on video may be easier than hearing someone testify from a witness box at a hearing. Parties may agree to video testimony, and when they don't,I see no downside to considering videoconferencing, including video testimony after considering the position of counsel based on the individual circumstances of a given case. With the on-going health crisis there has been more use of technology for court conferences, motions and applications. It may have changed our profession permanently going forward, and again,I see no downside to consideration of videoconferencing, including video testimony based on the argument of counsel and circumstances of the case.
I sincerely hope that everyone is well and remains safe and well.

Robert L. Arrington | April 5, 2020 5:17 PM | Reply

I think all electronic meetings are the wave of the future, and we all need to master out use of them. Security is a constant concern.

Steven Skulnik | April 5, 2020 7:42 PM | Reply

Mike Lampert is reporting from the front lines. The infrastructure is not there yet and may not be in our lifetimes. A major hallmark of arbitration is its flexibility and we will adapt in the short run in ways courts cannot imagine. But humans need to meet. It's why we have cities.

Al Appel | April 5, 2020 9:39 PM | Reply

I may be one of the lone wolves here, but the primary (if only) advantages touted in favor of video hearings and mediations are cost and convenience, the latter of which is an offshoot of cost. Credibility, sincerity, honesty, empathy, and a host of other emotions are best displayed by human presentation and reaction, and are inferior to current and perhaps even future technology (perhaps West World excluded) in resolving what are essentially disputes between human beings.

Jerry Hoover | April 5, 2020 9:44 PM | Reply

I've had 2 AAA arbitrations to cancel because the parties were not willing to go forward via videoconferencing. However,I've had no mediations to cancel yet, and have conducted 3 mediations via the Zoom videoconferencing platform, and 2 of the 3 settled, and we're working post-mediation to get the other one resolved. Good experience with all 3 mediations, and counsel for the parties were glad that we went forward with the cases as scheduled. Its the new normal in mediations. The jury is still out on the arbitrations.

Stephen Conover | April 6, 2020 8:46 AM | Reply

Virtual mediation is here, and by most accounts, very effective in the hands of a tech-savvy mediator. Two of my partners have conducted successful virtual mediations almost every day since March 23. Virtual arbitration proceedings can be equally effective and are inevitable, but predictability and uniformity are needed. AAA should develop guidelines to define the protocol so arbitrators and parties will know what to expect. Without specific language in the arbitration clause requiring in-person hearings, virtual hearings will become the standard.

Anonymous | April 6, 2020 9:01 AM | Reply

The Second Circuit has been conducting telephonic/ video mediations since the inception of the mediation program. The AAA in expedited matters where matters are less than 75k (on consent of parties) has also conducted arbitration by phone / virtually . When ODR is the rule , parties seem to accept the procedure and work within the framework . Where geography or amounts in controversy make virtual mediations the norm there is no downside to the process. It saves on costs and I think often it is more efficient. Often I find the virtual proceedings as successful as in person matters and I do not believe it poses a hurdle.

At this time parties do not know how long optional / virtual mediation will be the new norm. I think defendants / respondents are often reluctant to consent and are using the procedure as an excuse for delay.

Before the Covid/19 crisis , I have had arbitrations where hours of the witness testimony was presented in the form videos/transcript. I think the remainder of "live testimony " and openings could have easily be done by zoom.

I think it should be the new normal (at the very least) where the amount in controversy is not greater than 150 k (double the current AAA). The procedure should be an opt out of virtual mediations/ arbitrations for those types of cases.

At a minimum there should be pilot programs. There should be follow up surveys /both in Courts and private panels (following this crisis)where parties are asked whether the virtual nature was a positive experience or whether it had drawbacks.

The current crisis will lead to a back log and a substantial increase of cases. The AAA and other organizations many need to set up crisis programs similar to the successful programs implemented following Sandy and Katrina.

Peter J. Pettibone | April 6, 2020 10:50 AM | Reply

On Friday I participated in a virtual VIS pre-moot as the tribunal chairman, and I found the experience most interesting as a precursor to significant changes in the way arbitration hearings are held in the future. It was only just a few months ago when we would accept the testimony of a witness from a remote location using the Internet, but we would not consider holding the entire hearing in a virtual format for many reasons which we felt at the time were worthy considerations for not conducting a virtual hearing. However, coronavirus has changed all that, and we're now experimenting with conducting the full hearing virtually with the parties, counsel, and the tribunal all participating from remote locations. Naturally, the technology needs to advance so that documents and exhibits can be presented in real time, and all those participating remotely will have to have good Internet connections, but that will happen. These developments could lead to more efficient, and perhaps less costly, arbitrations by eliminating the time and expense of traveling to the hearing location

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Jonathan TK Cohen | April 6, 2020 11:19 AM | Reply

While widespread videoconferencing of arbitration hearings may become a more common path for parties who collectively choose such an option, and arbitrators will need to become increasingly adept at alternative technological choices, I believe in-person hearings will continue to be preferred in many matters when the pending health crisis subsides.

As for mediations, I believe in-person sessions will be more difficult to replace with alternative video based communications and negotiations. The back and forth subtleties that are needed to build trust and understanding between a mediator and the disputing parties in less predictive, and more flexible, mediation based communications, as well as the required confidential nature of the process, should continue to see in-person mediations enjoy a distinct qualitative edge over possible video based mediations. In person mediations should also have a much higher success rate than mediations that are pursued through video means, especially with larger more complex disputes.

Barry Leone | April 6, 2020 11:44 AM | Reply

A very important and obviously timely topic, Jeff.

All those involved in dispute resolution, whether arbitration or mediation — or for that matter, court proceedings — need to be thinking and learning about the topic.

And we need to be learning how to be efficient and effective in virtual proceedings. Virtual proceeding are going to be our reality for a while, and perhaps they will be the 'new normal' or at least part of the 'new normal'.

Paul Bennett Marrow | April 6, 2020 11:53 AM | Reply

I was a wing man on the moot Peter Pettibone describes above. It worked beautifully with one exception. The platform was Zoom. The advocates couldn't display documents as they made their presentations. The Panel had those documents but still, something was lost.

I have used a video format for a pre-hearing conference and it worked fine. Usually one doesn't see parties and counsel during a pre-hearing call but this time I did see them and it gave a new and welcomed dimension to the event.

I am very concerned about security. Not zoomblasting or whatever they call that silliness. I'm talking about the recording of mediations. I have a mediation scheduled soon and I am asking the parties to stipulate that they will not record the meeting and will not use documents shown that haven't already been exchanged as part of the underlying arbitration process.

It's 2020 folks! Video in here to stay. If you have issues, resolve them and then get over the resistance to the future!

Paul Marrow

Eli R. Mattioli | April 6, 2020 12:10 PM | Reply

I would strongly favor the AAA's offering and developing guidelines for the use of virtual hearings as a means of efficiently resolving commercial arbitration disputes in keeping with the social distancing protocols and limited travel required to address current public health concerns. As a practicing attorney, I had successful experiences involving witnesses appearing from distant locations by Skype and similar media to testify in international arbitrations. In the context of Covid-19, the same could and should be done now for entire hearings in domestic cases as well as international disputes. This is particularly so because the economic impact of the pandemic crisis is likely to engender a far greater than usual number of commercial disputes (quite possibly including, but not limited to a flood of bankruptcy-related adversarial disputes that the U.S. bankruptcy courts will not have anything near the capacity to handle in a timely manner). The use of virtual hearings combined with other efficient hearing practices, such as parties' submission of written direct testimony and bifurcation of hearings with respect to liability and damages, will enable parties to resolve disputes through the AAA without the very significant delays that will result from requiring that matters only be resolved by in-person hearings.

I am not advocating for the use of virtual hearings in all arbitration cases. But many disputes will lend themselves to resolution by the use of such hearings.

The utility of virtual hearings for mediations may be more limited because settlement negotiations so often involve and require more personal interaction than arbitration hearings as an essential dispute resolution technique.

Mark Alcott | April 6, 2020 4:32 PM | Reply

In the current environment, of course, it is essential and the only way to proceed. In normal times, as an arbitrator, I generally conduct the Preliminary Hearing remotely. To conduct a full evidentiary hearing remotely, however, would be less than satisfactory, although I have done it on a couple of occasions in small cases when the parties insist. I can't imagine presiding over a remote mediation and would be extremely reluctant to do it.

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June 1, 2020

Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, DC 20544

Re: Possible Emergency Procedures

Dear Rules Committee:

I thank the Committee for the opportunity to provide some comments on how the Federal Rules of Civil Procedure might address emergency situations, like the current pandemic. Certainly, emergencies can make it difficult to follow the usual practices. Chief Justice Roberts recently described the current reality succinctly: COVID–19 is a

> novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others.

South Bay United Pentecostal Church v. Newsom, No. 19A1044 (May 29, 2020) (Roberts, C.J., concurring in denial of application for injunctive relief, available at https://www.supremecourt.gov/opinions/19pdf/19a1044_pok0.pdf

The current health-care crisis is not a one-off event, but symptomatic of a future where pandemics are increasingly likely. *See* Nita Madhav *et al.*, "Pandemics: Risks, Impacts, and Mitigation," ch. 17, in Disease Control Priorities: Improving Health and Reducing Poverty (D.T. Jamison et al., editors. 2017 3d ed.). As the Advisory Committee's request for comments also makes plain, other crises can also prompt the need for emergency or remote participation rules.

Certainly, no one should have to choose between their health or safety and access to the courts. Courts have adjusted to current circumstances by reducing paper filings and conducting court business by email, telephone, and video conference. As a general principle, the rules should encourage courts and parties to participate in court-related events by remote means to the extent possible whenever emergency circumstances make the health or safety of the participants problematic. Still, to avoid creation of another arena of conflict between parties, during a declared national or regional emergency, the covered geographic area should default to remote arrange-

ments, rather than await a written stipulation or individual court order, and the rules should adopt that arrangement as automatic.

Courts possess "inherent powers that are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016) (quoting *Link v. Wabash R. Co*., 370 U.S. 626, 630-31 (1962)). To be sure, those powers are not unlimited and must be exercised as a "'reasonable response to the problems and needs' confronting the court's fair administration of justice." *Id*. at 1892 (quoting *Degen v. United States,* 517 U.S. 820, 823-24 (1996)).

Judges, too, can also rely on existing Federal Rules of Civil Procedure, which anticipate many of the problems courts and parties face. Still, judges may be reluctant to deviate from the usual practices, particularly when, as during the current pandemic, conflicting information clouds the situation even as emergencies are declared or when respected colleagues have not seen fit to alter procedures. The fact that we have seen legal challenges to stay-at-home and other emergency orders may also operate to discourage courts from taking steps that some might see as taking sides on the validity of various emergency measures taken by other parts of government.

In addition, available party cooperation in a typical case is not always forthcoming and obtaining a party's position on an issue can prove difficult. During an emergency, communication and the adoption of different solutions to what counsel is used to become even more problematic, as advocates will always fear some hidden disadvantage to their side in a new arrangement. Moreover, the gamesmanship that is still practiced by some will still seek to turn the emergency to advantage.

The best way to avoid these problems is to make remote participation explicit in the rules as a default to a declared emergency. The declaration, by a public official with authority to do so, or by the Judicial Conference, would avoid uncertainty, objections, or reluctance that can create other difficulties for the courts or parties. The expression of this process in a rule also avoids accusations that the courts, operating under rules established before the next emergency, are operating politically by exercising discretion that might seem to favor one side or the other on the legal issues an emergency can generate.

The focus of my comments here will be with respect to depositions, pretrial conferences, and witness availability. I will not address jury trials, though, as others are likely to have more to contribute on that front.

Depositions

Currently, Rule 30(b)(4) permits depositions to be taken "by telephone or other remote means" when the parties stipulate in writing to that process or the Court issues an order. A rule

change that permits depositions by telephone or remote means without a stipulation or court order avoids creating another point of contention between the parties and contributes to the Rule 1 goal of "just, speedy, and inexpensive determination of every action and proceeding."

Neither the requirement of an oath or recordation of the deposition through remote means should be deemed a problem. Courts are authorized to appoint someone to administer oaths to out-of-state witnesses, Rule 28(a)(1)(b), and the terms of appointment permit the courts to specify the conditions that need to be met under the court's inherent powers and through an order issued pursuant to Rule 26(c) for good cause. In *Hudson v. Spellman High Voltage*, 178 F. R. D. 29, 32 (E.D.N.Y. 1998), for example, the court authorized a telephone deposition with the oath administered remotely by a notary public on the phone call. In *Atkins v. Mason*, No. 3:06-CV-248, 2008 WL 4646142, at *2 (E.D. Tenn. Oct. 17, 2008), even though the court called the process of getting there "procedurally flawed" because there was no party stipulation or court order, the court accepted a deposition involving a remote reporter (located in Knoxville, while the deposition was in Nashville) because there was no prejudice in the process utilized.

These examples of courts accommodating circumstances in accordance with the existing rules supports their applicability to emergency circumstances. Still, a rule amendment authorizing this deposition process (by telephone or video conference) when a declared emergency exists would avoid adding a new set of issues for a court to resolve, while moving cases forward more quickly.

Pretrial Conferences

The default to remote arrangements would eliminate any potential confusion that the requirement to "appear" at a pretrial conference in emergency circumstances could be accomplished, with notice to the court, by telephone or other remote means. A committee note adverting to the default in Rule 16 could explain the applicability of the more general default remote-participation rule. Similarly, where practicable, courts hold hearings by telephone, video conference, or other remote means. A reference to the remote default rule in a committee note to Rule 78 may be sufficient to accomplish this.

Witness Availability

Emergency conditions may also make it difficult for witnesses to be in the courtroom for a trial that may take place. Rule 32 addresses the use of depositions when a witness is unavailable. Rule 32 (a)(4)(C) and (D) allow deposition use in lieu of a witness in-person testimony, *inter alia*, when illness or the interests of justice demand an alternative arrangement. Here, a note to the rule may be insufficient to embrace the default rule described above. Instead, explicit text should make clear that emergency conditions may warrant use of this process, while providing the court with some measure of discretion to evaluate the situation, as occurs now. The court should consider, as with the current pandemic, that different parts of the country may be under different government

orders or conditions so that the availability of witnesses from one area of the country does not suggest that other witnesses with legitimate emergency safety or health concerns specific to their region must also be present in the courtroom.

Another solution to witness availability comes through use of Rule 43(a). It provides that "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Prudence suggests that a committee note that a declared emergency qualifies as good cause to permit testimony would be helpful.

As I indicated earlier, a jury trial is probably the most complex undertaking for emergency conditions. Ideas for how that might be accomplished, beyond the witness issue discussed above, is outside the scope of these comments because of the potential complexities involved. Still, allowing cases to move forward without explicit court orders or party stipulations during a declared emergency through a rule that makes remote participation routine would advance access to justice and its fair administration.

Sincerely,

Robert S. Peck

From: Peck, Robert
To: RulesCommittee Secretary
Subject: Possible Emergency Rules
Date: Monday, June 01, 2020 9:48:04 AM
Attachments: Ltr re Emerg Rules 06012020.pdf

Please find attached comments on Possible Emergency Rules, as requested by the Committee.

Robert S. Peck

Robert S. Peck
President
Center for Constitutional Litigation, PC

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June 1, 2020

Submitted via Email: RulesCommittee_Secretary@ao.uscourts.gov

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Room 7-300
Washington, D.C. 20544

Attention: Honorable David G. Campbell – Chair
Professor Catherine T. Struve – Reporter

Re: Response to the Request for Input on Possible Emergency Procedures & Comment on Emergency Rulemaking

Dear Judge Campbell and Professor Struve:

The Federation of Defense & Corporate Counsel (FDCC) appreciates this opportunity to respond to the Request for Comment on Possible Emergency Procedures and compliments the Committee and its five advisory committees on taking this initiative to examine the appropriateness of establishing a set of Rules and standards, which can be implemented as future emergencies arise.

The over 1,400 members of the FDCC work in private practice, as in-house counsel, and as insurance-claims professionals and executives. Membership is limited to attorneys and insurance professionals nominated and then vetted by their peers for having achieved professional distinction and demonstrated leadership in their respective fields. The FDCC is committed to promoting knowledge and professionalism in its ranks and has organized itself to that end. The FDCC constantly strives to provide access to and protect the American system of justice and to improve its effectiveness and efficiencies. Its members have established a strong legacy of leadership in representing the interests of civil defendants.

Introduction

The FDCC also greatly appreciates the efforts of the federal judiciary in responding to the COVID-19 pandemic. In every jurisdiction, our members report that federal courts, and their staffs, are working tirelessly to ensure that the rule of law is maintained in these difficult times.

In future times of crisis, the rule of law, embodied in the United States Constitution, must be preserved in the same manner as the federal judiciary has done in addressing the current crisis. Indeed, the rule of law "must inspire us even in times of crisis."[1] Therefore, the FDCC encourages the committees to proceed cautiously when contemplating changes in response to future emergencies, as well as in addressing the issues yet to come arising from the COVID-19 pandemic.

The FDCC is of the view that no current or future national or local emergency take precedence over or subvert the fundamental and inalienable rights guaranteed by the Constitution. In our ordered system of justice, these rights must remain sacrosanct. Yet, the profession at the Bench and the Bar must also remain flexible and adapt to changing circumstances brought about by Acts of God and other occurrences beyond our control. Within those circumstances, we must have a dynamic set of rules that can be used as a framework to ensure access to justice.

As we are seeing today by the difficulties imposed by the novel coronavirus, the solutions are not easy ones; however, as President John F. Kennedy once wrote, "there is work to be done and obligations to be met – obligations to truth, to justice and to liberty."[2] It remains to the rest of us to establish the most prudent and proportional means by which to accomplish these obligations.

<u>The Rules Should Encourage Simplicity</u>

The next crisis may look very different from the current one. So, in addressing the impact of COVID-19 on our judicial system, the FDCC cautions against a "one size fits all" approach. For example, almost all courts have implemented some form of video-conferencing for court proceedings. Some courts in Texas have taken the technical leap to video-conferencing for non-binding jury trials and binding bench trials. On a more-common scale, many judges, and even the Supreme Court, have used video-conferencing for hearings, oral arguments and other court appearances. FDCC members have great concerns about a wholesale rush to embrace this technology as a standard of the legal system unless, of course, there were no other available alternative.[3] The COVID-19 emergency provided a unique circumstance in which video technology was a handy, short-term substitute for in-person appearances. But, if the next national emergency is a cyber-attack of some kind, over-reliance on technology could effectively bring our courts and the administration of justice to a complete halt.

Federal courts are frequently called-upon to interpret complex laws and implement remedies for complex problems. Yet, the hallmarks of the federal rules are simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay.[4] Instead of increasing the complexity of our system of justice, the FDCC encourages and is

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[1] *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1869 (2017).
[2] Address by the President of the United States of America, John F. Kennedy, Before the Free University Berlin June 26, 1963.
[3] To the point, a foreign or domestic penetration of the Internet or other stable networks might preclude or hamper the facilitation of electronic communications protected from outside interference.
[4] Fed. R. Crim. P. 2; *see also* Fed. R. Civ. P. 1 (requiring the civil rules to be administered "to secure the just, speedy, and inexpensive determination of every action and proceeding.")

prepared to work hand-in-hand with the committees to explore solutions that will result in simple, just and expedient outcomes, regardless of circumstance.

The Rules Should Encourage Local Professionalism

A crisis can reveal the best or the worst in any person or any system. The FDCC has observed that the COVID-19 pandemic has brought out the best of the Bench and Bar. In civil cases, plaintiffs' counsel and defense counsel have worked hand-in-hand with the courts to administer justice while accommodating limitations of stay-at-home orders and appropriate social distancing. In most (if not all) districts, the Chief United States District Court Judge issued general orders implementing scheduling changes in civil cases. The FDCC concurs with that district-by-district approach.

The FDCC cautions against any attempt by the committees that might consider a uniform rule to address scheduling difficulties in future national emergencies. Such a rule might require that all deadlines remain-in-place; or, in the opposite extreme, require that all deadlines be stayed during the state of emergency. Those types of rules are a disservice to local courts and the professionalism of the bar. Local judges are in the best position to know the difficulties facing their communities. Local lawyers are in the best position to work cooperatively to obtain simple, just and expedient outcomes. The committees should allow each district to retain authority over scheduling.

The Rules Should Encourage Expedient Justice

Local authority may result in local delays. In response to COVID-19, most court systems required stays of all civil cases for some period of time. As a result, as courts re-open they are facing backlogs in virtually every aspect of their case management systems. Presumably, the committees will be examining methods for avoiding backlogs in future emergencies. In doing so, the committees should consider the sometimes-competing goals of expediency and justice. Both are central to the fundamental fairness requirement of due process, but neither can be sacrificed in the interest of the other. The FDCC is particularly concerned that an emphasis on expediency in the wake of COVID-19 may result in a lack of justice.

Judges and lawyers, faced with crowded dockets and unmanageable calendars, may look for "innovative" ways to reduce or expedite cases. Parties may feel increased pressure to: settle their cases; waive jury trials; consent to multiple-plaintiff trials; agree on exclusion of certain classes of people (like first responders) from jury service; or, accede to video appearances of witnesses at trial.[5] Those well-intentioned innovations slowly erode the concepts of fair play and substantial justice. At all times, the right to a fundamentally fair trial by jury must remain sacrosanct. Hopefully, the committees will keep that principal as a touchstone when considering new or emergency rules.

[5] While agreeing that the safety of the Court, Judge, clerks, court reporters administrative personnel, counsel and witnesses must be assured, we believe the right to confront one's adversaries must also be preserved. To that extent, provisions will need to be made to ensure that safety is maintained without facial masks or other means to preclude this fundamental right.

The FDCC believes that the fundamental right to a jury trial can be preserved while simultaneously honoring the need for expediency in exceptional times. In particular, the FDCC recommends trial time limits as an effective way of preserving precious judicial resources during and after national emergencies. The benefits of trial time limits are apparent. As parties are placed in direct control of their cases, Judges are removed from the labor of micro-managing trial. Shorter trials increase the size and expand the diversity of the available juror pool for other cases. Under the time-honored maxim of "less is more," decreased trial time results in increased juror comprehension of the issues. Finally, shorter trials constrain litigation costs for both the parties and the court system. Yet, in the face of those expediencies, justice remains. The Rules of Civil Procedure and Rules of Evidence still control. The parties strike the elusive jury of their peers and confront the witnesses against them. Thus, trial time limits provide one method for rendering expedient justice in face of judicial backlogs.

The FDCC also believes that one key element for expedient justice is avoidance of backlogs in the first instance. To avoid backlogs, the committees should consider increased roles in times of national emergency for Senior United States District Court Judges and United States Magistrate Judges. Generally, Senior United States District Court Judges receive the benefits of their office by annually working an amount equal to that which an average judge in active service would perform in three months.[6] The Judicial Conference promulgates the rules determining whether a Senior Status judge has fulfilled those work requirements.[7] Thus, the Judicial Conference may be able to work with Senior Status judges to promulgate rules that could result in increased workload (and presumably fewer backlogs) during and following times of national emergency.

The committees should also consider expanding the usage of United States Magistrate Judges. By statute and rule, Magistrate Judges are highly qualified jurists who are capable of exercising the full judicial power of a United States District Court. Yet, for various reasons, parties frequently "opt out" of a Magistrate Judge's jurisdiction, and they are permitted to do so because consent is statutorily mandated.[8] The FDCC believes circumstances may arise where it would be appropriate to consider the parties' mutual consent to Magistrate jurisdiction. Nevertheless, the FDCC would be open to consideration of mandatory waiver of the consent requirement in certain civil matters where a national emergency has arisen and case management will be advanced.

Even if consent remains a requirement in emergency situations, the FDCC believes that the committees should consider all available options for utilization of United States Magistrate Judges. Clerks and deputy clerks of a court of the United States may be appointed as part-time United States Magistrate Judges.[9] Members of the United States Armed Services and National Guard may be appointed to the position,[10] and retired Magistrate Judges may be recalled to service.[11] While funding for any "new" positions will undoubtedly be a concern, the committees

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[6] 28 U.S.C. § 371 (e)(1).
[7] 28 U.S.C. § 371 (e)(2).
[8] 28 U.S.C. § 636 (c)(1).
[9] 28 U.S.C. § 631 (c).
[10] *Id.*
[11] 28 U.S.C. § 636 (h).

should consider methods for expanding the usage of Magistrate Judges in times of national emergency.

In addition, we would urge the committees to consider rules and procedures that would not relegate civil litigants to become unwitting victims of the constitutionally guaranteed right to a speedy trial for criminal defendants. That right must be preserved. However, we appreciate that in order to preserve the right to a speedy trial for criminal defendants the backlog of civil cases following an emergency might become further delayed. For the same reasons that underlie the purpose of statutes of limitation being imposed upon civil grievances (e.g., the ability of witnesses to testify as to their recollections; the assuredness that evidence - whether physical or eyewitness - has not deteriorated with time; the ability of injured parties to be made whole and for alleged tortfeasors to have matters against them be concluded), civil litigants must also be assured that their access to the finality of justice is pursued in a timely manner.

The FDCC Opposes Professional Juries

In recent days, the FDCC has heard increased calls for so-called "professional juries." While the specifics of these proposals vary, in general concept, a cadre of "professional jurors" would receive specialized training and attain certification to serve as jurors in federal courts. Ostensibly, a professional would somehow be a "better" juror than a typical United States citizen or a juror of one's peers.

The committees should not consider professional juries in their effort to address concerns related to emergency situations. The FDCC imagines that somebody could make a straight-faced argument that the current United States jury system is "bad" and a wholesale change to professional jurors could be "good." But, those arguments have nothing to do with redressing deficiencies in court systems caused by national emergencies. Instead, proponents of professional juries are simply using fear in the age of COVID-19 to push an agenda that would never be viable in more stable times.

And, to be clear, a professional jury system is inherently unjust. By definition, professional jurors would rely upon the court system for their livelihood. And, in the interest of preserving their livelihood, professional jurors would be dissuaded from reaching hard, controversial – yet just – verdicts. A professional juror with the "wrong reputation" would soon find themselves out of a job.

The arguments against professional juries are legion. If the committees are inclined towards such a sea change, they should permit full notice and comment before undertaking any course of action. Moreover, we believe such a constitutional change would require federal legislative action as opposed to an amendment to the Rules.

The Rules Should Further Empower the Mandates of Rule 11

The requirements of Rule 11 of the Federal Rules of Civil Procedure pertaining to representations to the Court and sanctions for the violations for doing so cannot be

relaxed or diluted in any future possible emergency.[12] Civil litigants and their Counsel must abide by these time honored requirements first substantially enumerated in the former Equity Rules[13] so as to preserve the integrity of the judicial process.

Unfortunately, human nature is such that under any proposed "relaxation" of rules there are those who may seek to take undue advantage for their own personal gain. Notwithstanding the fact that in practice Rule 11 has not been as effective in deterring abuses as might have been intended,[14] the FDCC would hope the committees agree to reemphasize the mandates of the Rule so as to ensure the veracity, equity and verification of pleadings, representations to the court and the sanctions for any abuses.

Emergency Rules Should Have Limits

By definition, emergency rules should be limited to emergency situations. Yet, the very nature and extent of an emergency is unpredictable. As a result, it makes sense for the committees to contemplate two types of rules as they seek to ameliorate future national emergencies' effects on court operations.

- The first type of rule is discussed in the preceding sections: concrete actions that, based on experience, can be taken in response to extraordinary circumstances; and
- the second type of rule is more visceral: it seeks to prepare for the unexpected and unexperienced situation.

The committees should be exploring ways to grant the Judicial Conference discretion to address and remedy future problems that cannot be anticipated today.

But, both types of rules – as emergency rules – must be subject to defined, concrete limitations. Otherwise, the emergency exception may threaten to swallow the well-established rule of law in the United States. Therefore, the FDCC recommends that the promulgation of emergency rules be accompanied by specific procedures detailing:

(1) the process for activating an emergency rule in the future (e.g., two-thirds vote of the Judicial Conference);
(2) timelines for review of the need for continuation/cessation of the emergency rule (e.g., every 30/60/90 days); and,
(3) the process for de-activating or sunsetting an emergency rule.

[12] Fed. R. Civ. P., Rule 11(a)-(d)
[13] Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare [former] Equity Rule 36 (Officers Before Whom Pleadings Verified); *See also,* Notes of Advisory Committee on Rules - 1937.
[14] *See* 6 Wright & Miller, Federal Practice and Procedure: Civil §1334 (1971); and Notes of Advisory Committee on Rules - 1983 Amendment.

Moreover, to the extent that the committees allow District Courts to retain discretion to control operations, as suggested by the FDCC above, similar procedural limitations should be flowed-down to the lower courts.

Conclusion

Thank you again for the opportunity to provide input on these important issues. The FDCC stands for the rule of law and the primacy of the United States Constitution. Thus, in all circumstances we support the right to a trial by jury accompanied by full due process and equal access to and protection of the law. We stand ready to provide any further advice or input and look forward to the opportunities to further engage with the committees in preserving those fundamental principles of law.

Respectfully submitted,

Elizabeth Lorell
FDCC President

From:	Bernie Heinze - Federation
To:	RulesCommittee Secretary
Subject:	FDCC Comments on Emergency Rulemaking
Date:	Monday, June 01, 2020 11:20:33 AM
Attachments:	image001.png image003.png image004.png image005.png image006.png FDCC Comments on Emergency Rulemaking.pdf

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Good Morning:

We are pleased to attach the Comments of the Federation of Defense and Corporate Counsel (FDCC) to the Invitation and Request for Input on Possible Emergency Procedures received from the United States Courts.

We look forward to working with the Committee of Rules of Practice and Procedure and its advisory committees on examining these issues and opportunities further, and will be pleased to provide any further information as may be warranted.

Kind regards,

Bernie

Bernd G. Heinze, Esq. | Executive Director | Federation of Defense & Corporate Counsel |

Tel: (direct)
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Slack Davis Sanger LLP
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March 16, 2020

Michael L. Slack
Austin Office

VIA EMAIL
RulesCommittee_Secretary@ao.uscourts.gov

Ms. Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Emergency Rulemaking

Dear Ms. Womeldorf:

Thank you for the opportunity to address the Committee regarding rule amendments being considered for national emergencies. I am a practicing attorney who represents passengers killed or injured in aviation accidents. My practice has a national scope and we litigate in both federal and state courts. In addition to handling a diverse array of aviation accident cases over the years, I have previously served on leadership committees in major airline and commuter mass disaster litigation in federal and state courts.

In the context of a national emergency, the rules must continue to serve the fundamental purpose that cases shall proceed efficiently and expeditiously, notwithstanding the emergency. Federal Rule of Civil Procedure 1 states that the rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." This governing mandate must persevere a national emergency and its immediate aftermath. The rules should not allow, and should further discourage, parties from exploiting an emergency, such as COVID-19, to engage in dilatory and obstructive tactics. The rules should accommodate the continuation of discovery and pretrial practice during a crisis, especially the with respect to written discovery and oral depositions. The guise of a crisis or emergency should not undermine processes and procedures that efficiently advance a case toward resolution.

Each crisis or emergency will assert its own disruptive characteristics and impose its own hardships which are difficult to anticipate. The impact of a devastating hurricane has far different consequences to litigation than a pandemic such as COVID-19. The current pandemic has been most impactful in curtailing most, if not all, in-person proceedings on a national scale. However, the crisis has taught us that traditional in-person proceedings such as mediations and depositions can be successfully accomplished using virtual or remote technologies. However, the pandemic has also illuminated examples of parties opportunistically seeking to delay cases when virtual or remote processes would otherwise allow them to progress.

I suggest that the Committee consider affirmative language that rejects parties' use of emergencies as a delay mechanism and affords courts the means to enforce the spirit and intent of Rule 1 in the wake of an emergency, whether global or local.

Lastly, emergencies should never impair the right to trial by jury. I would strongly oppose rule proposals or suggestions which would place limitations on jury trials other than reasonable delays to accommodate risks to court personnel and jurors from the prevailing crisis. Emergencies might delay jury trials, but they should never preempt them. The rules should provide a courts and parties a roadmap for maintaining, the just and speedy progress of cases during emergencies while ensuring that jury trials occur as soon as possible after an emergency or crisis abates.

Thank you for considering my comments.

Kindest regards,

SLACK DAVIS SANGER LLP

Michael L. Slack

MLS/rel

From: Rosie Lachico
To: RulesCommittee Secretary
Cc: Mike Slack
Subject: Emergency Rulemaking
Date: Monday, June 01, 2020 12:12:27 PM
Attachments: Letter to Rebecca Womeldorf dated June 1, 2020.pdf
Importance: High

Please see Michael Slack's letter to Rebecca Womeldorf attached.

Thank you,
Rosie

Rosie Lachico
Executive Assistant to Michael L. Slack
Slack Davis Sanger LLP
p:
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AS OF OCTOBER 1, 2019

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20-CIV-27

June 1, 2020

VIA E-MAIL
RulesCommittee_Secretary@ao.uscourts.gov

Honorable David G. Campbell, Chair, and Members
U.S. Courts Committee on Rules of Practice and Procedure

Re: *Public Input on Possible Rule Amendments*

Dear Chairman Campbell and Committee Members:

The National Association of Shareholder & Consumer Attorneys ("NASCAT") respectfully submits this response to the Committee on Rules of Practice and Procedure (the "Committee") and its five advisory committees' invitation for public input on possible rule amendments that could ameliorate future national emergencies' effects on court operations.

I. NASCAT

NASCAT, founded in 1988, is a volunteer membership organization and public policy voice for lawyers interested in a strong set of legal protections for investors and consumers. NASCAT and its members are committed to representing victims of fraud in cases with the potential to advance the state of the law, educate the public, ensure corporate accountability, and improve access to justice for those who have been harmed by wrongdoing. NASCAT advocates for the principled interpretation and application of the federal securities laws to protect investors from manipulative, deceptive and fraudulent practices, and to ensure this nation's capital markets operate fairly and efficiently. NASCAT similarly advocates for stronger consumer-deception statutes and related consumer-protection laws.

The COVID-19 pandemic has resulted in severe challenges for litigants in state and federal courts. These challenges have significantly delayed the prosecution and resolution of actions. Fortunately, the effects of future national emergencies on court operations can be ameliorated by implementing rules that expressly authorize, endorse and facilitate the use of technological advances to conduct litigation activities. Specifically, by amending the rules and adding Committee notes that expressly permit the use of telephonic and other remote means for depositions, hearings, arguments and other proceedings, cases will be able to proceed apace, even at times when it is impossible to proceed face-to-face.

II. Rules for Hearings, Arguments and Other Proceedings Should be Amended to Expressly Permit and Encourage Participation by Telephone and Other Remote Means

Although certain courts have utilized telephone and video conferences for hearings, arguments and other proceedings, often court rules are silent about whether these practices are proper. Amending those rules to expressly permit the use of telephonic or other electronic means will codify best practices currently utilized by many courts and ensure that justice can continue to be served in times of a declared emergency.

For example, Fed. R. Civ. P. 23(e)(2), "Settlement, Voluntary Dismissal or Compromise," states: "The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate." However, Rule 23(e)(2) is silent as to whether all class members must have the opportunity to be physically present for the hearing. **Rule 23(e)(2)** should be amended to provide: "The Court, in its discretion, may hold class-settlement, voluntary-dismissal or compromise hearings using telephonic or other electronic means."

This proposed Amendment would codify the practice of conducting class-settlement, voluntary-dismissal or compromise hearings by telephonic or other remote means—a practice that has been employed by courts across the country, both before and during the COVID-19 pandemic. *See, e.g.*, *Milburn v. PetSmart, Inc.*, No. 1:18-cv-00535-DAD-SKO, 2019 WL 5566313 (E.D. Cal. Oct. 29, 2019); *Martin v. Sysco Corp.*, No. 1:16-cv-00990-DAD-SAB, 2019 WL 6894471 (E.D. Cal. Dec. 18, 2019); *Wise v. Ulta Salon, Cosmetics & Fragrance, Inc.*, No. 1:17-cv-00853-DAD-EPG, 2020 WL 1492672 (E.D. Cal. Mar. 27, 2020); *French v. First Transit, Inc.*, No. 18-cv-1648-CAB-MSB, 2020 WL 1849587 (S.D. Cal. Apr. 13, 2020); *Lopez v. Mgmt. and Training Corp.*, No. 17CV1624-JMC(RBM), 2020 WL 1911571 (S.D. Cal. Apr. 20, 2020); *Plymouth Cty. Ret. Assoc. v. Advisory Board Co.*, No. 1:17-cv-01940-RC (D.D.C. Apr. 22, 2020), Order (J. Contreras); *City of Sunrise Gen. Emps.' Ret. Plan v. Fleetcor Techs., Inc.*, No. 1:17-cv-02207-LMM (N.D. Ga. Apr. 14, 2020), Order (J. May); I*n re Akorn, Inc. Data Integrity Sec. Litig.*, No. 1:18-cv-01713 (N.D. Ill. Mar. 12, 2020), Minute Entry (J. Seeger); *Macy v. GC Services L.P.*, No. 3:15-cv-819-DJH-CHL (W.D. Ky. Mar. 24, 2020), Order (J. Hale); *In re Deutsche Bank AG Sec. Litig.*, No. 1:09-cv-01714-GHW-RWL (S.D.N.Y. May 12, 2020), Order (J. Woods); *In re Gen. Motors LLC Ignition Switch Litig.*, No. 1:14-cv-02543-JMF (S.D.N.Y. Apr. 6, 2020), Order (J. Furman); *In re Ubiquiti Networks, Inc. Sec. Litig.*, No. 18 Civ. 1620 (VM) (S.D.N.Y. Mar. 24, 2020), Order (J. Marrero); *In re Vale S.A. Sec. Litig.*, No. 15 Civ. 09539 (GHW) (S.D.N.Y. Apr. 21, 2020), Order (J. Woods); *Wood v. AmeriHealth Caritas Svcs. L.L.C.*, No. 17-3697, 2020 WL 1694549 (E.D. Pa. Apr. 7, 2020); *Norfolk Cty. Ret. Sys. v. Community Health Systems, Inc.*, No. 3:11-cv-00433 (M.D. Tenn. May 13, 2020), Order (J. Richardson); *Isolde v. Trinity Indus., Inc.*, No. 3:15-cv-02093-K (N.D. Tex. Mar. 24, 2020), Order (J. Kinkeade); *Barlow v. United States*, 145 Fed. Cl. 228 (2019); *Lambert v. United States,* 124 Fed. Cl. 675 (2015).

Other rules governing hearings, arguments and conferences should be similarly amended to expressly authorize courts to conduct those proceedings through the use of telephonic or other

remote means. These rules include: **Rule 16(a)**: Pretrial Conferences; **Rule 16(c)(1)**: Attendance and Matters for Consideration at a Pretrial Conference; and **Rule 77(b)**: Place for Trial and Other Proceedings.

III. Discovery Rules Should Be Amended to Expressly Permit and Facilitate Participation by Telephonic and Other Remote Means

Amendments of the rules to permit, facilitate and encourage the use of telephonic and other remote means for depositions can ameliorate the impact of future declared emergencies upon court operations. Although certain rules permit these methods for depositions, they require a stipulation or court order before they can be utilized. Dispensing with that requirement in times of a declared emergency will ensure that discovery is not unduly delayed. Rules that do not contemplate telephonic and other remote means should be amended to facilitate the use of these methods for depositions.

For example, Rule 30(b)(4) authorizes depositions to be conducted by telephonic or other remote means. But the rule requires a stipulation or, on motion, a court order before litigants can utilize these methods to conduct depositions. **Rule 30(b)(4)** should be amended to dispense with the requirements of a stipulation or court order to conduct depositions by telephonic or other remote means in times of a declared emergency. In addition, Rule 30(b)(4) should be further amended to remove the "on motion" requirement before a court can order litigants to conduct a deposition by telephonic or other remote means. Courts should be afforded the discretion to order that depositions be conducted by telephonic or other remote means without the necessity of a motion.

Other rules should be amended to facilitate the use of telephonic or other remote means for conducting depositions. Indeed, while Rule 30(b)(4) permits the use of those methods, the rules provide little guidance on the logistics for administering oaths and recording depositions conducted remotely. For example, Rule 30(c)(1) contains the requirement that, among other things, an officer put the deponent under oath and record the testimony personally, but is silent about whether an officer can fulfill those requirements when not physically present with the witness. **Rule 30(c)(1)** should be amended to codify that its requirements can be satisfied whether the officer administering the oath and recording the testimony is physically present with the witness or participating on the same telephone conference or other remote means pursuant to which the deposition is being conducted.

Rules 28 and 29 should similarly be amended to facilitate the use of telephonic and other remote means for conducting depositions. Specifically, both Rule 28 and Rule 29 are silent as to whether the stenographer must be in the same physical location as counsel and the deponent during depositions. **Rule 28** and **Rule 29** should be amended to codify that depositions are taken before an officer provided the officer is physically present with the witness or participating on the same telephone conference or other remote means pursuant to which the deposition is being conducted.

IV. The Foregoing Amendments Will Preserve Access to the Courts

NASCAT is committed to preserving access to our nation's courts for shareholders and consumers. NASCAT believes that amending the rules in the manner set forth herein will ensure that those victimized by fraudulent conduct will be able to obtain justice without the undue delay that has been experienced in times of national emergencies.

We thank the Committee for its careful attention to these matters.

Respectfully submitted,

Robert M. Rothman and Janine Pollack
Co-Presidents
NASCAT

NASCAT
The National Association of Shareholder & Consumer Attorneys

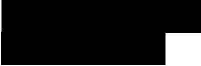
From:	Robert Rothman
To:	RulesCommittee Secretary
Cc:	Robert Rothman; "Janine Pollack"; "nkulesa@[redacted]"; Serena Hallowell
Subject:	National Association of Shareholder and Consumer Attorneys Response to Committee on Rules of Practice and Procedure
Date:	Monday, June 01, 2020 1:51:16 PM
Attachments:	National Association of Shareholder & Consumer Attorneys to Committee on Rules of Practice and Procedure.pdf

On behalf of the National Association of Shareholder and Consumer Attorneys ("NASCAT"), I attach NASCAT's response to the Committee on Rules of Practice and Procedure's invitation for public input on possible rule amendments that could ameliorate future national emergencies' effects on court operations.

Respectfully submitted,

Robert M. Rothman

58 South Service Road, Suite 200



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American Property Casualty Insurance Association
INSURING AMERICA apci.org

20-CIV-28

Claire Howard
SVP, General Counsel &
Corporate Secretary

June 1, 2020

VIA E-Mail RulesCommittee Secretary@ao.uscourts.gov

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

In re: Committee on Rules of Practice and Procedure Invitation for Comments on Emergency Rulemaking
Submission Deadline: June 1, 2020

Dear Ms. Womeldorf:

The American Property Casualty Insurance Association (APCIA) is the primary national trade association for home, auto, and business insurer. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions – protecting families, communities, and businesses in the U.S. and across the globe.

Property casualty insurers are among the most frequent participants in the federal justice system and have a genuine interest in preserving the integrity of a fair, predictable, legal system. APCIA appreciates the invitation from the Committee on Rules of Practice and Procedure and its five advisory committees (the Committee) to provide input on possible rule amendments considering the Covid-19 pandemic.

Disruptions across the country and across all segments of society caused by the Covid-19 crisis have inescapably impacted court systems and their operations, which warrants an evaluation of whether changes to procedural rules are needed. We note that our society will likely face future crises that will require new and creative solutions, though those solutions may vary greatly depending upon the nature of the emergency. APCIA urges the Committee to proceed cautiously and to reject amendments that disrupt the just and speedy determination of judicial proceedings. The Federal Rules of Civil Procedure (FRCP) ". . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." FRCP 1, (As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 29, 2015, eff. Dec. 1, 2015.) The Federal Rules of Evidence (FRE) "should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." FRE 102 (As amended Apr. 26, 2011, eff. Dec. 1, 2011.)

APCIA also urges the Committee to guard against adopting amendments that change, or might be interpreted to change, substantive law. The rules of procedure and evidence "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072 (Added Pub. L. 100–702, title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4648, eff. Dec. 1, 1988; amended Pub. L. 101–650, title III, §§ 315, 321, Dec. 1, 1990, 104 Stat. 5115, 5117.)

We believe that there are certain rule amendments that will improve the certainty and stability of litigation under the Federal Rules of Civil Procedure and Federal Rules of Evidence and we ask that the Committee consider the following:

1. **Amend FRCP 9 to strengthen the pleading requirements for tort claims arising from COVID-19 or a future declared pandemic.**

Given a pandemic's universal nature, the ability to establish causation and/or to allocate responsibility is fundamentally necessary yet challenging. We believe that FRCP 9 should be amended to provide that lawsuits seeking damages arising out of COVID-19 or a later declared pandemic require a heightened pleading standard (i.e., *that the pleader must state with particularity the supporting facts demonstrating a causal connection between COVID-19 and/or a later declared pandemic and the loss alleged.*). It may further be appropriate to require that parties seeking such damages provide medical, scientific, and/or legal affidavits that pinpoint the injury and its causation.

Suggested revision:
Federal Rules of Civil Procedure 9 (c)
(c) CONDITIONS PRECEDENT. In pleading conditions precedent, except in cases seeking damages for losses allegedly arising from Covid-19 or a later declared Pandemic, it suffices to allege generally that all conditions precedent have occurred or been performed. But when a pleading seeks damages for a loss allegedly arising from Covid-19 or a later declared Pandemic, the party must state with particularity the supporting facts demonstrating a causal connection between Covid-19 and/or a later declared pandemic and the loss alleged. When denying that a condition precedent has occurred or been performed, a party must do so with particularity.

2. **Amend FRCP 26(a) to require preliminary disclosure of Third-Party Litigation Financing (TPLF)**.

TPLF is likely to play an outsized role in pandemic litigation. The media is replete with related stories. TPLF is a mechanism for investors to buy their way into a lawsuit, turning the judicial system into a commoditized marketplace, trying to encourage and profit from litigation by providing high interest rate loans or seed money to litigants. The states are increasingly requiring early disclosure of TPLF. There is an existing request to the Civil Advisory Committee to modify FRCP 26(a) by a broad range of associations including APCIA to require preliminary disclosure of TPLF. Supplemental comments supporting this request have also been submitted. We support this effort.

3. **Amend Federal Rule of Evidence (FRE) 407 to confirm the inadmissibility of pandemic remedial measures.**

While we believe FRE 407 provides strong protections that encourage property owners to make subsequent remedial measures, we believe that the Rule should be amended to expressly provide protection against the introduction of evidence related to remedial measures made in response to COVID-19 or a later declared pandemic.

Suggested Revision:
Federal Rules of Evidence 407 Subsequent Remedial Measures
When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or

• a need for a warning or instruction.

But, except in cases that seek damages arising from Covid-19 or a later declared Pandemic, the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures. In cases seeking damages arising from Covid-19 or a later declared Pandemic, evidence of subsequent remedial measures is not admissible for any purpose.

4. **Amend Federal Rule of Evidence 702 to clarify the judicial role on admissibility of expert evidence.**

On May 6, 2020, the Washington Legal Foundation submitted a recommendation to the Advisory Committee on Evidence Rules suggesting that FRE 702 be amended to clarify courts' "gatekeeping" obligation. We support this recommendation. Clarification that FRE 702 assigns to the court – and not the jury – the obligation to weigh the reliability and admissibility of expert evidence is particularly significant given the anticipated onslaught of COVID-19 litigation, much of which is likely to turn on expert testimony.

5. **Proposed rulemaking on MDL proceedings.**

On March 19, 2020, the Washington Legal Foundation submitted comments proposing amendments to the Federal Rules of Civil Procedure for multidistrict litigation (MDL) proceedings to address the filing of meritless claims. On March 30, 2020, Lawyers for Civil Justice also submitted comments proposing amendments to address the filing of meritless claims in MDL. We support those proposals.

Thank you for the opportunity to comment and for your consideration of our perspective.

Please contact me directly at [redacted] with any questions.

Sincerely,

Claire Howard
Senior Vice President, General Counsel & Corporate Secretary
American Property Casualty Insurance Association

From: Howard, Claire
To: RulesCommittee Secretary
Cc: Shiel, Colleen; Park, Kim; Howard, Claire
Subject: In re: Committee on Rules of Practice and Procedure Invitation for Comments on Emergency Rulemaking
Date: Monday, June 01, 2020 3:24:22 PM
Attachments: 2020 06 01 APCIA Letter to Committee on Rules of Practice and Procedure - final.docx

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Dear Ms. Womeldorf:

Attached please find APCIA's comment letter responsive to the Committee on Rules of Practice and Procedure's Invitation for Comment on Emergency Rulemaking.

Thank you for your attention to this matter.

Sincerely yours,

Claire Howard
Senior Vice President, General Counsel & Corporate Secretary
American Property Casualty Insurance Association

John A. Hawkinson, freelance news reporter

June 1, 2020

Committee on Rules of Practice and Procedure
Honorable David G. Campbell, Chair

Advisory Committee on Civil Rules
Honorable John D. Bates, Chair

Advisory Committee on Appellate Rules
Honorable Michael A. Chagares, Chair

Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544
BY ELECTRONIC MAIL: *rulescommittee_secretary@ao.uscourts.gov*

Re: Request for Input on Possible Emergency Procedures

Dear Judge Campbell, Judge Bates, and Judge Chagares:

I write, as a journalist covering federal courts, to respectfully offer my experience regarding challenges to that coverage during the COVID-19 crisis. My comments focus on access to civil video teleconferences (pp. 1–5), as well as access to materials in immigration cases (pp. 5–8), an area I specialize in that is constrained by Civil Rule 5.2(c) both directly and through Appellate Rule 25(a)(5).

1. Access to civil video hearings

Courts across the country have taken differing approaches to public access for civil litigation. Although a single District may serve as a laboratory for the judiciary just as "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" (*New State Ice*

Co. v. Liebmann, 285 U.S. 262, 311, (U.S. March 21, 1932) (Brandeis, J., dissenting)), the past few months have shown the need for some general guidelines for all.

Many districts have embraced video conferencing for civil proceedings, consistent with the parallel explicit authorization for criminal cases under the CARES Act (Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (March 27, 2020)). But they do not consistently provide adequate public access to those proceedings — access that the First Amendment requires.

Although the Administrative Office of the United States Courts appears to have promulgated guidance providing for remote access to criminal proceedings for the public and press[1], it has not done so for civil proceedings. The result is that public and press access to those proceedings may be curtailed, such as by limiting access to audio-only, or even no access at all.

Video access to proceedings is important because the public deserves the same degree of access that litigants and their attorneys have, where feasible. Audio-only access means public observers cannot observe the demeanor of attorneys or witnesses, cannot see exhibits or visual presentations[2], and cannot observe the physical manifestations of courtroom advocacy and judicial conduct on the bench. Furthermore, because counsel and the Court can see who the speaker is, speakers are not required to identify themselves when speaking, which makes can make it speaker identification challenging for audio-only listeners, especially when there is crosstalk or poor audio.

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[1] "Media organizations and the public will be able to access certain criminal proceedings conducted by videoconference or teleconference for the duration of the coronavirus (COVID-19) crisis, according to new guidance provided to federal courts." *Judiciary Provides Public, Media Access to Electronic Court Proceedings* April 3, 2020, retrieved May 31, 2020. `https://www.uscourts.gov/news/2020/04/03/judiciary-provides-public-media-access-electronic-court-proceedings`. The AOUSC has not responded to an April 3 query from me seeking a copy of the referenced guidance.

[2] This is not hypothetical. An AUSA presented a powerpoint presentation through Zoom videoconference at an April 30 hearing, but because I only had audio access, I was unable to follow the colloquy.

In my home district, the District of Massachusetts, access to video has been rocky. A *chronology:*

March 30: Near the beginning of the COVID-19 crisis, Judge William G. Young began holding video hearings in *Savino v. Hodgson*[3] via Zoom teleconferencing. The first such hearing was held on March 30, 2020, and the courtroom deputy provided video access to the press and public upon request. But subsequently, the District instituted a formal process for those seeking access to all remote hearings (a web-based form), and at the same time restricted public access for civil hearings to audio-only. The Clerk of the Court justified the curtailment of public video access by reference to the CARES Act[4]. The next *Savino* hearing was set for April 2.

April 1: By letter (attached hereto as Ex. A), I wrote Judge Young seeking access to the video proceedings[5]; I also wrote Chief Judge F. Dennis Saylor IV (attached hereto as Ex. B) seeking a more liberal access policy. There was no apparent response[6].

April 2–3: The *Savino* Court held hearings with audio-only access for the public. The audioconference bridge degraded the quality such that one speakers, who was apparently understandable-with-difficulty via video, was nearly unintelligible via the audio-only mechanism.

April 22: The Clerk of Court wrote that "At this time, public access to civil hearings in the District of Massachusetts will be by audio only."[7]

April 24: However, the Court quietly changed its practice, evidently solely for Judge Young's *Savino* hearings. Its web-based form returned video access information for a *Savino* hearing on April 24, but not for any subsequent non-*Savino* civil hearings, seemingly in conflict with the Court's stated policy. Video access to *Savino* hearings has continued, including those on May 11 and May 22.

May 4: In response to an inquiry prompted by the Standing Committee's invitation, the Clerk advised that "The court still has the question of video access to civil proceedings under advisement and is working towards a resolution. We have a full court meeting this Friday and this is an agenda item for further discussion and resolution."[8]

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[3] No. 20-cv-10617-WGY (D. Mass). Also known as *Savino v. Souza*. A class action *habeas* petition by immigration detainees held at the Bristol County House of Corrections challenging their confinement in light of COVID-19. Although captioned and referred to as "Savino," the lead petitioner's surname is actually a multi-word compound; she is Maria Alejandra **Celimen Savino**.

[4] Personal communication of March 31, 2020; on file with the author.

[5] The letter also sought access to case documents because of the PACER immigration restriction under Fed. R. Civ. P. 5.2(c). At the time the public terminal was available with reduced hours, but on April 14 it closed entirely.

[6] However, the Court acted on the document access portion of the Young request and began removing docket access restrictions for *Savino* case documents.

[7] Personal communication; on file with author.

[8] *Ibid.*

May 27: Although the court's lack of apparent access has continued for non-*Savino* cases, in response to inquiry, the Clerk advised that "In the District of Massachusetts, Individual judges may make the determination on video access to civil proceedings."[9]

It is not the usual practice for the public and press to write letters to judges seeking access, nor is it to repeatedly correspond with the Clerk of Court to seek to understand changing policies. These steps are intimidating, and indeed, often leave the author feeling as if he is unwittingly pushing the boundaries of appropriate communication and advocacy.

At present, it remains unclear by what process the public should properly seek access to a non-*Savino* civil video hearing in D. Mass.

In contrast, other districts[10] have made civil video access easier, although not always easy: For instance, in the District of Connecticut, civil and criminal Zoom hearings are both listed on the ECF docket, and anyone may follow the URL to join[11]. In the Northern District of California, Zoom URLs are provided in civil ECF docket entries, as well as available on the Court's free public website[12]. In the District of New Hampshire, a telephone call to the Clerk's Office is required to obtain access, which results in an emailed invitation URL prior to the hearing[13].

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[9] *Ibid.*

[10] Unfortunately, this is not solely a concern at the district court level. Although this letter focuses on the district courts, there are concerns at the Courts of Appeals as well. I am not sure they are within scope, but the First Circuit Court of Appeals announced last week that it would "provide live audio access" to its June session, which is scheduled to be conducted via videoconference. The Circuit Executive has confirmed the Court will *not* provide video access, triggering many of the same concerns raised in this letter. Of course, appellate argument is of a different kind than district court argument, and not all of the same concerns apply in the same way.

[11] *See, e.g., Lancaster v. Ecuadorian Investment Corp.*, No. 3:19-cv-01581-JAM, D. Conn., unnumbered ECF entry of April 12, 2020.

[12] *See, e.g., Zepeda Rivas v. Jennings*, No. 3:20-cv-02731-VC, N.D. Cal., ECF No. 262, as well as `https://apps.cand.uscourts.gov/telhrg/`. This court uses Zoom in "webinar" mode, which restricts the public's ability to participate (rarely needed or merited) but avoids unintentional interruption.

[13] *See Order Re: Procedures Governing Out-Of-Court Videoconference and Telephonic Hearings Necessitated Due to the Exigent Circumstances Created by COVID-19* D.N.H. ADM-1 ORDER 20-7, `http://www.nhd.uscourts.gov/pdf/ADM%201%2020-7.pdf` at ¶8. The possibility of error in oral communication of email addresses seems significant.

Sufficient uniformity to ensure public access to civil video hearings is needed. Although such a rule need not specify the mechanics of access, it should be made clear that the public is entitled to some form of video access where feasible.[14]

Is a rule required? Unfortunately, I think so. It is tempting to suggest that the Administrative Office of the United States Courts could promulgate guidance for public access to civil hearings, just as it has done for criminal hearings. But that is insufficient. There is no transparency in the guidance published by the AOUSC, as noted *supra*, n. 1. Not only can the public not see that guidance, it could change at any time, and there is no opportunity to offer feedback on or input to those changes. The Rules Enabling Act process provides that minimal level of transparency.

With the above in mind, I would propose the following language as the basis for such a rule: **"Any hearing conducted by remote video shall have video access open to the public, unless the court orders otherwise for good cause."**

(I anticipate rules explicitly permitting video access would be part of an emergency rule package, in lieu of the CARES Act, and that the above could be part of such a package.)

2. Access to immigration case documents

As a general matter, remote PACER access to civil immigration case documents is barred by Fed. R. Civ. P. 5.2(c), which seeks to balance the privacy interest of litigants against the public interest, and is written with the presumption that there is generally not a lot of public interest in such cases.

With the increased prevalence of "impact" immigration litigation over the past 4 years, that underlying premise becomes more questionable. When a civil immigration

[14] It is easy to imagine high-profile situations where the volume of public access might overwhelm a Court or its technology, especially on short notice. Although N.D. Cal's model would seem to avoid that (Zoom's webinar mode supports can support thousands of observers), it's not my intent to suggest a rule should be so specific or inflexible.

action affects many people, such as in a class action, or where it defines a critical area of law that impacts other subsequent cases, that balance increasingly seems problematically tilted against the public interest.[15]

Although Rule 5.2(c) allows an "unless the court orders otherwise" carveout, it is challenging to obtain public access. And even prior to the pandemic, visiting the courthouse's public terminal provides a poor substitute for actual access to documents. With pandemic-related closures in effect, the public terminal is not available at all (D. Mass, D.N.H.).

Prior to the coronavirus, undersigned has had varying results seeking to lift such access restrictions. Within the District of Massachusetts, motions to intervene and remove access restrictions have been favorably entertained, and in 2019 the Court entered a General Order intended to allow general public access to such cases after a 30-day period to allow time for the parties to object[16]. Contrariwise, a motion seeking this relief in the District of New Hampshire was denied. Undersigned has also obtained this relief by letter in the Eastern District of New York. Some judges in other districts appear to grant such access *sua sponte*.

I would suggest it may be time for the Rules Committee to take a hard look a Rule 5.2(c) and relax some of its restrictions. In particular, there seems to be no reason why such restrictions should be the default in class action litigation.

At the circuit level, Appellate Rule 25(a)(5) provides that "an appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by

[15] *See also* Nancy Morawetz. *A Better Balance for Federal Rules Governing Public Access to Appeal Records in Immigration Cases*. 69 Hastings L.J. 1271 (2018).

[16] *General Order 19-02: Standing Procedural Order Re: Public Access to Immigration Cases Restricted by Federal Rules Of Civil Procedure 5.2(c)*, June 1, 2019, `http://www.mad.uscourts.gov/caseinfo/pdf/general/General%20Order%2019-2%20w%20Electronic%20Signaure.pdf`. The order also includes a so-called "gag" provision on Internet publication of case documents within the first 30 days of case filing.

the same rule on appeal." In practice, the First Circuit has interpreted this rule to restrict access on appeal, even in cases where the District Court has entered an order lifting the restrictions.

Furthermore, it is undersigned's experience in both the Tenth Circuit and the First Circuit that unopposed motions seeking public access are resolved by granting access solely to the movant, not to the public at large[17].

With the emergency closures of courthouses or public portions of clerks offices, these access restrictions are more painful. And, indeed, the pandemic has lead to an increase in notable immigration litigation at exactly the time when access to that information has become more difficult.

Although I would advocate for a general relaxation of FRCP 5.2(c) and FRAP 25(a)(5) at all times (and am prepared to argue for such at length if the Committee(s) so invite), it seems especially important to do so during emergency procedures.

Courts have made accommodations, however. In the *Savino* case, discussed *supra*, D. Mass court personnel have manually removed docket restrictions after each case document is filed. In a prominent New Hampshire case[18], the Court's procedure is for the public to email the ECF Administrator, who replies with the documents. In a different D. Mass case with some unique privacy considerations, in response to inquiry, the Court entered an order allowing immediate public access with a gag on Internet publication[19].

All of these situations require a fair degree of attention from the press, and only serve to provide access where it is already understood that it is necessary. It is likely impracti-

[17] *See, e.g., Doe v. Tompkins*, No. 19-1368, 1st Cir., Order of April 14, 2020. Furthermore, the pace of resolution may be discordant with the pace of public interest and of other docket activity. The unopposed motion seeking relief in that case was filed on August 12, 2019.

[18] *Gomes v. DHS*, No. 20-cv-00453-LM, D.N.H.

[19] *Augusto v. Moniz*, No. 20-cv-10685-ADB, ECF No. 19 (April 14, 2020). A *habeas* action brought by 65 individual *pro se* detained immigration petitioners. Actions involving *pro se* detained petitioners present unique challenges when leave of the parties might be sought to remove access restrictions.

cal to request this sort of case-specific treatment for all immigration cases, meaning that significant items can fall through the cracks and escape timely notice.[20]

For instance, in a seemingly pedestrian individual immigration *habeas* action, the Government filed a "status report" at 4:30pm on this past Thursday. It was followed at 6:56pm by a judicial order observing that "The government's removal of the Petitioner from this jurisdiction without notice in direct contravention of the Court's order is regrettable." There is now heightened interest in the status report which presumably detailed the circumstances of this "direct contravention of the Court's order," but it is not available.[21]

For these reasons, I would urge the crafting of a rule that lifts Rule 5.2(c)'s restrictions during a pandemic, or at other times where access to public terminals has been restricted.

3. Closing

I thank the Committees very much for their time and respectfully request you entertain the above suggestions as part of a rules package for future national emergencies. Please do not hesitate to contact me if desired.

Very truly yours,

/s/ John A. Hawkinson
John A. Hawkinson

encl: Exhibit A, April 1 letter to Judge Young: media access in *Savino*;
Exhibit B, April 1 letter to Chief Judge Saylor: media access to videoconferencing.

cc: Robert A. Farrell, Clerk of Court, District of Massachusetts

[20] Prior to the pandemic, undersigned had a practice of reviewing all immigration *habeas corpus* cases on a weekly-or-better basis, at the District of Massachusetts public terminal. There appears no analogue for this sort of review during the pandemic, and PACER charges might make it impractical as well.

[21] *See Martinez v. Moniz*, No. 20-cv-10869-GAO, ECF No. 9 (May 28, 2020). It was my intention to inquire of the Clerk's Office how to obtain the prior status report filing, ECF No. 8, but I did not have time to do so on Friday.

Exhibit A

April 1 letter to Judge Young: media access in *Savino*

John A. Hawkinson, freelance news reporter

The Honorable William G. Young
One Courthouse Way, Suite 2300
Boston, MA 02210
BY ELECTRONIC MAIL, with leave: *media@mad.uscourts.gov*

April 1, 2020

Letter-request[1] for expedited media access in *Savino v. Hodgson*, 20-cv-10617-WGY

Dear Judge Young:

I am a freelance reporter writing for *Cambridge Day* covering immigration cases in this court, including the above-captioned case.

Because it is an immigration case, access to its filings are restricted[2] to counsel in PACER; because of COVID-19 and the Governor's order restricting travel, it is challenging to get timely access to documents. And access at the Courthouse is not available after 2pm due to the Clerk's Office's new schedule.

After consultation with the Clerk, I respectfully request you exercise your powers under Federal Rule of Civil Procedure 5.2(c) and General Order 19-02 ¶4 to lift access restrictions on this case's documents. It is a fast-moving class action of high prominence, and the personal privacy issues the Rule is designed to protect are absent here. Undersigned hopes Your Honor may expedite this matter and rule at Thursday's hearing.

Petitioners assent to this request. Respondents have not answered an inquiry lodged Sunday night, but Rayford A. Farquhar, Chief of Defensive Litigation for the U.S. Attorney's Office, has previously stated that, as a general matter, "the office policy under our new U.S. Attorney is that we are not going to assent, we are not going to object, but we are going to leave it up to the Court to decide on a case-by-case basis."

Collaterally, undersigned also requests you continue to make Zoom videoconferencing fully available to the public and press when they are used, as you did Monday, so we can see the faces and expressions that counsel and the Court see. Virtual public attendance at such hearings would not constitute the prohibited "broadcasting" under the rules, and relegating the public to an audio-only version leaves us with impaired access to the proceeding. (See April 1 letter to Chief Judge Saylor.)

Thank you for Your Honor's kind attention.

Very truly yours,
/s/ John A. Hawkinson
John A. Hawkinson

cc: Counsel of record (via email)

[1] If preferred, I'd be pleased to move to intervene accompanied by this request in motion and memorandum form. It would be substantially similar to *Pereira Brito v. Barr*, No. 19-cv-11314-PBS, ECF No.s 10–12.

[2] This was originally filed as NOS 440—Other Civil Rights—so documents were available in PACER. But it was reclassified to NOS 463— Alien Detainee—automatically blocking public access to subsequent filings.

Exhibit B

April 1 letter to Chief Judge Saylor: media access to videoconferencing

John A. Hawkinson, freelance news reporter

The Honorable F. Dennis Saylor IV
One Courthouse Way, Suite 2300
Boston, MA 02210
BY ELECTRONIC MAIL, with leave: *media@mad.uscourts.gov*

April 1, 2020

Media access to videoconferencing

Dear Chief Judge Saylor:

I write, respectfully, to request that the media and the public be granted access via videoconference to any civil videoconference proceedings held in the District of Massachusetts during the COVID-19 pandemic. Pursuant to the Court's March 31, 2020 Public Notice, the press and the public currently may access "teleconference and videoconference hearings" in civil and criminal cases "via teleconference" only, without access to video. To the extent a civil matter is being conducted via videoconference, the public should be granted video access as a substitute for its ability to attend hearings in the courtroom.

The COVID-19 pandemic has deprived the public of the ability to see District Court proceedings in person. Videoconference technology, to the extent it is used by the Court in civil cases, can provide a platform from which the public may observe the demeanor of witnesses, see any visual aids or chalks, and watch the physical manifestations of courtroom advocacy and judicial conduct on the bench. Public access to such videoconference hearings can ensure that public understanding of civil proceedings is less hampered than it otherwise might be.

There does not appear to be any legal or policy impediment to permitting public access to civil videoconference proceedings. The general policy of the Judicial Conference of the United States against "broadcasting, televising, recording, or taking photographs in the courtroom" does not apply, by its terms, to a closed Internet videoconference made available to members of the public who request access in advance as a substitute for attending court in person. *Cf.* 47 USC § 153 (defining term "broadcasting" for purposes of federal communications law as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.") This policy, which is plainly directed at mass communication of images, would have even less application to a videoconference that has a limited number of participants—for example, a number of persons equivalent to the capacity of the courtroom.

This inquiry was generated by Judge Young's Zoom videoconferencing in *Savino v. Hodgson*, No. 20-cv-10617. The public had access to Monday's video, but the Clerk's Office has advised that access will be reduce to audio-only for tomorrow's. Thank you.

Very truly yours,

/s/ John A. Hawkinson
John A. Hawkinson

cc: Hon. William G. Young

From: John Hawkinson
To: RulesCommittee Secretary
Subject: Hawkinson feedback on emergency rulemaking
Date: Monday, June 01, 2020 4:05:16 PM
Attachments: 2020.06.01.hawkinson.rules.covid19 merged.pdf

Good afternoon:

Please find attached my submission to the Standing Committee as well as the Civil and Appellate Rules Committees regarding the "Request for Input on Possible Emergency Procedures" in light of the COVID19 pandemic.

Would you please confirm receipt and let me know how it and other suggestions are docketed, if it is other than at the standard Rules Suggestions web page (https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/rules-suggestions does not appear to have any responses to the emergency procedure solicitation to date, and I was unable to find a docket on regulations.gov).

Thank you.

I hope you and your families are safe and well.

--

John Hawkinson
Freelance Journalist

twitter: @johnhawkinson

June 1, 2020

Submitted Electronically

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Civil Procedure to Address Future Emergencies

Dear Members of the Committee:

We write as attorneys with experience in antitrust class action litigation and respectfully submit the suggestions below, on behalf of the Committee to Support the Antitrust Laws (COSAL), in response to the Committee's call for proposed rules amendments that could improve the operations of the federal courts during national emergencies.

COSAL members are law firms throughout the country that represent individuals and businesses that have been harmed by violations of the antitrust laws. For more than 30 years, COSAL has promoted and supported the enactment, preservation, and enforcement of a strong body of antitrust laws in the United States. We engage in the full gamut of complex litigation in federal courts nationwide. Our members have learned firsthand during the COVID-19 pandemic—just as many judges and other practitioners surely have—that many of the traditionally in-person aspects of litigation can be effectively and efficiently conducted by telephone or videoconference. Used to their full potential, these technologies can help ensure that depositions, oral arguments, conferences, and other court appearances carry on apace during emergency conditions.

COSAL believes that a set of modest changes to the Federal Rules of Civil Procedure ("Federal Rules"), all acknowledging this evolution in legal practice, would do much to improve

the resilience of the justice system in future emergencies. By granting judges and litigants greater flexibility, our proposed changes also would have the salutary effect of permitting remote depositions and hearings as other, non-emergency circumstances warrant. Broadly speaking, the Federal Rules already permit and encourage such adaptation: they are to be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. In our experience, however, vague or dated language in a number of individual rules—often just a single word or phrase—is a potential impediment to courts' full use of this flexibility. That is particularly so when judges are presented with rules-based arguments from litigants whose strategic purposes are served by delay. The rules amendments and Advisory Committee notes we propose are intended to effectuate the flexibility contemplated by Rule 1.

Below, we identify wording in several rules that may discourage telephone and video conferencing and propose solutions, organizing our suggestions into three categories: (1) depositions and subpoenas; (2) hearings and oral arguments; and (3) trials.

Depositions and Subpoenas

Whether during an emergency or in the normal course, Rule 30 allows for depositions to be taken by telephone or video conference. In all instances, Rules 28, 29, and 30 should be interpreted to facilitate efficient and effective depositions by telephone or video conference. The language potentially running counter to that interpretation, and COSAL's proposed solutions, are as follows:

- **Rule 28** sets forth the rules regarding "Persons Before Whom Depositions May Be Taken."
- *Issue*: Whether "before" requires the court reporter be in the same room with a deponent and counsel.
- *Solution*: For clarity, we suggest an Advisory Committee note stating that the requirement that depositions be taken "before" an officer does not preclude remote depositions, nor does it preclude the court reporter being remote from the witness or counsel.
- **Rule 29** states, "Unless the court orders otherwise, the parties may stipulate that: (a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition."
- *Issue/Solution*: This rule should include the same proposed Advisory Note as Rule 28, for the same reason.

- **Rule 30(b)(4)** (Oral Depositions By Remote Means) "*By Remote Means*. The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means."

- *First Issue*: The rule does not expressly provide for videoconferencing as a "remote means."

- *Solution*: Amend the rule to read: "*By Remote Means*. The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone**, video conference,** or other remote means." (additional language emphasized)

- *Second Issue*: During certain emergencies, the default means of oral depositions should be by telephone or video conference.

- *Solution*: Add this language to Rule 30(b)(4) at the end: "During a declared national emergency or in a state where an emergency has been declared, depositions may be taken by telephone, videoconference or other remote means without stipulation or order of the court."

- **Rule 30(b)(5)(A)** (Before the Deposition): "Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28 . . . ."

- **Rule 30(c)(1)** (Deposition Examination): "After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer."

- *Issue*: Courts and attorneys could interpret the word "personally" to mean that the officer must record the testimony in the same physical place as the deponent. They could also interpret the phrases "before an officer" and "in the presence" to mean that the officer must be physically in the same place as participants in the deposition, including any person recording the deposition under the direction of the officer.

- *Solution*: We suggest adding a general Advisory Committee Note: "Unless otherwise stated in any rule, the words "appear," "attend," "before," "present" and "personally" shall not mean or connote exclusively "in person." One may also "appear" or "attend" by telephone or video conference. One may be "before" another, be "present" or do something "personally" by telephone or video conference

Trial depositions should not count towards the total number of depositions permitted. If an emergency or other logistical difficulty prevents a party from bringing its witnesses to trial, that

party should not be forced to choose between conducting necessary deposition discovery and conducting trial depositions of its own witnesses.

- **Rules 30 and 31** require leave of court to take more than 10 depositions, absent a stipulation of parties.
- *Issue:* The caselaw is divided on whether trial depositions count toward the presumptive limit of 10.
- *Solution*: We suggest amending Rules 30(a)(2)(A)(i) and 31(a)(2)(A)(i) to add the phrase, ", except that a party's trial depositions of its own witnesses shall not be counted."

The parameters of issuing a subpoena for a remote deposition, hearing, or trial testimony under Rule 45 should be amended.

- **Rule 45(c)** states under the "Place of Compliance": "(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person;" or "(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense."
- *Issue:* The rule does not give the issuer or the witness the right to a telephonic or videoconference appearance amid a declared emergency like a natural disaster or a pandemic. In those circumstances, finding an acceptable location within 100 miles of the witness or even in the state may be difficult. Travel to a trial court may be as well.
- *Solution:* We suggest amending the rule to permit the witness appear telephonically or by videoconference for "good cause." Either the issuer of the subpoena or the witness could seek such an accommodation. In addition, add an Advisory Committee Note that good cause includes "a declared emergency like a natural disaster or a pandemic."

<u>Hearings and Oral Arguments</u>

Whether during an emergency or in the normal course, courts have held conferences, hearings and oral arguments by telephone or video conference. The rules should be interpreted to

facilitate efficient and effective hearings by telephone or video conference. The language potentially running counter to that interpretation, and COSAL's proposed solutions, are as follows:

- **Rule 16(a)** (Pretrial Conferences): The rule states: "In any action, the court may order the attorneys and any unrepresented parties to **appear** for one or more pretrial conferences..." (emphasis added)
- *Issue*: Courts and attorneys could interpret the word "appear" to mean that an attorney or party must appear "in person."
- *Solution*: We suggest adding an Advisory Committee Note: "Unless otherwise stated in any rule, the words "appear," "attend," "before," "present" and "personally" shall not mean or connote exclusively "in person." One may also "appear" or "attend" by telephone or video conference. One may be "before" another, be "present" or do something "personally" by telephone or video conference.
- **Rule 16(c)(1)**: The rule states: "ATTENDANCE AND MATTERS FOR CONSIDERATION AT A PRETRIAL CONFERENCE. (1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement."
- *Issue*: Courts and attorneys could interpret the words "attendance" and "present" to each mean that an attorney, party or representative must attend or be present "in person."
- *Solution*: We suggest adding an Advisory Committee Note: "Unless otherwise stated in any rule, the words "appear," "attend," "before," "present" and "personally" shall not mean or connote exclusively "in person." One may also "appear" or "attend" by telephone or video conference. One may be "before" another, be "present" or do something "personally" by telephone or video conference.
- **Rule 77(b)**: "PLACE FOR TRIAL AND OTHER PROCEEDINGS. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing—other than one ex parte—may be conducted outside the district unless all the affected parties consent."
- *Issue*: The rule provides that hearings may not be conducted outside the district unless the parties consent. Courts and attorneys could interpret this to require all parties to the hearing

to be physically present in the district without consent of the parties. Note: the first sentence of this rule is addressed below in the "Bench Trials and Jury Trials" section.

- *Solution*: We suggest adding a sentence at the end of the rule, or an Advisory Committee note, stating: "The Court in its discretion may hold hearings using telephone, video conference or other contemporaneous electronic means."

Bench Trials and Jury Trials

Courts should be able to deem a witness "unavailable" under Rule 32 due to a declared emergency.

- **Rule 32(a)(4)** (Unavailable Witness): The rule states: "A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: (A) that the witness is dead; (B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition; (C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment; (D) that the party offering the deposition could not procure the witness's attendance by subpoena; or (E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used."

- *Issue*: Although subparagraph 32(a)(4)(C) of the rule deems witnesses unavailable if they cannot attend trial because of "age, illness, infirmity, or imprisonment," the rule does not address the circumstance of witnesses unable to attend trial in an emergency, whether because of a legal prohibition on travel or the practical infeasibility of travel. In an emergency, parties presumptively should be able to use the deposition of a witness who cannot travel, without the motion and notice required by the catch-all in subparagraph 32(a)(4)(E).

- *Solution*: We suggest amending Rule 32(a)(4)(C) to read: "that the witness cannot attend or testify because of age, illness, infirmity, imprisonment, a legal restriction on travel, or emergency conditions that render travel impracticable."

A declared emergency should constitute "good cause" to appear from a different location under Rule 43.

- **Rule 43** establishes the rule that witness testimony at trial must be taken in open court, but also states: "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."

- *Issue*: The rule leaves to interpretation whether "good cause" includes travel restrictions or risks related to a declared emergency such as a natural disaster or pandemic.

- *Solution*: We suggest adding an Advisory Committee note that a declared emergency such as a natural disaster or pandemic qualifies as good cause.

Rule 77(b) should permit remote hearings or trials in the normal course and/or during a state of emergency.

- **Rule 77(b)-** "PLACE FOR TRIAL AND OTHER PROCEEDINGS. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing—other than one ex parte—may be conducted outside the district unless all the affected parties consent."

- *Issue*: The rule requires a trial on the merits to be conducted "so far as convenient, in a regular courtroom," which could be read to prevent a remote trial during a declared emergency, such as a pandemic.

- *Solution*: We suggest amending the rule to read as follows: "Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. For good cause shown, the Court may conduct a bench trial using video conference or other contemporaneous electronic means. With the consent of all parties and under extraordinary circumstances, the Court may conduct a jury trial using video conference or contemporaneous electronic means."

- While many proposals discussed above are more minor, common sense modifications on which the Committee could act quickly, the Committee may want to commission more in-depth research on the constitutionality of jury trials by video conference or other contemporaneous electronic means. It also may want to consider the efficacy of such trials, drawing from the experience of federal and state courts throughout the country during the COVID-19 pandemic.

* * *

Thank you for considering COSAL's suggestions for amendments to the Federal Rules of Civil Procedure to improve the operations of the federal courts during emergencies.

Sincerely,

Robert S. Kitchenoff
Weinstein Kitchenoff & Asher, LLC
President, Committee to Support the Antitrust Laws

From: Pamela Gilbert
To: RulesCommittee Secretary
Cc: Kitchenoff@wka-law.com; Pamela Gilbert
Subject: Proposed Amendments to Address Future Emergencies
Date: Monday, June 01, 2020 5:59:49 PM
Attachments: COSAL Future Emergencies Submission.pdf

Dear Secretary,

We realized that two lines were inadvertently dropped off of the COSAL submission we sent you at 4:40pm. The mistake is fixed in the attached document – please use this submission instead. Thank you very much.

We apologize for the inconvenience.

Sincerely,

Pamela Gilbert
Counsel and Executive Director, COSAL
Cuneo Gilbert & LaDuca
(direct)
(main)
(cell)

From: Pamela Gilbert
Sent: Monday, June 01, 2020 4:40 PM
To: RulesCommittee_Secretary@ao.uscourts.gov
Cc: Pamela Gilbert ;
Subject: Proposed Amendments to Address Future Emergencies

The Committee to Support the Antitrust Laws (COSAL) respectfully submits the attached letter in response to the Committee's call for proposed rules amendments that could improve the operations of the federal courts during national emergencies.

Thank you for considering our views.

Sincerely,

Pamela Gilbert
Counsel and Executive Director, COSAL
Cuneo Gilbert & LaDuca

(direct)
(main)
(cell)

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COMMENT

to the

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
and its
ADVISORY COMMITTEES

ENSURING CONTINUITY IN TIMES OF UNCERTAINTY: THE NEED TO UPHOLD AND DEFEND THE RULES ENABLING ACT PROCESS IF ANY RULE AMENDMENTS ARE NEEDED TO AMELIORATE FUTURE NATIONAL EMERGENCIES' EFFECTS ON COURT OPERATIONS

June 1, 2020

Lawyers for Civil Justice (LCJ), DRI – The Voice of the Defense Bar (DRI), the Federation of Defense & Corporate Counsel (FDCC), and the International Association of Defense Counsel (IADC) respectfully write in response to the invitation by the Committee on Rules of Practice and Procedure (the "Standing Committee") and its five advisory committees for public input on possible rule amendments that could ameliorate future national emergencies' effects on court operations.

I. The Standing Committee Should Reaffirm the Rules Enabling Act Process

It is important for the Standing Committee and advisory committees to consider whether rule amendments are needed to ensure the continuing operation of the courts during future emergencies, and it is appropriate in that context to examine the challenges encountered during the COVID-19 pandemic and any solutions developed to deal with those challenges. Emergency situations may require some modifications of procedural rules. If modifications are necessary to rules promulgated pursuant to the Rules Enabling Act, which have the force of law,[1] then those modifications should be made pursuant to the Rules Enabling Act process. It would be very difficult, if not outright impossible, to draft a single federal rule (or even a set of rules) that would be able to encompass all emergency situations. Conversely, drafting a rule to give courts the power to create their own *ad hoc* rules which would alter existing procedural requirements would inject uncertainty into the judicial system,[2] so there are good

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[1] *In re CVS Pharmacy, Inc., et al.*, No. 20-3075 (6th Cir. Apr. 15, 2020) (rules promulgated pursuant to the Rules Enabling Act are binding upon court and parties alike and have the force of law)(*citing Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988); *In re Pangang Grp. Co*., 901 F.3d 1046, 1055 (9th Cir. 2018); *Winston & Strawn*, LLP v. McLean, 843 F.3d 503, 506 (D.C. Cir. 2016)).

[2] *Ad hoc* rulemaking is already a problem in particular areas of practice, notably in multidistrict litigation and expert evidence admissibility. *See* Letter from 48 Chief Legal Officers to Ms. Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (Oct. 3, 2019), https://www.uscourts.gov/sites/default/files/19-cv-aa-suggestion_from_45_companies.pdf ("MDLs have become less and less grounded in the widely accepted principles of procedural fairness and transparency that are the FRCP's hallmarks" and *ad hoc* MDL procedures are "inconsistent with the basic tenets of the FRCP"); Comment from Lawyers for Civil Justice to the Civil Rules Advisory Committee, *What MDL Problems Need to be Solved with Amendments to the Federal Rules of Civil Procedure?* (March 30, 2020), https://www.uscourts.gov/sites/default/files/20-cv-e_suggestion_from_lcj_-_mdl_proceedings_0.pdf (*ad hoc* practices in MDL cases are inconsistent with Rule 1's admonition that the FRCP

grounds for caution. For that reason, as part of this review, the Standing Committee and advisory committees should reaffirm the fundamental purpose of the rules of practice and procedure—fair, consistent, uniform practices—and their role in furthering adherence to those rules including during times of national emergency.

II. The Next National Emergency Could Look Vastly Different from the COVID-19 Pandemic

Although this examination of possible emergency rules will be influenced by the circumstances of the current pandemic, the next national emergency may present very different—indeed, inconsistent—needs. Modifications designed to avoid the spreading of a highly communicable disease might logically include allowing technological means for communicating from a distance such as video conferencing. Such technologies, however, may well be the source of danger, rather than a means of avoiding it, in a national emergency caused by a malicious cyber attack, or may simply be unavailable in an emergency relating to failure of the electrical grid. The impossibility of forecasting the nature of future emergencies counsels strongly for caution in undertaking to write rules that would apply in unknowable situations.

III. The Aim of Emergency Rules Should be to Ensure "Regular Order" of Judicial Process, Rather Than to Impose a Slowdown to be Followed by New Expedited Practices

Emergency rules, if any are needed, should aim to maintain as much "regular order" in the courts as possible. The contrary idea—rules requiring or allowing a prolonged cessation of process—likely would result in serious threats to fundamental fairness. Pauses create backlogs, and backlogs inherently produce pressure to expedite matters. As courts speed up to tackle backlogs, parties may experience pressure to waive jury trials, forego oral arguments, participate in depositions or trials by video conference, proceed with multiple-plaintiff trials, exclude "high-risk" categories of people from jury service—all of which can implicate fundamental notions of justice. The way to avoid such problems is to focus any emergency rules on helping to avoid the creation of backlogs in the first place, and to state explicitly in any emergency rule that the rights of parties should not be abridged.

IV. Emergency Rules Should Protect the Integrity of the Judiciary

Beyond ensuring continuation of operations, emergency rules also may be needed to protect people from misuse of the courts during crisis situations. Times of civic stress and chaos provide opportunities for people, whether maliciously or not, to take advantage of others by bringing litigation or pressing forward

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should "govern all actions and proceedings," so the FRCP should be amended to end the individualized practices in different courts by different judges); Letter from Amy Sherry Fischer, President of the International Association of Defense Counsel, to Ms. Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (Oct. 30, 2019) ("without firm and predictable guidance in the form of rulemaking, MDL practice will continue to evolve into a process that is considered unjust by most observers"); Letter from 50 Companies to Ms. Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (March 2, 2020), https://www.uscourts.gov/sites/default/files/20-ev-b_suggestion_from_50_companies_-_rule_702_0.pdf (Rule 702 should be amended to address judicial practices that diverge materially from the Evidence Advisory Committee's purpose when it drafted the rule); Lee Mickus, *Gatekeeping Reorientation: A Rule 702 Can Correct Judicial Misunderstandings about Expert Evidence,* WLF Working Paper No. 217 (May 2020), https://www.uscourts.gov/sites/default/files/20-ev-d_suggestion_from_washington_legal_foundation_-_rule_702_0.pdf ("Twenty years of inconsistency … have turned Rule 702 into a mosaic of standards in which the same testimony that one court excludes would be admissible in a sister court," and "the widespread inconsistency among the courts cries out for amendments to clarify the rule.").

aggressively at a time when their opponents may be unable to focus sufficient attention and resources to litigation due to the demands of the emergency situation. It therefore may be useful for courts to have a heightened ability to enforce Rule 11 and other ethical responsibilities during times of crisis.

V. The Use of Emergency Rules should be Determined by the Supreme Court

If the Standing Committee moves forward with consideration of any emergency rules, it should also consider creating an implementation mechanism that provides discretion to the Supreme Court. The CARES Act contemplates "emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act,"[3] but not all emergency declarations necessitate invoking emergency rules. There are at least three such designations in effect now (terrorism, border wall, and COVID-19), and the declaration relating to terrorism has been in effect since 2001. The Supreme Court should make the decision as to whether any emergency rules are invoked, and for how long.

VI. Conclusion

As the Standing Committee and its five advisory committees consider possible rule amendments that could ameliorate future national emergencies' effects on court operations, we urge the committees to focus on the goal of preserving the rule of law as contemplated by the Rules Enabling Act, due process, and fundamental fairness. The committees should proceed with great caution in drafting rules, if any, because of the unknown nature of any future emergency and because new rules implemented in a crisis could risk forcing parties to compromise their basic rights in the name of expediency or convenience.

[3] Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136, § 15002(b)(6).

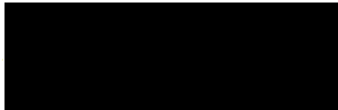
From:	Alex Dahl
To:	RulesCommittee Secretary
Subject:	Comment on emergency rules
Date:	Monday, June 01, 2020 5:30:48 PM
Attachments:	image001.png Comment on Emergency Rules by LCJ DRI FDCC and IADC June 1 2020.pdf

Attached please find a comment in response to the Standing Committee's invitation for public input on possible rule amendments that could ameliorate future national emergencies' effects on court operations. This comment is submitted by Lawyers for Civil Justice (LCJ), DRI – The Voice of the Defense Bar (DRI), the Federation of Defense & Corporate Counsel (FDCC), and the International Association of Defense Counsel (IADC).

Thank you,

Alex

STRATEGIC POLICY COUNSEL



ALEX DAHL
FOUNDER & CEO

COMMENT OF PUBLIC JUSTICE AND THE NATIONAL CONSUMER LAW CENTER

TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AND ITS FIVE ADVISORY COMMITTEES ON POSSIBLE RULE AMENDMENTS FOR FUTURE EMERGNCIES

June 1, 2020

Public Justice, P.C., the Public Justice Foundation (collectively, "Public Justice"), and the National Consumer Law Center respectfully submit this Comment to the Advisory Committee on Civil Rules in response to the request for public input on possible rule amendments that could ameliorate future national emergencies' effects on court operations.

INTRODUCTION

Public Justice, P.C. is a national public interest law firm that pursues impact litigation to combat social and economic injustice, protect the Earth's sustainability, and challenge predatory corporate conduct and government abuses. We have one of the most diverse public interest litigation portfolios in the country. We protect consumers, employees, civil rights, and the environment. We litigate to stop sexual assault and bullying in schools, to promote a more sustainable and safe food system, to safeguard water sources from pollution, and to provide consumers and employees with access to the courts. Public Justice works extensively to protect access to justice, and has long fought to preserve access to court proceedings and records, frequently representing members of the public and the press in intervening to combat unnecessary or overbroad sealing orders. The list goes on, but our litigation has one common theme: it aims to protect the underprivileged and the powerless by ensuring access to justice for all who have been wronged by those in power.

The Public Justice Foundation is a not-for-profit charitable membership organization that supports the work of Public Justice, P.C. and educates lawyers, judges, and the broader public about critical social and economic issues that affect the public interest. Its almost 2,600 members, from all fifty states, represent plaintiffs in a broad range of personal injury, employment

discrimination and wage and hour cases, consumer, tort (both mass and individual), antitrust and securities fraud, commercial, and civil rights cases.

The National Consumer Law Center ("NCLC") is a national non-profit research and advocacy organization that seeks to achieve consumer justice and economic security for low-income and other disadvantaged Americans. NCLC pursues these goals through policy advocacy, litigation, expert-witness services, and training for consumer advocates throughout the United States, and does so on a wide range of issues, including consumer protection, access to justice, unfair and deceptive acts and practices, privacy rights, civil rights, and employment. Since establishing its own litigation practice in 1999, NCLC has brought or co-counseled over 140 consumer cases. NCLC also prepares and publishes a twenty-one volume Consumer Credit and Sales Legal Practices Series, including Consumer Class Actions (10th Ed. 2020). The organization has sponsored an annual Consumer Rights Litigation Conference for 29 years and an annual Class Action Symposium for 20 years.

For over fifty years, NCLC has been a leading source of legal and public policy expertise on consumer issues for courts, Congress, state legislatures, agencies, consumer advocates, journalists, and social service providers. Throughout its history and during the COVID-19 pandemic, NCLC has sought strong and effective enforcement of consumer protection and civil rights laws and worked to ensure equal access to justice.

During the COVID-19 pandemic, Public Justice and NCLC have continued to litigate their cases to the extent possible. Public Justice has been in constant communication with its membership, and Public Justice and NCLC have gathered examples of court disruptions resulting from the pandemic and some of the creative solutions litigants and courts around the country have employed to resolve some of these issues. The following comments are drawn from this experience.

These comments propose a number of concrete and specific changes this Committee should consider in anticipation of future emergency conditions like COVID-19, including (a) changes to Rules 30 and 32 to facilitate the taking and memorializing of remote depositions, (b) a rule and accompanying comment to ensure that public access to court proceedings is preserved, even in times of emergency, and (c) a suggestion to facilitate the admission of counsel pro hac vice to federal courts when their respective

state courts may be experiencing disruptions that affect counsel's ability to secure needed documentation, like certificates of good standing.

I. RULE CHANGES ARE NEEDED TO FACILITATE THE TAKING OF DISCOVERY DURING EMERGENCIES LIKE COVID-19.

a. The Committee should consider changes to Rule 30 to facilitate the taking of remote depositions.

Challenge: There are two ambiguities in Rule 30 that may present difficulties in encouraging the taking of depositions remotely during an emergency: Rule 30(b)(4)'s requirement that the "court may on motion order" that a deposition be taken by remote means, and Rule 30(b)(5)(A)'s requirement that depositions be conducted "before" a Rule 28 officer.

Proposed Solution 1: Amend Rule 30(b)(4) as follows:

> *By Remote Means.* The parties may stipulate—or the court may ~~on motion~~ order—that a deposition be taken by telephone or other remote means. [1]

Proposed Solution 2: Amend Rule 30(b)(5)(A) as follows:

> *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. **[A deposition may be deemed to have been conducted "before" such an officer if that officer participates by such means that he or she can hear (if conducted via audio) or see and hear (if conducted via videoconference) the deponent.]**

Rationale:

For decades, the federal rules have allowed for the taking of depositions by telephone or "other remote means." During the COVID-19 pandemic, this flexibility has proven invaluable. With states and counties across the country issuing stay-at-home orders, and gatherings of even small groups presenting opportunities for virus transmission, remote depositions have become the only way for many cases to move forward.

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[1] In this document, proposed new text appears in **[bold and in brackets]**. Proposed deletions appear in ~~strikethrough~~.

Unfortunately, some parties have sought to delay depositions, and have bucked the broader trend towards permitting remote depositions. Moreover, ambiguities in Rule 30 present potential barriers to the taking of remote depositions in some cases during this emergency, and have caused confusion for some courts and litigants. The rule changes proposed above would remove these barriers.

Rule 30(b)(4) allows the parties to stipulate, or the court to order, that a deposition be taken by telephone or other remote means. But, in the absence of a stipulated agreement, the rule may be read to require a motion before the court may make such an order. During the COVID-19 pandemic, many state court systems issued blanket orders encouraging the taking of all depositions by remote means. *See, e.g.*, 151st Civil District Court Harris County, Texas Order Regarding Remote Oral Depositions by Videoconference (March 24, 2020) (providing that all oral depositions may be taken, and oaths administered, remotely via videoconference); 129th Civil District Court Standing Order No. 1 Regarding Remote Depositions (March 30, 2020) (same); Supreme Court of New Jersey Omnibus Order (March 27, 2020) ("To the extent practicable through April 26, 2020, depositions should be conducted remotely.").

Such blanket orders are an efficient and effective way of preserving judicial resources while ensuring that cases continue to move along where possible during an emergency such as the current pandemic. If Rule 30(b)(4) is read to require a motion before a federal court can issue such an order, it stands as a barrier to the court's efficient administration of justice during such times. Public Justice and NCLC therefore propose that the "on motion" requirement be excised from the rule, to provide courts with the flexibility to order that depositions be taken remotely, without motion, during any future emergency.

Rule 30(b)(5)(A) requires that "[u]nless the parties stipulate otherwise, a deposition must be conducted *before* an officer appointed or designated under Rule 28." (emphasis added). Questions about whether the "conducted before" requirement permits the Rule 28 officer to participate remotely, or whether the deponent and the officer must be physically located in the same place, throw a potential wrench into the works. Public Justice and NCLC therefore urge this committee to consider clarifying this requirement, to make clear that the deponent and the officer need not be physically located in the same place. The fix could be as simple as an additional sentence in the rule or a clarifying comment, stating that a deposition may be deemed to

have been conducted "before" such an officer if that officer participates by such means that he or she can hear the deponent if the deposition is conducted via teleconference and see and hear the deponent if conducted via videoconference.

This question was presented to a number of federal courts during the COVID-19 pandemic. For example, in two separate cases, the Southern District of New York was forced to clarify this requirement under the federal rules. In both *In re Keurig*, No. 14-md-2542 (VSB) (SLC), ECF No. 85 (March 16, 2020), and *Sinceno v. The Riverside Church in the City of New York*, No. 18-cv-2156 (LJL), ECF No. 50 (March 18, 2020), judges of the Southern District clarified that "[f]or avoidance of doubt, . . . a deposition will be deemed to have been conducted 'before' an officer so long as that officer attends the deposition via the same remote means (e.g., telephone conference call or video conference) used to connect all other remote participants, and so long as all participants (including the officer) can clearly hear and be heard by all other participants." *See also SAPS, LLC v. EZCare Clinic, Inc.*, No. CV 19-11229, 2020 WL 1923146, at *2 (E.D. La. Apr. 21, 2020) (same).

Similarly, numerous state systems issued orders making just such a change to their own rules. For example, the Supreme Judicial Court of the State of Maine issued an emergency order stating that "an officer or other person before whom a deposition is to be taken is . . . authorized to administer oaths and take testimony remotely, so long as that officer or other person can both see and hear the deponent via audio-video communication equipment or technology for purposes of positively identifying the deponent." State of Maine Supreme Judicial Court, Emergency Order for the Administering Of Oaths at Depositions via Remote Audio-Video Communication Equipment (March 25, 2020). The Maine court believed its order was necessary for the same reason Public Justice and NCLC believe this committee should act: "a situation in which the officer or other person before whom the deposition is to be taken is actually or impliedly precluded, by statute, rule, or otherwise, from administering oaths and taking testimony if not in the presence of the deponent." *Id.* Similarly, the Supreme Court of Wisconsin issued an order on the same date mandating that "the remote administration of an oath at a deposition via audio-visual communications technology pursuant to this order shall constitute the administration of an oath 'before' a court reporter under" Wisconsin law. Supreme Court of Wisconsin, In re the Matter of the Remote Administration of Oaths at Depositions via Remote Audio-Visual

Equipment during the COVID-19 Pandemic (March 25, 2020); *see also, e.g.*, Supreme Court of Florida Administrative Order No. AOSC20-17 (suspending "any actual or implied requirement that notaries, and other persons qualified to administer an oath in the State of Florida, must be in the presence of witnesses for purposes of administering an oath for depositions and other legal testimony, so long as the notary or other qualified person can both see and hear the witness via audio-video communications equipment for purposes of readily identifying the witnesses"); Commonwealth of Massachusetts Supreme Judicial Court Order For the Administering of Oaths at Depositions Via Remote Audio-Video Communication Equipment (same).

To avoid the need for such case-by-case clarifications during future emergencies in the federal courts, and to ensure the consistent application of the federal rules, Public Justice and NCLC therefore advocate that the Committee clarify the requirements of Rule 30(b)(5)(A).

b. *The Committee should consider changes to Rule 30 and/or 32 to facilitate the admissibility of recordings of remote depositions.*

Challenge: Rule 30 also presents a potential barrier to allowing litigants to produce admissible recordings of depositions taken remotely because it mandates that "the officer must record" the testimony, even though currently-available technology obviates the need for the officer to be responsible for the making of any recording.

Proposed Solution 1: Amend Rule 30(c)(1) as follows:

> *Examination and Cross-Examination*. The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must **[ensure that]** ~~record~~ the testimony **[is recorded]** by the method designated under Rule 30(b)(3)(A). ~~The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer~~.

Proposed Solution 2: Issue a clarifying comment to Rule 32 stating that video or digital recordings of depositions held remotely, where they comply

with the notice and non-distortion requirements of Rule 30(b), shall be admissible.

Rationale:

As currently written, the Federal Rules present a potential barrier to the admissibility of recordings of depositions taken remotely during times of emergency. Rule 32 provides that "[u]nless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise." The Advisory Committee Notes make clear that this language "is included in view of the increased opportunities for video-recording and audio-recording of depositions under revised Rule 30(b)."

Under Rule 32(c), "a party may offer deposition testimony in any of the forms authorized under Rule 30(b)," so long as the party also provides the court with "a transcript of the portions so offered." Rule 30(b), in turn, provides for great flexibility in the manner of recording depositions, conferring "on the party taking the deposition the choice of the method of recording." And under Rule 30(b)(3)(B), "any party may designate another method for recording the testimony in addition to that specified in the original notice." No matter the form in which the deposition is memorialized, Rule 30(e) provides a safeguard against inaccurate content, requiring that the deponent have the opportunity to review the "transcript or recording" and offer necessary changes.

Rule 30(c), however, presents a potential limitation to the ability of parties to memorialize depositions in the most efficient manner during an emergency. Under this provision, the "*officer* must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer *personally* or by a person *acting in the presence and under the direction of the officer*." (emphasis added). And some courts have said that videos of depositions taken through technology operated by parties' counsel will not be admissible. *See, e.g.*, *C.G. v. Winslow Twp. Bd. of Educ.*, No. CIV. 13-6278 RBK/KMW, 2015 WL 3794578, at *3 (D.N.J. June 17, 2015) (approving magistrate judge's ruling barring Plaintiffs' counsel from "videotaping the deposition himself on his laptop computer because he was

not an 'officer' within the meaning of the Rules"); *Schoolcraft v. City of New York*, 296 F.R.D. 231, 240 (S.D.N.Y. 2013), on reconsideration, 298 F.R.D. 134 (S.D.N.Y. 2014) ("Although the Plaintiff may take video recordings in depositions for his own purposes, those recordings taken by counsel will not be admissible.").

Such views appear outdated. Traditional rationales for requiring the officer to control the recordation device have little applicability to modern video and digital technology. With the taking of a traditional written transcript of an oral proceeding, "the operator interprets what people say into words and puts them on paper." *Rice's Toyota World, Inc. v. Se. Toyota Distributors, Inc.*, 114 F.R.D. 647, 651 (M.D.N.C. 1987). But the making of a "stationary video recording of a deposition which can be easily duplicated and given to all parties . . . does not involve any interpretation" on the part of the person who hits "record," greatly diminishing any concern for conflicts of interest. *Id*.

Particularly during emergencies like the COVID-19 pandemic, as discussed above, depositions should be permitted to go forward via remote means with the deponent, attorneys, and Rule 28 officer all appearing from different locations. Many of the technologies routinely used for remote depositions include integrated mechanisms for making high-quality, faithful audio or video recordings of the proceeding, presenting little to no risk that the resulting recording will present reliability issues. *Cf. Schoolcraft*, 296 F.R.D. at 240. And there is likewise little risk that there will be any need for interpretation in the recordation. Especially given the Rule 30(e) safeguards, there is no reason why the rules should require the officer to be responsible for pressing "record."

For these reasons, Public Justice and NCLC believe that this Committee should amend Rule 30 as stated above, making clear that the officer need not be the individual actually making the recording, and/or issue a clarifying comment to Rule 32, making clear that video or digital recordings of depositions held remotely, where they comply with the notice and non-distortion requirements of Rule 30(b), shall be admissible.

II. RULE CHANGES ARE NEEDED TO ENSURE THE SEAMLESS PROVISION OF PUBLIC ACCESS TO COURT PROCEEDINGS IN ANY FUTURE EMERGENCY.

Challenge: The court shutdowns necessitated by COVID-19 disrupted the ability of the public and the press to observe federal court proceedings.

Proposed Solution: A federal rule of both civil and appellate procedure stating that the sittings of the federal courts are open to the public, accompanied by an advisory committee note memorializing the best practices and minimum guarantees of openness that courts must meet, even in times of emergency like COVID-19.

- **Proposed Rule Language:**

  PRESUMPTION OF PUBLIC ACCESS TO COURT PROCEEDINGS. Court proceedings are presumptively open to and accessible by the public. This presumption of access applies equally to proceedings held in-person and those held via remote means. Where proceedings are held remotely or where the public is excluded from in-person proceedings due to an emergency condition, a court must provide an alternative form of real-time public access, which shall ordinarily consist of a live video feed or, if that is not technically feasible or the proceeding itself is audio-only, a live audio feed.

  ORDERS TO CLOSE A PROCEEDING. If a court determines that it is necessary to close a proceeding to the public, it must state its reasons on the public record and provide particularized findings of fact supporting its decision. A court may not close a proceeding unless it finds that closure is necessitated by a compelling interest, is narrowly tailored to serve that interest, and that no less restrictive means exist to protect that interest.

- **Proposed Comment:**

  The alternative forms of access required by this rule are especially crucial where a courthouse is physically closed to the public because of an emergency. In anticipation of emergency conditions that may affect the courts' ability to hold in-person proceedings and/or permit in-person public access to their proceedings, courts should maintain robust mechanisms to provide remote public

> access to their proceedings. Courts should provide real-time audio-video access to live proceedings wherever possible. Where audio-video access is not technically feasible or a proceeding is itself audio-only, courts shall at a minimum provide real-time public audio access. To maximize public access at all times, courts are encouraged to offer live remote audio or audio-video public access even when court proceedings take place in-person and no emergency is in place.

Rationale:

As this Committee is no doubt aware, the public and press have a First Amendment right to observe court proceedings and to access court records. This right of access attaches to proceedings including hearings and trials—any proceedings that have "historically . . . been open to the press and general public" and for which access "plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 605-06 (1982). Openness in court proceedings "enhances both the basic fairness of the [proceedings] and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Super. Court*, 464 U.S. 501, 508 (1984). Public access to court hearings and records represents "an essential part of the First Amendment's purpose to 'ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.'" *Courthouse News Service v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014) (quoting *Globe Newspaper Co.*, 457 U.S. at 604). It fosters public confidence in the fairness of the country's justice system, allows the public to operate as a check on potential judicial abuses, and promotes the truth-finding function of trials. *Globe Newspaper Co.*, 457 U.S. at 606; *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 (1979); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). In times of disruption like the COVID-19 pandemic, the principle of openness and the purposes it serves become more—not less—important.

As the COVID-19 pandemic ramped up in the beginning months of 2020, the federal courts and their state counterparts faced the difficult task of ensuring that the country's judicial system could continue operating to at least a minimal, constitutionally-mandated degree, while prioritizing public safety. For many courts across the country, this has meant physically closing courtrooms to the public, closing some courthouses altogether, canceling and postponing some appearances, and moving many proceedings to telephone

and video conferencing technology. Courthouses have been operating with reduced staff, with many judges, attorneys, and litigants appearing from home.

Through all of this, courts have struggled to prioritize public access to their proceedings. The result has been a kind of unplanned experiment in adoption of a variety of public-access mechanisms. This experiment has proven that a number of different mechanisms may be feasible, each with their own benefits and potential drawbacks. Learning from this experience, Public Justice and NCLC urge this committee to ensure that the capabilities to provide public access to remote court proceedings be fostered such that they can be brought online immediately when a future emergency or other circumstance necessitates remote proceedings. Wherever possible, courts should strive to provide more complete access, such as through live video-streaming technology. Where video may not be feasible, at a bare minimum, federal courts should build and maintain the capability to provide live, telephone or digital audio access to their proceedings.

In general, these remote access mechanisms can and should be kept in place at all times as part of federal courts' regular operations. Beyond providing constitutionally-required access to court proceedings in emergencies, these mechanisms can improve the practices of the federal courts by facilitating broader court access for those who may not be able to attend court proceedings in person for health or other reasons, regardless of any emergency conditions. For this reason, courts should be encouraged not only to provide remote access during court closures, but also to supplement in-person access to their courtrooms during the regular course of business, for proceedings held remotely or in person.

The experience of the courts during the COVID-19 pandemic has shown that providing live video, telephone, or digital audio access already is feasible for most courts. In recent months, many federal courts made their sittings available to the public via live video streams on the internet, or instituted public listen-only dial-in lines so that the press and public could access their proceedings. *See, e.g.*, Southern District of Illinois Administrative Order No. 263 (March 30, 2020) available at http://www.ilsd.uscourts.gov/Forms/AdminOrder263.pdf (last visited April 7, 2020) (providing that for "any traditional in-court proceeding that is conducted via video teleconference or telephone conference," "audio *and* video feeds will be available to the public and press to the extent

practicable") (emphasis added). Some made information about these dial-in capabilities available on specific case dockets, while others posted call-in information specific to each judge or courtroom. For example, the Northern District of California and the District of Minnesota each posted call-in numbers for hearings on their public dockets. *E.g.*, *Roe v. SFBSC Management, LLC*, No. 3:14-cv-03616-LB (N.D. Cal.) (publicly circulating dial-in conference number "which can accommodate up to 200 people"); *see also* Notice Regarding Press and Public Access to Court Hearings (Updated April 3, 2020), available at https://www.cand.uscourts.gov/notices/notice-regarding-press-and-public-access-to-court-hearings-april-3-2020/ (last visited June 1, 2020) ("[M]embers of the press and public will be permitted to hear and/or observe telephonic and video hearings, free of charge, to the extent practicable. Information on public and press access to telephonic or video hearings will be available on PACER."); District of Minnesota General Order No. 6 (March 31, 2020), available at https://www.mnd.uscourts.gov/sites/mnd/files/2020-0331_COVID-19-General-Order-No6.pdf (setting out instructions for members of the press and public to locate public access information on individual case dockets) (last visited June 1, 2020). Others, like the District Court of the Virgin Islands, provided call-in numbers for each sitting judge. Fifth Order Concerning Operations of the District Court of the Virgin Islands During the COVID-19 Outbreak Public Access to Court Proceedings (April 30, 2020).

Even the U.S. Supreme Court began broadcasting live audio of its arguments for the first time in its history, to great success and public approval. *See, e.g.*, Editorial Board, *The Supreme Court sounds great. Keep the broadcasts coming*, The Washington Post (May 23, 2020), https://www.washingtonpost.com/opinions/the-supreme-court-sounds-great-keep-the-broadcasts-coming/2020/05/22/887895ba-9b04-11ea-89fd-28fb313d1886_story.html ("The broadcasts have been an unmitigated success"); Kalvis Golde, *Public approves of live access to Supreme Court arguments, polls show*, SCOTUSblog (May. 21, 2020), https://www.scotusblog.com/2020/05/public-approves-of-live-access-to-supreme-court-arguments-polls-show/ (citing polls showing that 83% of public approved of decision to provide live audio access, and nearly 70% believe that "all courts should allow cameras into the courtroom so that anyone who wants to watch oral argument can do so"). On May 29, 2020, in fact, Senators Charles E. Grassley and Patrick Leahy wrote to Chief Justice Roberts urging the Supreme Court not only to continue "providing live audio streams of *all* oral arguments" going forward, but also to build upon its

COVID-19 practices by providing live video access to its arguments. Letter to Chief Justice Roberts (May 29, 2020), available at https://www.grassley.senate.gov/sites/default/files/2020-05-29%20CEG%2C%20Leahy%20to%20SCOTUS%20-%20Transparency%20Following%20Pandemic.pdf.

Live audio and video streaming is not new. Many federal and state courts have been live streaming video or audio of their proceedings for some time. *See, e.g.*, United States Courts for the Ninth Circuit, Audio and Video, https://www.ca9.uscourts.gov/media/; U.S. Court of Appeals for the D.C. Circuit, Information Regarding Live Audio Streaming of Oral Arguments (Effective September 5, 2018), https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+RPP+-+Information+Regarding+Live+Audio+Streaming+of+Arguments; Maryland Court of Appeals Live Webcasts, https://www.courts.state.md.us/coappeals/webcasts; Washington State Supreme Court, https://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/ (all court hearings are "broadcast live online or televised by TVW, Washington's Public Affairs Station").

To ensure a more seamless transition in the event of any future emergency, and to foster broader access to the federal courts, this Committee should consider adopting the proposed rule and supplemental comment. The proposal is intended to codify existing Supreme Court law mandating open courts, and to apply to those proceedings to which the public has access under that jurisprudence. This proposal will ensure that federal courts uniformly provide a minimum degree of public access to any ongoing proceedings during times of physical court closures. The proposed rule and explanatory comment would effectively set a baseline, encouraging federal courts to provide video access to their proceedings but also ensuring that, at the very least, the public may listen in on the activities of their courts during times of crisis. And the comment is meant to encourage courts to allow remote access even in non-emergency times, to foster public access to court proceedings and the democratic accountability and civic engagement such access engenders.

III. PRO HAC VICE ADMISSIONS

Challenge: Attorneys have encountered difficulty accessing certificates of good standing during COVID-19 court closures.

Proposed Solution: An additional rule, or a comment to Rule 11 or other appropriate existing rule, providing that during times of emergency or when there may be disruptions to state court operations, counsel should be permitted to move for admission on the basis of a declaration that he or she is a member in good standing of the relevant state's bar, in lieu of providing a certificate of good standing. If needed, the rule or comment could require counsel that appears pro hac vice on the basis of a declaration to provide the court with a certificate of good standing from the relevant state's bar as soon as is practicable.

Rationale:

During the COVID-19 pandemic, state court systems and bars across the country shut down. Only a few state systems, like Washington, D.C., provide the certificates of good standing needed for many federal courts' pro hac vice admissions processes electronically. As a result, it became all but impossible to secure up-to-date documents and complete pro hac vice applications in a timely manner, even as some federal court proceedings, rightfully, continued remotely.

While pro hac vice admissions generally are handled through courts' local rules, in future moments of emergency like COVID-19 where conditions impede counsel's ability to secure such documents, the federal rules could resolve this problem uniformly by permitting counsel to move for admission on the basis of a declaration that he or she is a member in good standing of the relevant state's bar, in lieu of providing a certificate of good standing. Given counsel's role as an officer of the court, and the easily-verifiable nature of the information to be attested to, there would be little risk to such a procedure. Moreover, the requirement that counsel appearing pro hac vice on the basis of a declaration provide the court with the relevant certificate of standing as soon as is practicable, if included, would further minimize any risk.

CONCLUSION

Public Justice and NCLC thank the Committee for its time and attention to these important subjects.

From:	Stevie Glaberson
To:	RulesCommittee Secretary
Cc:	Ariel Nelson
Subject:	Comments on Possible Emergency Procedures
Date:	Monday, June 01, 2020 6:23:38 PM
Attachments:	image001.png PJ NCLC Comments on Possible Emergency Rules FINAL.pdf

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Good afternoon,

Please see attached for comments from Public Justice and the National Consumer Law Center in response to the Committee's Invitation for Comment on Emergency Rulemaking. If you have any questions regarding these comments, please don't hesitate to contact me.

Thank you,
Stephanie

Stephanie Glaberson
Staff Attorney

Phone:
she/her/hers

Let's make 'Justice for All' a reality in 2020. Support our work today and join our fight to keep the courthouse doors open.

CONTACT
POLICY DEPARTMENT
ELIZABETH KOCIENDA
|
MARY MARGULIS-OHNUMA
|

REPPORT BY THE FEDERAL COURTS COMMITTEE

COMMENTS ON POSSIBLE EMERGENCY PROCEDURES PROPOSED BY THE JUDICIAL CONFERENCE'S COMMITTEE ON RULES OF PRACTICE AND PROCEDURE THAT COULD AMELIORATE FUTURE NATIONAL EMERGENCIES' EFFECTS ON COURT OPERATIONS

The New York City Bar Association ("City Bar") greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure (the "Committee") on the subject of possible rule amendments that could ameliorate future national emergencies' effects on court operations.

The City Bar, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The City Bar includes among its membership many lawyers in virtually every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations. The City Bar's Committee on Federal Courts (the "Federal Courts Committee") is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules. The Federal Courts Committee respectfully submits the following comments on the subject of the request for input on possible emergency procedures.

On balance, the City Bar has been impressed with the speed and flexibility with which the federal courts have adapted to the conditions forced upon judges and court personnel by the COVID-19 crisis. The use of electronic filing and remote court conferences by video and telephone have allowed cases to proceed as much as possible despite the unavailability of in-person proceedings. To a considerable extent, these proceedings have taken advantage of the fact that the Federal Rules of Civil Procedure afford discretion to the judges to fashion proceedings that advance the goal of a "just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. While protective of the constitutional rights of the accused in criminal cases during the COVID-19 crisis, courts in both civil and criminal cases have nevertheless made recourse to the use of technology to maintain some of the ongoing work of the federal courts during this time.

We offer the following suggestions as areas for possible rulemaking in light of what we have observed during the past several weeks. We do not propose specific rule amendments, and some of these proposals may be better taken as suggestions for clarification of existing rules in

order to make express what already may be implicit. We hope that these suggestions are useful to the Committee:

- Remote proceedings: The federal rules should be amended to make clear that, upon the declaration of a public health emergency by federal, state or local officials, the chief judge in a particular district court or circuit court can shift from in-person court appearances to remote proceedings. The courts should permit those proceedings to be conducted on video or by telephone. In order to make such proceedings effective and open to the public, the judiciary should license software that meets the following requirements: (i) the judge and court staff have the ability to allow participants to speak or to mute them, as appropriate; (ii) each speaker can be identified; (iii) court appearances can be recorded on audio in case the court reporter loses their connection to the proceeding; (iv) members of the public can listen to the proceedings, in order to protect the right of access to court proceedings; and (v) to the extent necessary, Federal Rule of Criminal Procedure 53 should be amended to make clear that such remote proceedings are not considered "the broadcasting of judicial procedures from the courtroom." We also suggest that the courts consider encouraging the routine use of remote proceedings in civil cases even outside of a public health emergency, particularly where more efficient scheduling is possible or cost savings can be achieved and the need for an in-person appearance is minimal (such as a pretrial conference to discuss the status of civil discovery).

- Automatic and global extensions of time: In the immediate aftermath of the COVID-19 crisis, on March 16, 2020, the U.S. Court of Appeals for the Second Circuit issued a general extension of time of 21 days for all cases that had deadlines between the date of the order and May 17, 2020. This extension of time accomplished two ends. First, it made sure that lawyers and clients who were dealing with the business and personal exigencies created by the public health crisis would have the time necessary to complete their briefs. Second, it also ensured that, with a modest delay, appeals would continue to be briefed and cases moved along in the appellate process. The Court also gave discretion to individual panels to direct the parties to follow a different schedule as deemed necessary in a specific case. While extensions of time are already permitted, this approach should be formalized, giving chief judges the option of adjourning all dates by three weeks (or more, as appropriate) in the Courts of Appeals and the District Courts in the event of a public health emergency, except to the extent that such would be contrary to the constitutional rights of the accused in criminal proceedings or as appropriate for the particular exigencies of a given case (for example, a motion for a preliminary injunction or temporary restraining order).

- Electronic filing and service of all papers: One of the key elements that allowed federal courts to continue their business during the COVID-19 crisis was the use of electronic filing and service of papers. The federal rules are generally supportive of service of court filings by ECF, see Fed. R. Civ. P. 5(b)(2)(E), but not all important litigation papers are filed in court. For example, discovery objections, interrogatory responses, and notices of deposition are not filed in court and therefore cannot be sent to opposing counsel by email without the consent of counsel. See id. The rule should be modified

to permit service of all papers by email to opposing counsel using whatever email address that the recipient uses for their ECF filings. There are reasons to require consent from pro se litigants, who may be less accustomed to the court rules, but counsel of record should be required to accept all papers by email after the inception of a case. There is no reason to limit this proposed procedure to emergencies.

- Criminal defendants' choice of remote proceedings: Federal Rule of Criminal Procedure 43 requires the defendant's presence at most critical stages: initial appearance, arraignment, plea, trial and sentencing. These are waivable rights, however, and courts should facilitate virtual proceedings for those defendants who wish to plead guilty or be sentenced without making an in-person court appearance, due to a public health emergency. Rule 43 should be amended to allow courts to provide this option to defendants so long as the proceedings permit them to proceed knowingly and intelligently with their case and with the assistance of counsel. We do not, however, recommend requiring that defendants participate in such proceedings by remote means. Important interests of notice and advocacy are often served by conducting such proceedings in person, even if it results in some delay.

***

We thank the Committee for considering these suggestions and we look forward to providing comments on any amendments that are proposed in the future.

Federal Courts Committee
Harry Sandick, Chair

From:	Elizabeth Kocienda
To:	RulesCommittee Secretary
Subject:	Input on Possible Emergency Procedures
Date:	Monday, June 01, 2020 11:11:03 AM
Attachments:	image001.png 2020718-NatlEmergenciesCourtOperations.pdf

Good morning,

On behalf of the Federal Courts Committee of the New York City Bar Association, attached please find comments on possible rule amendments that could ameliorate future national emergencies' effects on court operations.

Thank you for your consideration,

Elizabeth Kocienda, Director of Advocacy
New York City Bar Association |
www.nycbar.org/150
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June 1, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
United States Judicial Conference
One Columbus Circle, NE
Washington, D.C. 20544

Via email: RulesCommittee_Secretary@ao.uscourts.gov

Re: Invitation for Comment on Emergency Rulemaking

Dear Ms. Womeldorf:

The Reporters Committee for Freedom of the Press (the "Reporters Committee") writes in response to the Judicial Conference's request for public input on possible rule amendments that could ameliorate the effects of future national emergencies on court operations.

The Reporters Committee has long championed the public's constitutional and common law rights of access to judicial records and proceedings, and has been monitoring the response of state and federal courts around the country to the current public health crisis.[1] The Reporters Committee appreciates the opportunity to provide input to the Committee on Rules of Practice and Procedure and its advisory committees as they consider whether rule amendments are needed to deal with future emergencies, in accordance with the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

I. Public access to judicial proceedings and court records in civil and criminal matters is no less vital in times of national crisis.

Courts have long recognized the central importance of openness to our justice system. Though "[j]udges deliberate in private," they "issue public decisions after public arguments based on public records." *In re Krynicki*, 983 F.2d 74, 74 (7th Cir. 1992). The presumption that court records and proceedings will be open, among other things, "enhances the quality and safeguards the integrity of the factfinding process," "fosters an appearance of fairness," and allows "the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (citations and internal quotation marks omitted); *see also*

[1] *RCFP State and Federal Court Responses to COVID-19_From the Reporters Committee for Freedom of the Press (www.rcfp.org/covid19)*, Reporters Committee for Freedom of the Press, https://bit.ly/3dNQSJQ (last visited June 1, 2020) (collecting standing orders from all federal courts).

Sheppard v. Maxwell, 384 U.S. 333, 349 (1966) (noting that secrecy breeds "distrust" of the judicial system). Public oversight has long been understood to be a foundational feature of our criminal justice system, in particular. *See Waller v. Georgia,* 467 U.S. 39, 47 (1984) (Sixth Amendment right of accused to a public trial). As the Supreme Court has recognized, "without the freedom to attend [criminal] trials . . . important aspects of freedom of speech and 'of the press could be eviscerated.'" *See Richmond Newspapers, Inc.*, 448 U.S. at 580 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

By attending judicial proceedings and reporting on civil and criminal matters, the press plays a key role in ensuring "an informed and enlightened public opinion," *Grosjean v. Am. Press Co.*, 297 U.S. 233, 247 (1936), an essential component of a healthy democracy, *see Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983). The public relies on the press to "observe at first hand the operations of [ ] government" and report on them. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975). With respect to the work of the judicial branch, journalists serve as "surrogates for the public," whose members may not have the time or resources to attend court proceedings or review court records in matters in which they have an interest. *See Richmond Newspapers, Inc.*, 448 U.S. at 573. Access to judicial proceedings and court records is necessary for the press to fulfill its constitutionally recognized mission to inform the public and contribute to "public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

The presumptive right of members of the press and the public to attend and observe judicial proceedings is secured by both the First Amendment and common law. The Supreme Court has long recognized a qualified right of public access to criminal proceedings in a variety of contexts that is rooted in the First Amendment. *See Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 10 (1986) (preliminary hearings); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508–510 (1984) (*voir dire*); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (criminal trials). A number of federal appellate courts have similarly recognized a qualified constitutional right of access to civil trials and proceedings, as well as court records in both civil and criminal matters. *See, e.g.*, *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 298, 298 n.9 (2d Cir. 2012) (collecting cases from several circuits and noting that "six of the eight sitting Justices in *Richmond Newspapers* clearly implied that the right applies to civil cases as well as criminal ones" (internal quotation marks omitted)); *see also Courthouse News Servs. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) (holding that the First Amendment guarantees the public "a right to timely access" newly filed civil complaints); *Doe v. Public Citizen*, 749 F.3d 246, 269 (4th Cir. 2014) (holding that the First Amendment right of access applies to civil docket sheets, memorandum opinions ruling on motions for summary judgment, and the materials relied on by the court in issuing such rulings). The common law also guarantees the public "a general right to inspect and copy public

records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978).

Press and public access to judicial proceedings and court records is no less important during times of national crisis. To the contrary, at such times, visibility into the operations of government, including the judiciary, is all the more crucial. As discussed in Part II below, in response to the ongoing COVID-19 pandemic, federal courts have taken laudable steps to facilitate remote public access to judicial proceedings. As the Committee on Rules of Practice and Procedure and its advisory committees consider possible rule amendments to address future emergencies, the Reporters Committee urges continued attention to ensuring that the public's ability to meaningfully observe proceedings in civil and criminal matters is not curtailed due to restrictions on physical access to courthouses in future times of crisis, and that the advances toward greater transparency made during the COVID-19 pandemic are not undone.

II. Public access to judicial proceedings during the COVID-19 pandemic.

In response to the ongoing COVID-19 pandemic, many judicial proceedings typically held in open court have been held remotely—either telephonically or via video conference. To facilitate public access to such proceedings, the Judicial Conference temporarily authorized the use of teleconferencing to provide the press and public audio access to certain civil and criminal proceedings. *See Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, United States Courts (Mar. 31, 2020), https://perma.cc/7HAG-L2FB (the "March 31 Press Release"); *Judiciary Provides Public, Media Access to Electronic Court Proceedings*, United States Courts (Apr. 3, 2020), https://perma.cc/VM68-R6N7 (the "April 3 Press Release"). This authorization followed the March 27 enactment of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Section 15002 of which permitted the chief judges of district courts to authorize videoconferencing or teleconferencing for certain criminal proceedings under certain circumstances and with the consent of the defendant. In its March 31 Press Release, the Judicial Conference reported:

> The Executive Committee of the Judicial Conference, acting on an expedited basis on behalf of the Conference, on March 29 approved a temporary exception to the Conference broadcast/cameras policy to allow a judge to authorize the use of teleconferencing to provide the public and media audio access to court proceedings. This exception may be applied when public access to the federal courthouse is restricted due to health and safety concerns during the COVID-19 pandemic, and the authorization will expire when the Judicial Conference finds that emergency conditions are no longer materially affecting the functioning of federal courts.

See March 31 Press Release. Beyond this temporary exception to the Judicial Conference's broadcast/cameras policy, *History of Cameras in Courts*, United States Courts, https://perma.cc/HM4A-35F9 (last visited June 1, 2020), on April 3, the Judicial Conference announced an expansion of that authorization "to permit courts to include the

usual participants and observers of such proceedings by remote access" in certain criminal proceedings, while maintaining that "Federal Rule of Criminal Procedure 53 continues to prohibit broadcasting of court proceedings generally, such as through live streaming on the internet." *See* April 3 Press Release.

Courts and judges across the country relied on that guidance to hold remote proceedings with media and public in attendance and have implemented the policy in different ways.

Several judges have affirmatively provided public access to proceedings in which the public interest is evident. For example, Judge Preska of the U.S. District Court for the Southern District of New York directed the parties in a civil litigation matter to file the dial-in information for a telephonic hearing on the public docket. *See Giuffre v. Maxwell*, 1:15-cv-07433-LAP, ECF No. 1039 (S.D.N.Y. Mar. 30, 2020); ECF No. 1041 (S.D.N.Y. Mar. 30, 2020) (listing dial-in information). Similarly, Judge Boasberg of the U.S. District Court for the District of Columbia granted requests by reporters to listen to a telephonic hearing related to a coronavirus lawsuit and provided members of the news media with dial-in access. *See* Ann E. Marimow, *Federal Courts Shuttered by Coronavirus Can Hold Hearings by Video and Teleconference in Criminal Cases*, Wash. Post (Mar. 31, 2020, 5:59 PM), https://wapo.st/2X1rg6w.

A number of courts have taken a universal approach to providing remote access for the news media and public. As Chief Judge Howell of the U.S. District Court for the District of Columbia stated, her court "is committed to providing the public and the media with access to public court proceedings, including those held by video or teleconference." *See id.* Many other district courts have made similar commitments, implementing policies requiring that all remote proceedings be made available to the public. *See, e.g.*, *MGO 20-13 Suspension of Court Proceedings Effective May 1, 2020*, U.S. District Court District of Alaska (Apr. 21, 2020), https://perma.cc/YM2L-NQ98 (providing that a toll-free conference line will be publicly available for civil and criminal proceedings); *In re: Public and Media Access to Judicial Proceedings During COVID-19 Pandemic*, U.S. District Court District of Columbia (Apr. 8, 2020), https://perma.cc/F99Q-5RTA (providing that video and audio access to judicial proceedings will be available for the public); *Notice Regarding Public Access to Telephonic Hearings During COVID-19 Outbreak*, U.S. District Court Eastern District of Wisconsin, https://perma.cc/98CR-TN7M (last visited June 1, 2020).

State courts too have taken steps to facilitate public access to remote proceedings in response to the COVID-19 pandemic. For example, in Texas, for any judicial proceeding held outside its normal venue courts must provide "reasonable notice and access to the participants and the public." *Background and Legal Standards—Public Right to Access to Remote Hearings During COVID-19 Pandemic*, State of Texas Office of Court Administration, https://perma.cc/X8RQ-3ES9.

As a result of these efforts guided by the Judicial Conference, including its temporary exception to its broadcast/cameras policy, members of the press and public

have been able to continue to observe judicial proceedings even in the face of physical restrictions on access to courtrooms themselves. Remote access has been critical to ensuring the news media's ability to effectively report on matters of public concern, including judicial matters directly connected to this national crisis. For instance, news organizations across the country have been reporting on federal lawsuits arising from COVID-19 outbreaks in jails and prisons. *See* Michael Balsamo & Michael R. Sisak, *Federal Prisons Struggle to Combat Growing COVID-19 Fears*, Associated Press (Mar. 27, 2020), https://perma.cc/FHA7-LDTN?type=image; Timothy Williams et al., *'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, N.Y. Times (Mar. 30, 2020), https://perma.cc/R2N5-FHSE. Public access to hearings and other proceedings in those matters has provided invaluable insight into how government operates. *See* Shannon Dooling, *As Nurse Tests Positive, Judge Looks For Ways To Release Some ICE Detainees At Bristol County Jail*, WBUR News (Apr. 2, 2020), https://perma.cc/39JQ-57Q5; Amy Beth Hanson, *Rights Group Asks Justices to Release Inmates over COVID-19*, Associated Press (Apr. 1, 2020), https://perma.cc/NU33-6WDY; Patricia Hurtado, *Federal Jails Are Covid-Free, U.S. Says at Murder Bail Hearing*, Bloomberg (Mar. 17, 2020, 3:52 PM), https://perma.cc/FD5Z-GZVZ; Tulsi Kamath, *Harris County Judge Says She Will Sign Order to Release About 1K Inmates from County Jail Amid Coronavirus Crisis*, Click2Houston (Mar. 31, 2020, 3:55 PM), https://perma.cc/H7G7-6QZS.

To ensure meaningful public access, public notice of when remote proceedings will take place and how members of the public can observe them is crucial. Courts have been inconsistent in this respect during the COVID-19 pandemic. Many district court policies now make clear that presiding judges should provide a publicly accessible link to remote hearings and other proceedings on the docket for the relevant matter, or upon request. Other courts have posted links to remote proceedings on their websites—an approach that has the advantage of reaching a broader swath of the public, as it does not require a PACER account to access. Unfortunately, however, during the pandemic, some members of the press have reported difficulty in obtaining information about when certain proceedings were taking place, or have been required to request access to proceedings on a case-by-case basis. This uncertain terrain poses challenges for journalists and other members of the public attempting to observe specific court proceedings that, absent COVID-19 restrictions, they would have been able to attend in person.

III. Recommendations for future rules amendments and guidance.

The Reporters Committee urges the Judicial Conference to consider rules amendments and guidance that would permanently remove barriers for the broadcast or streaming of both civil and criminal proceedings. It should also make clear that when a proceeding that would normally be held in open court must be held remotely due to some national emergency, courts must provide meaningful notice of such proceeding and a means for members of the public to observe it.

In response to the COVID-19 pandemic, the Judicial Conference temporarily authorized courts to provide the public and members of the news media access to remote teleconferences in certain proceedings. The Reporters Committee urges the Judicial Conference to permanently authorize courts to broadcast or stream their proceedings in both civil and criminal matters, by considering amending Federal Rule of Criminal Procedure 53 and revising or eliminating any contrary policy, including its Cameras in the Courtroom policy.[2] *See History of Cameras in Courts*, United States Courts, https://perma.cc/HM4A-35F9 (last visited June 1, 2020). At least one federal appellate court gave the Judicial Conference's policy against broadcasting civil proceedings "substantial weight" in holding that local rules did not permit a federal district court judge to allow broadcasting of proceedings in a specific civil case. *See In re Sony BMG Music Entm't*, 564 F.3d 1, 6–7 (1st Cir. 2009) (noting that Judicial Conference policies are "not lightly to be discounted, disregarded, or dismissed"). Permanent authorization would remove this hurdle, allowing district courts to quickly adapt to any future emergency necessitating remote proceedings, experiment with finding the best technological means for broadcasting or streaming proceedings, and simultaneously realize many of the benefits to public access that have been highlighted by the Judicial Conference's recent temporary authorization.

The benefits of broadcasting or streaming judicial proceedings cannot be overstated. It enables *all* members of the public—regardless of whether they are able to physically enter a courtroom—to observe the important work of the judiciary in real-time, contributing to creating the informed citizenry necessary to a healthy democracy. *See Minneapolis Star & Tribune Co.*, 460 U.S. at 585 ("[A]n informed public is the essence of working democracy."); *Int'l News Servs. v. Associated Press*, 248 U.S. 215, 235 (1918) ("The peculiar value of news is in the spreading of it while it is fresh."). Not only does such contemporaneous, remote access to judicial proceedings allow for more observers than the physical capacity of a courtroom, but it also enables members of the press and public who may be located hundreds of miles away or otherwise unable to visit a courthouse in person, to exercise their rights to observe judicial proceedings.

The ongoing pandemic has highlighted the public's immense interest in the judiciary's work. SCOTUSblog reports that approximately 500,000 people tuned into livestreamed oral arguments before the Supreme Court on May 12, 2020 in *Trump v. Mazars USA LLP*, No. 19-715, and *Trump v. Vance*, No. 19-635. Amy Howe, *Courtroom Access: Where Do We Go From Here?*, SCOTUSblog (May 13, 2020, 12:37 PM), https://perma.cc/THX9-F8XJ. And, as of June 1, 2020, an estimated 1.9 million people have listened to one of the Supreme Court's recorded oral arguments online. *SCOTUS Oral Argument Numbers*, Reporters Committee for Freedom of the Press,

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[2] In some cases, district courts incorporate Judicial Conference policies into local rules or general orders. *See* General Order 58, United States District Court Northern District of California, https://perma.cc/ET6L-JWRV. Even if they are not directly incorporated, the Judicial Conference's policy conclusions are "at the very least entitled to respectful consideration." *See Hollingsworth v. Perry*, 558 U.S. 183, 193 (2010) (citation omitted).

https://bit.ly/2TUql5m (last visited June 1, 2020). Many of the videos posted by the U.S. Court of Appeals for the Ninth Circuit, which regularly livestreams video of its oral arguments, have hundreds of viewers, enough to fill several courtrooms. *See United States Court of Appeals for the Ninth Circuit*, YouTube (last visited May 17, 2020), https://bit.ly/2TgQf2Y. Guidance from the Judicial Conference would help broaden remote access to proceedings to all levels of the federal judiciary.

Moreover, permanent authorization will prepare courts to easily transition to operating remotely in future national crises. Before the pandemic, several federal appellate courts regularly provided live audio or video of oral arguments and archived those recordings. *See* News Release, United States Court of Appeals for the District of Columbia Circuit, Court to Provide Live Audio Streaming of All Arguments at Start of 2018-2019 Term (May 23, 2018), https://perma.cc/Y9W9-G65P; *Audio and Video*, United States Court of Appeals for the Ninth Circuit, https://www.ca9.uscourts.gov/media/ (last visited June 1, 2020). In response to the COVID-19 pandemic, more federal appellate courts, including the Supreme Court, have turned to live audio of oral arguments. *See, e.g.*, Press Release, Supreme Court of the United States, May Teleconference Oral Arguments (Apr. 13, 2020), https://perma.cc/CB72-ESH9; Advisory, United States Court of Appeals for the Federal Circuit, Availability of Live Audio Access to April 2020 Court Session (Apr. 1, 2020), https://perma.cc/7F8J-N8JG. For arguments in which counsel for the parties and/or the court themselves participated remotely during the COVID-19 pandemic, those appellate courts that regularly livestreamed their oral arguments—such as the Ninth and District of Columbia Circuits—were able to quickly adapt to remote, livestreamed proceedings. Permanent authorization to broadcast or stream proceedings at the district court level would be similarly beneficial.

At a minimum, the Reporters Committee urges the Judicial Conference to revisit how its Camera in the Courtrooms policy applies to civil cases. *See History of Cameras in Courts*, United States Courts, https://perma.cc/HM4A-35F9 (last visited June 1, 2020). The Judicial Conference implemented that policy in 2016, after the conclusion of a four-year pilot program that introduced cameras into 14 district court courtrooms from 2011–2015. *Id.* The Federal Judicial Center's report on that pilot program found that more than 70 percent of participating judges and attorneys favored recording court proceedings. Molly Treadway Johnson et al., Fed. Judicial Ctr., Video Recording Courtroom Proceedings in United States District Courts: Report on a Pilot Project 33–34, 55 (2015). By the end of the pilot program, more judges were in support of cameras in the courtroom than against, *id.* at 33–34, and most judges and attorneys said they would be in favor of permitting video recordings of civil proceedings, *id.* at 36, 44–45. Many judges and attorneys who participated in the pilot program also expressed surprise that the cameras were as unobtrusive as they were. *Id.* at 40–41. Now that many more judges have conducted remote and recorded proceedings as a result of the COVID-19 pandemic, the Judicial Conference should revisit its policy.

Finally, the Reporters Committee urges the Judicial Conference to issue guidance making clear that whenever proceedings that would normally be held in open court must

instead be held remotely due to a national crisis or otherwise, courts should provide effective public notice of those proceedings, including instructions for how members of the press and public can easily observe them. Guidance from the Judicial Conference can help to ensure uniformity in the manner in which courts provide such notice, which is necessary for members of the public to effectively exercise their rights of access.

* * *

Thank you for your consideration. Please do not hesitate to contact Reporters Committee Legal Director Katie Townsend (ktownsend@rcfp.org) with any questions. We would be pleased to provide any additional information to the Judicial Conference in aid of this important work.

Sincerely,
Reporters Committee for Freedom of the Press

From:	Lin Weeks
To:	RulesCommittee Secretary
Cc:	Katie Townsend; Bruce Brown
Subject:	Response to Invitation for Comment on Emergency Rulemaking
Date:	Monday, June 01, 2020 2:15:55 PM
Attachments:	6.1.2020-RCFP-Letter to Rules Committee.pdf

Good afternoon, Ms. Womeldorf. Please see the attached correspondence to the Committee on Rules of Practice and Procedure from the Reporters Committee for Freedom of the Press concerning the Rules Committee's request for public input on possible rule amendments that could ameliorate the effects of future national emergencies on court operations.

Sincerely,
Lin Weeks

Lin Weeks - Staff Attorney