

APPENDIX A

DRAFT OF 1.310 AND 1.451 NOT YET APPROVED BY THE BOARD OF GOVERNORS

RULE 1.310. DEPOSITIONS UPON ORAL EXAMINATION

(a) [no change]

(b) **Notice; Method of Taking; Production at Deposition.**

(1)-(3) [no change]

(4) Any deposition may be audiovisually recorded by videotape without leave of the court or stipulation of the parties, provided the deposition is taken in accordance with this subdivision.

(A) Notice. A party intending to videotape audiovisually record a deposition must state in the notice that the deposition is to be videotaped audiovisually recorded and must give the name and address of the operator. Any subpoena served on the person to be examined must state the method or methods for recording the testimony.

(B) ~~Stenographer~~ Court Reporter. Videotaped Audiovisually recorded depositions must also be recorded stenographically transcribed, unless all parties agree otherwise.

(C) Procedure. At the beginning of the deposition, the officer before whom it is taken must, on camera: (i) identify the style of the action, (ii) state the date, and (iii) swear the witness.

(D) Custody of ~~Tape~~ Recording and Copies. The attorney for the party requesting the videotaping audiovisual recording of the deposition must take custody of and be responsible for the safeguarding of the videotape audiovisual recording, must permit the viewing of it by the opposing party, and, if requested, must provide a copy of the videotape audiovisual recording at the expense of the party requesting the copy.

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(E) Cost of ~~Videotaped~~ Audiovisually Recorded Depositions.
The party requesting the videotaping audiovisual recording must bear the initial cost of videotaping recording.

(5)- (6) [no change]

(7) If not otherwise agreed by the parties, ~~On~~ motion the court may order that the testimony at a deposition be taken by telephone or comparable audio communication equipment, or by video conference or comparable audiovisual communication equipment. The order may prescribe the manner in which the deposition will be taken. The cost for the use of such communication equipment is the responsibility of the requesting party unless otherwise agreed by the parties or ordered by the court. A party may also arrange for a stenographic transcript at that party's own initial expense.

(8) [no change]

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The officer before whom the deposition is to be taken must put the witness on oath and must personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness, except that when a deposition is being taken by telephone or comparable audio communication equipment, the witness must be sworn by a person physically present with the witness who is qualified to administer an oath in that location. If deposition testimony is being taken via video conference or comparable audiovisual communication equipment, and the parties agree, the witness may also be sworn remotely using such video conference or comparable audiovisual communication equipment by a person who is qualified to administer oaths in the witness's jurisdiction and who administers the oath consistent with the laws of the jurisdiction. The testimony must be ~~taken stenographically transcribed~~ or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony must be transcribed at the initial cost of the requesting party and prompt notice of the request must be given to all other parties. All objections made at time of the examination to the qualifications of the officer taking the deposition, the manner of taking it, the evidence presented, or the conduct of any party, and any other objection to the proceedings must be noted by the officer on the deposition. Any objection during a deposition must be stated concisely and in a nonargumentative and nonsuggestive manner. A party may instruct a deponent not to answer only when necessary to

preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under subdivision (d). Otherwise, evidence objected to must be taken subject to the objections. Instead of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and that party must transmit them to the officer, who must propound them to the witness and record the answers verbatim.

(d)- (h) [no change]

Committee Notes

[no change]

Court Commentary

[no change]

DRAFT

RULE 1.451. TAKING TESTIMONY

(a) [no change]

(b) **Communication Equipment.** The court may permit a witness to testify at a hearing or trial by contemporaneous audio, or by video conference or comparable audiovisual communication equipment;

_____ (1) by agreement of the parties; or

_____ (2) for good cause shown upon written request of a party upon reasonable notice to all other parties.

_____ The request and notice must contain the substance of the proposed testimony and an estimate of the length of the proposed testimony. In considering sufficient good cause, the court shall weigh and address in its order the reasons stated for testimony by communication equipment against the potential for prejudice to the objecting party.

(c) **Required Equipment.** Communication equipment as used in this rule means a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other simultaneously and permits all conversations of all parties to be audible to all persons present. Contemporaneous video conference or comparable audiovisual communication equipment must make the witness both audible and visible to all participants during the testimony. For testimony by any of the foregoing means, there must be appropriate safeguards for the court to maintain sufficient control over the equipment and the transmission of the testimony so the court may stop the communication to accommodate objection or prevent prejudice

(d) **Oath.** Testimony may be taken through audio communication equipment only if a notary public or other person authorized to administer oaths in the witness's jurisdiction is physically present with the witness and administers the oath consistent with the laws of the jurisdiction. If testimony is provided at the hearing via video conference or comparable audiovisual communication equipment, and the parties agree, the witness may also be sworn remotely using such video conference or comparable audiovisual communication equipment by a person who is qualified to administer oaths in the witness's jurisdiction and who administers the oath consistent with the laws of the jurisdiction.

(e) **Burden of Expense.** The cost for the use of the communication equipment is the responsibility of the requesting party unless otherwise agreed by the parties or ordered by the court.

Committee Note

2013 Adoption. This rule allows the parties to agree, or one or more parties to request, that the court authorize presentation of witness testimony by contemporaneous video or audio communications equipment. A party seeking to present such testimony over the objection of another party must still satisfy the good-cause standard. In determining whether good cause exists, the trial court may consider such factors as the type and stage of proceeding, the presence or absence of constitutionally protected rights, the importance of the testimony to the resolution of the case, the amount in controversy in the case, the relative cost or inconvenience of requiring the presence of the witness in court, the ability of counsel to use necessary exhibits or demonstrative aids, the limitations (if any) placed on the opportunity for opposing counsel and the finder of fact to observe the witness's demeanor, the potential for unfair surprise, the witness's affiliation with one or more parties, and any other factors the court reasonably deems material to weighing the justification the requesting party has offered in support of the request to allow a witness to testify by communications equipment against the potential for prejudice to the objecting party. With the advance of technology, the cost and availability of contemporaneous video testimony may be considered by the court in determining whether good cause is established for audio testimony.