

**NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
COMMENT ON AMENDMENT TO
COMMERCIAL DIVISION RULE 29¹**

SUMMARY

The Administrative Board of the New York Courts (the “Administrative Board”) has requested comments on a proposed amendment to Commercial Division Rule 29 proffered by the Commercial Division Advisory Council (“CDAC”) (the “Amendment”). The Commercial and Federal Litigation Section of the New York State Bar Association (the “Section”) recommends that the proposed rule amendments be adopted, as further explained below.

COMMENT

I. OVERVIEW

The Section is comprised of a wide cross-section of practitioners, including members in the private and public sectors, solo practitioners, and members of small, mid-size, and large law firms, who litigate both civil and criminal bench and jury trials in state and federal courts in New York and throughout the country. Thus, in offering the following comments, the Section is drawing upon a broad range of experience.

II. PROPOSED AMENDMENT

A. Current Version of Rule 29

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

B. Proposed Version of Rule 29

Rule 29. Identification of Deposition Testimony. Counsel for the parties shall consult prior to trial and shall in good faith attempt to agree upon the portions of deposition testimony to be offered into evidence without objection, **and to resolve any objections regarding the use of any corresponding video recording of such deposition testimony.** The parties shall delete from the

¹ Opinions expressed in this Memorandum are those of the Section and do not represent the opinions of the New York State Bar Association unless and until the Memorandum has been adopted by the Association’s House of Delegates or Executive Committee.

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

C. **CDAC Rational for Revision**

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

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

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

D. **Section’s Position**

The Section supports the proposed amendments as there is a need in Rule 29 to acknowledge that corresponding video recording of deposition testimony of a witness may be offered at trial and that concomitantly there may be objections that need to be identified and addressed that are inherent to the use and means of memorializing video deposition testimony at trial. In addition, the proposed amendment properly makes explicit what had been implicit—that deposition testimony that may be used for impeachment or credibility purposes at trial is not subject to Rule 29.

Respectfully Submitted,

New York State Bar Association
Commercial and Federal Litigation Section
Ignatius A. Grande, Section Chair

December 30, 2022

Approved by the NYSBA Commercial & Federal Litigation Section Executive Committee,
December 14, 2022

Commercial Division Committee
Mark A. Berman,* Co-Chair
Ralph Carter, Co-Chair

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