

# HELLO? IS EVERYONE THERE?

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News As of Jan. 1, CPLR 3113 provides a way for parties to agree to take depositions by telephone or other electronic means.

DEPOSING WITNESSES who are located outside the state is an issue that New York attorneys often face. Clients are concerned about litigation costs and prefer not to incur travel expenses, for themselves, their employees or their lawyers; and witnesses are not always willing or able to travel to New York to be deposed.

The New York State Legislature has recognized that communications technology can make pretrial discovery more efficient and cost-effective, and can accelerate the disposition of cases. The Legislature thus enacted CPLR 3113(d) to create a formal procedure for parties in a civil action to conduct depositions by telephone or other electronic means.

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New York CPLR 3113(d)

As of Jan. 1, 2005, the CPLR fell in line with the Federal Rules of Civil Procedure in providing a mechanism for parties to agree to take depositions by telephone or other electronic means. CPLR 3113 (d) now provides the following:

The parties may stipulate that a deposition be taken by telephone or other remote electronic means and that a party may participate electronically. The stipulation shall designate reasonable provisions to ensure that an accurate record of the deposition is generated, shall specify, if appropriate, reasonable provisions for the use of exhibits at the deposition; shall specify who must and who may physically be present at the deposition; and shall provide for any other provisions appropriate under the circumstances. Unless otherwise stipulated to by the parties, the officer administering the oath shall be physically present at the place of the deposition and the additional costs of conducting the deposition by telephonic or other remote electronic means, such as telephone charges, shall be borne by the party requesting that the deposition be conducted by such means.<sup>2</sup>

While parties certainly could stipulate to electronic depositions in the past, the new rule provides specific instruction on how to proceed. However, the rule does not discuss the situation where one party resists a telephone or video deposition. Can a party prevent the taking of a deposition by

telephonic or other electronic means? And if a party does not agree, can the party seeking the telephone or video deposition obtain relief from the court?

Although the statutory language of CPLR 3113(d) calls for stipulation of the parties, other provisions of the CPLR may be relied upon to obtain judicial intervention if one party will not stipulate.

CPLR 3103 provides that the court can make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. CPLR 104 sets forth the rule of construction that the CPLR shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding. Given the stated justification of the new rule -- that technology be employed in the interests of efficiency and cost-saving -- CPLR 3113(d) should be read to permit application to the court to take a deposition by telephone or other electronic means.

The question remains: what standard will the court use on a motion to compel a deposition by telephone or other electronic means? New York courts have not articulated firm guidelines in deciding this question.<sup>3</sup>

For example, in *Rogovin v. Rogovin*,<sup>4</sup> the defendant, a Kansas resident, moved for a protective order directing that her deposition be conducted by live videoconference so that she would not have to travel to New York City. The defendant was the sole caregiver for her ailing grandmother, as well as her 10-year-old daughter. The court found that the defendant sufficiently showed that traveling from Kansas to New York City would result in hardship and it permitted the deposition by videoconference.

Although the movant in *Rogovin* demonstrated hardship, it is not clear whether this would be required under CPLR 3113(d). Federal court precedent provides some guidance.

#### Federal Court Standards

The federal courts have dealt with these issues since the 1980s and have articulated standards that provide insight into the way the New York courts would apply the new CPLR provision.

Rule 30(b)(7) of the Federal Rules was amended in 1980 to include a rule similar to CPLR 3113 (d), allowing depositions by telephone. In 1993, the rule was revised to allow depositions by other remote electronic means as well.<sup>5</sup>

Although the federal rule, like CPLR 3113(d), speaks in terms of stipulations, federal courts are generally amenable to ordering telephone or video depositions under Fed. R. Civ. P. 30(b)(7) where one party resists.<sup>6</sup> However, some federal courts have imposed stricter requirements on plaintiffs residing outside the district where the action is held.

The majority of federal courts follow the standard set forth in *Jahr v. IU International Corp.*<sup>7</sup> that the party seeking a telephone deposition need only make a limited showing of a legitimate reason for the request.<sup>8</sup> Conservation of financial resources is a legitimate reason to seek a telephone or videoconference deposition.<sup>9</sup>

In *Jahr*, the plaintiff moved to take the deposition of a non-party California resident by telephone, citing a lack of financial means to travel from North Carolina to California. The defendant

opposed the motion, stating that the plaintiff failed to show good cause and had not submitted an affidavit of financial hardship. The court held that leave to take telephonic depositions should be liberally granted in appropriate cases, placing the burden on the opposing party to establish that its rights would be prejudiced by a telephonic deposition.<sup>10</sup>

Parties opposing a telephone or video deposition may argue that they are prevented from effectively evaluating the witness's demeanor, or that the telephonic and video depositions deny the opportunity for face-to-face confrontation. These reasons, although frequently proffered, generally have been rejected because their acceptance would be tantamount to repealing Fed. R. Civ. P. 30(b)(7).<sup>11</sup> Assertions that video testimony is extraordinary and awkward also fail to meet the burden necessary to overcome the legitimate reasons to take depositions by remote means.<sup>12</sup>

Other courts have held that extreme hardship must be shown before a deposition by video or telephonic means will be allowed under the Rule 30(b)(7). However, this standard, articulated in *Clem v. Allied Van Lines International Corp.*,<sup>13</sup> arose in the more limited context of a plaintiff who sought to be deposed by telephone because he resided outside the United States. This requirement has also been applied to plaintiffs within the United States but outside the state of New York.<sup>14</sup> Courts justify the more rigorous standard by the fact that plaintiffs outside the jurisdiction who have availed themselves of the United States judicial system should expect to be deposed within the jurisdictional limits of the court they have selected.<sup>15</sup>

It is worth noting that some courts have rejected the extreme hardship standard, and have even permitted foreign plaintiffs to be deposed by telephone or video. In *Rehau Inc. v. Color Tech Inc.*,<sup>16</sup> the court found there was no reason to force the plaintiff's two corporate witnesses to fly from Europe to Michigan for depositions when the same task could be accomplished with two simple phone calls.<sup>17</sup>

Not surprisingly, a court's willingness to order a telephone or video deposition depends on the circumstances of the case. The court may be more willing to accept a defendant's argument concerning difficulty in obtaining a visa to come to the United States,<sup>18</sup> but less willing to accept the same argument from a plaintiff.<sup>19</sup> A party's prior bad conduct may also color a court's willingness to order a telephone deposition.<sup>20</sup> Applications by pro se plaintiffs are also generally liberally granted.<sup>21</sup>

#### Exhibit Issues

Remote depositions are appropriate even where complex or numerous exhibits will be shown to the witness. If counsel agree to send exhibits in advance, they can stipulate that the exhibits not be viewed until the deposition starts. If counsel does not want to deliver exhibits in this manner, documents may be faxed to the witness and each of the parties during the deposition.<sup>22</sup> Using PDF documents sent by e-mail or posting the exhibits to a Web site made available for the deposition are also solutions.

Since the policy underlying CPLR 3113(d) is to utilize technology to make pretrial discovery as efficient and cost effective as possible,<sup>23</sup> it seems unlikely that New York courts will refuse a telephone or video deposition simply because of exhibit-related issues.<sup>24</sup>

Nevertheless, federal courts have not allowed a telephone or video deposition if a party would be prejudiced because of the sheer number of exhibits to be introduced during the deposition.<sup>25</sup> Courts have also ordered a deponent to appear in person if the exhibits are highly technical or complex.<sup>26</sup> The majority view in the federal courts is that exhibit-related issues should be exceptional, and in the ordinary course, parties should be flexible in arranging for exhibits to be delivered to opposing counsel in advance or sending exhibits during the deposition electronically.

Another potential complication arises with administering the oath to the witness. Under CPLR 3113(b), the officer administering the oath must be present with the witness unless the parties stipulate otherwise.

### Questions About the Oath

If no agreement is reached in advance, and the officer administering the oath is not present with the witness for the telephone or video deposition, the opposing party must object at the time the deposition is taken.<sup>27</sup> In *Washington v. Montefiore Hosp.*, the court reporter administering the oath was in the New York office of the defendant's lawyer, not in Connecticut with the witness who was testifying by telephone. The court held that plaintiff's failure to object at the time of the deposition resulted in a waiver.

The oath-taker must be qualified to take the witness's oath where the witness is located.<sup>28</sup> CPLR 3113(a)(3) provides that a deposition in a foreign country may be taken before any diplomatic or consular agent or representative of the United States, appointed or accredited to, and residing within, the country, or a person appointed by commission or under letters rogatory, or an officer of the armed forces authorized to take the acknowledgment of deeds.<sup>29</sup>

If the witness is in a foreign country, that country may have laws identifying who has the authority to administer an oath. If the parties do stipulate to a remote deposition of a witness in a foreign country, they should consult with the United States embassy or consulate to confirm that the deposition is permitted. Consular officers charge daily fees for their services. Parties should contact the consulate for the current fee schedule.

Apart from the requirements under the rules, the oath-taker's presence with the witness during the deposition has the added benefit of safeguarding against chicanery on the witness's side.<sup>30</sup>

### Conclusion

Some attorneys may be uncomfortable with the idea of remote depositions, but as the practice becomes more common, the cost savings and other benefits to the witness will likely outweigh any perceived inconvenience by attorneys.

1. N.Y. Assembly Mem. in Support, L 2004, ch 66 (2004), eff. Jan. 1, 2005.
2. N.Y. CPLR 3113(d) (2005).
3. The Council on Judicial Administration for the Association of the Bar of the City of New York recommends that courts weigh the legitimate need of the party making the request, including cost savings, convenience to the witness and facilitating discovery, against the prejudice to the opposing party. Eric D. Welsh, Council on Judicial Administration for The Association of the Bar

of the City of New York, Report on Amending New York's Civil Practice Law and Rules to Provide for the Taking of Depositions by Telephonic Means (ABCNY Report) at 13 (April 1998).

4. 770 N.Y.S.2d 343 (1st Dept. 2004).

5. Fed. R. Civ. P. 30(b)(7).

6. *Bywaters v. Bywaters*, 123 F.R.D. 175, 177 (E.D. Pa. 1988).

7. 109 F.R.D. 429 (M.D.N.C. 1986).

8. *Id.* at 431.

9. *Cressler v. Neuenschwander*, 170 F.R.D. 20, 21 (D. Kan. 1996); *In re Central Gulf Lines and Waterman Steamship Corp.*, No. 97-3829, 1999 U.S. Dist. LEXIS 19070 (E.D. La. Dec. 3, 1999) (ordering deposition of witnesses in Hong Kong by videoconference citing Fed. R. Civ. P. 1 (similar to CPLR 103), and rejecting argument that video deposition was inappropriate simply because multiple documents would be reviewed).

10. *Jahr*, 109 F.R.D. at 431.

11. See, e.g., *Jahr*, 109 F.R.D. at 432 (holding that in civil cases as opposed to criminal cases, the telephonic deposition should not be denied on the mere conclusory statement that it denies the opportunity for confrontation); *Cressler*, 170 F.R.D. at 21; *Normande v. Grippo*, No. 01 Civ. 7441, 2002 WL 59427 at \*1 (S.D.N.Y. Jan. 16, 2002). But see *U.S. v. Bank of America*, 202 F.R.D. 624 (S.D. Cal. 2001) (holding that party's inability to see the witness and to evaluate the witness's demeanor, facial reactions and expressions would be prejudicial and denying telephone deposition).

12. *Cacciavillano v. Ruscello*, No. 95-5754, 1996 U.S. Dist. LEXIS 18968 at \*6-\*8 (S.D.N.Y. Dec. 23, 1996) (where party complained that travel to Arizona was cost prohibitive, court found that video deposition was appropriate, no showing of hardship required).

13. 102 F.R.D. 938 (S.D.N.Y. 1984).

14. *Connell v. City of New York*, 230 F.Supp. 2d 432, 436-37 (S.D.N.Y. 2002) (applying standard to indigent plaintiff resident of Massachusetts).

15. *Daly v. Delta Airlines, Inc.*, No. 90 Civ. 5700, 1991 WL 33392, at \*2 (S.D.N.Y. March 7, 1991) (holding that plaintiff should have expected to come from Ireland to New York for deposition when filing suit).

16. 145 F.R.D. 444 (W.D.Mich. 1993).

17. *Id.* at 447.

18. *Dagen v. CFC Group Holdings Ltd.*, No. 00 Civ. 5682, 2003 WL 22533425 at \*2 (S.D.N.Y. 2003).

19. *Dubai Islamic Bank v. Citibank*, No. 99 Civ. 1930, 2002 WL 1159699 at \*13-\*15 (S.D.N.Y.

May 31, 2002).

20. American Int'l Telephone v. MONY Travel Servs., 203 F.R.D. 153, 155 (S.D.N.Y. 2001).

21. Normande, 2002 WL 59427 at \*1.

22. Baker v. Institute for Scientific Information, 134 F.R.D. 117 (E.D. Pa. 1991). See also Daly, 1991 WL 33392 at n.1 (S.D.N.Y. 1991) (noting the advent of fax machines can alleviate any problem with allowing the deponent access to the exhibits before the deposition takes place, though denying motion by plaintiff in Ireland to be deposed by telephone).

23. N.Y. Assembly Mem.

24. ABCNY Report, at 8 n.7.

25. Epling v. UCB Films, Inc., Nos. 98-4226, 98-4227, 00-4062, 2001 WL 584355 at \*9-\*10 (D. Kansas April 2, 2001) (approving magistrate's refusal to grant telephone deposition based on the number of documents requested).

26. Mercado v. Transoceanic Cable Ship Co., No. 88 Civ. 5335, 1989 WL 83596, at \*3 (E.D. Pa. July 25, 1989). See also Fireman's Fund Ins. Co. v Zoufally, No. 93 Civ. 1890, 1994 WL 583173, at \*1 (S.D.N.Y. Oct. 21, 1994).

27. Washington v. Montefiore Hosp., 777 N.Y.S.2d 524 (3d Dept. 2004).

28. Loucas G. Matsas Salvage & Towage Maritime Co. v. M/T Cold Spring I, No. 96-0621, 1997 U.S. Dist. LEXIS 2415 (E.D. La. March 5, 1997) (relying on Fed. R. Civ. P. 28(b)).

29. N.Y. CPLR 3113 (a)(3).

30. Baker v. Institute for Scientific Information, 134 F.R.D. at 118.

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