

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT

**SPR21-03**

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<b>Title</b>	<b>Action Requested</b>
Discovery: Remote Depositions	Review and submit comments by May 27, 2021
<b>Proposed Rules, Forms, Standards, or Statutes</b>	<b>Proposed Effective Date</b>
Amend Cal. Rules of Court, rule 3.1010	January 1, 2022
<b>Proposed by</b>	<b>Contact</b>
Civil and Small Claims Advisory Committee Hon. Ann I. Jones, Chair	James Barolo, 415-865-8928 james.barolo@jud.ca.gov

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### Executive Summary and Origin

The Civil and Small Claims Advisory Committee recommends amending rule 3.1010 of the California Rules of Court governing remote depositions. The proposed amendments reflect recent statutory changes enacted in Senate Bill 1146 (Stats. 2020, ch. 112, § 3) that (1) removed the requirement that deponents appear in the physical presence of the deposition officer, and (2) eliminated the different treatment for party and nonparty deponents. The revised law also permits any party to be physically present with the deponent during the deposition. Accordingly, the proposed amendment adds a notice requirement for any party wishing to do so.

### Background

In April 2020, as part of the emergency rules of court adopted in response to the public safety concerns raised by the COVID-19 pandemic, the Judicial Council adopted emergency rule 11,<sup>1</sup> which provided that the deponent “is not required to be present with the deposition officer at the time of the deposition.” In September 2020, the California Legislature passed, and the Governor signed, SB 1146 (Link A). Among other modifications, SB 1146 changed Code of Civil Procedure section 2025.310,<sup>2</sup> the law regarding the conduct of depositions. SB 1146 deleted the prior provisions of section 2025.310 that, with certain limitations, allowed for remote depositions and replaced them with language from emergency rule 11. Section 2025.310 previously treated party deponents and nonparty deponents differently: party deponents had to appear in person at a deposition, while nonparty deponents could, by court order for good cause, appear remotely so long as in the presence of the deposition officer. The Legislature eliminated those differences

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<sup>1</sup> All further rule references are to the California Rules of Court unless otherwise noted.

<sup>2</sup> All statutory references are to the Code of Civil Procedure unless otherwise noted.

*This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.*

(including the authorization for a nonparty deponent to seek to appear remotely) and added a provision that, at the election of the deponent or deposing party, the deposition officer may attend the deposition and swear in the deponent from a location separate from the deponent. Additionally, subject to existing law on protective orders, any party or attorney of record may, but is not required to, be physically present with the deponent.

Because SB 1146 was enacted as urgency legislation, it went into effect immediately upon being signed by the Governor. Thereafter, emergency rule 11 was repealed by the Judicial Council. Accordingly, rule 3.1010 of the California Rules of Court does not conform to current law regarding remote depositions.

## **The Proposal**

This proposal recommends the changes to rule 3.1010 discussed below. The changes are needed to reflect recent amendments to Code of Civil Procedure section 2025.310 that are already in effect and to require notice if a party or attorney of record wishes to attend the deposition in the physical presence of the deponent.

Revised section 2025.310 permits a party or attorney of record to be physically present with the deponent and existing rule 3.1010(a)(3) provides that “any party may be personally present at the deposition without giving prior notice.” Because deponents may sit for remote depositions in their home or another private place and given the public health concerns raised by the COVID-19 pandemic, this proposal would amend rule 3.1010(a)(3) to require notice. Specifically, any party or attorney of record appearing at the deposition in the physical presence of the deponent would be required to provide three-days written notice. (Providing notice seems particularly important to allow parties time to make a motion for a protective order under section 2025.420, as envisioned by revised section 2025.310.) The notice provisions are similar to those in existing rule 3.1010(b)(1), but also expressly reference Code of Civil Procedure section 2025.420. Additionally, the proposed language tracks the statute by referring to “[a]ny party *or attorney of record*” and using “physically” instead of “personally” before “present.” This proposal makes a parallel change to subsection (b) by adding “or attorney of record” after “[a]ny party.”

Senate Bill 1146 also eliminated the different treatment for party and nonparty deponents. Specifically, party deponents were required to appear in person and in the presence of the deposition officer, while nonparty deponents were able to appear remotely for good cause. Current subsections (c) and (d) of the rule echo the previous law’s different provisions for party and nonparty deponents. This proposal would remove those differences by eliminating subsection (d) and making subsection (c) applicable to all deponents. Additionally, the requirement that deponents be in the presence of the deposition officer is removed from subsection (c) to conform to the revised statute and replaced with language requiring deponents to appear “as required by statute or as agreed to by the parties and deponent.”

This proposal aims to address the amended provisions of the Code of Civil Procedure and also account for the practical reality that many parties agree to hold depositions remotely. Hence, this

proposal expressly provides that deponents can appear “as agreed to by the parties and deponent” and safely implements the statute’s ability for parties to attend the deposition in the physical presence of the deponent by requiring advance notice of such attendance. This balance should serve the judicial branch by reducing eliminating unnecessary disputes about depositions, and aid parties and attorneys by affording the maximum flexibility provided under the law.

### **Alternatives Considered**

Because SB 1146 went into effect last September and expressly contradicts the provisions of rule 3.1010, the advisory committee determined it must act and that taking no action would be inappropriate. In addition to this proposal, the committee considered deleting rule 3.1010 altogether, to remove the conflict between rule 3.1010 and section 2025.310 without providing for anything further. A majority of the advisory committee ultimately decided, however, that providing guidance in the form of a rule of court is preferable. In particular, the committee concluded that amending rule 3.1010 to add a notice requirement for a party appearing at the deposition in the physical presence of the deponent was appropriate because the statute is silent on any such notice. Given the possibility that deponents may plan to participate in remote depositions from their homes, a notice requirement in order for other parties to be physically present was deemed crucial.

The committee also considered developing new rules governing conduct of remote depositions, but concluded that it was too early in the process to determine what rules were needed. The committee will look at this issue in the fall when it develops its agenda for next year.

### **Fiscal and Operational Impacts**

Because the COVID-19 pandemic has limited in-person interaction, many litigants have already stipulated to holding depositions remotely. To the extent such depositions are authorized by the new statute, the only operational impact this rule is likely to have is from the guidance it provides as to what notice is required in order to appear physically at an otherwise remote deposition. The proposal should have little financial impact on litigants and may provide some savings for courts by decreasing the number of discovery disputes.

### **Request for Specific Comments**

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

### **Attachments and Links**

1. Cal. Rules of Court, rule 3.1010, at pages 5–6
2. Link A: SB 1146,  
[https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB1146](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB1146)

Rule 3.1010 of the California Rules of Court would be amended, effective January 1, 2022, to read:

1 **Rule 3.1010. Oral depositions by telephone, videoconference, or other remote**  
2 **electronic means**

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4 **(a) Taking depositions**

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6 Any party may take an oral deposition by telephone, videoconference, or other  
7 remote electronic means, provided:

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9 (1) Notice is served with the notice of deposition or the subpoena;
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11 (2) That party makes all arrangements for any other party to participate in the  
12 deposition in an equivalent manner. However, each party so appearing must  
13 pay all expenses incurred by it or properly allocated to it;
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15 (3) Any party or attorney of record may be ~~personally physically~~ present at the  
16 deposition at the location of the deponent without giving prior written notice  
17 of such appearance served by personal delivery, email, or fax, at least three  
18 court days before the deposition, and subject to Code of Civil Procedure  
19 section 2025.420.

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21 **(b) Appearing and participating in depositions**

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23 Any party or attorney of record may appear and participate in an oral deposition by  
24 telephone, videoconference, or other remote electronic means, provided:

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26 (1) Written notice of such appearance is served by personal delivery, email, or  
27 fax at least three court days before the deposition;
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29 (2) The party so appearing makes all arrangements and pays all expenses  
30 incurred for the appearance.

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32 **(c) ~~Party d~~Deponent's appearance**

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34 A ~~party~~-deponent must appear as required by statute or as agreed to by the parties  
35 and deponent at his or her deposition in person and be in the presence of the  
36 deposition officer.

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38 **(d) ~~Nonparty deponent's appearance~~**

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40 A ~~nonparty deponent~~ may appear at his or her deposition by telephone,  
41 videoconference, or other remote electronic means with court approval upon a  
42 finding of good cause and no prejudice to any party. The deponent must be sworn  
43 in the presence of the deposition officer or by any other means stipulated to by the  
44 parties or ordered by the court. Any party may be personally present at the  
45 deposition.

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~~(e)~~ **Court orders**

On motion by any person, the court in a specific action may make such other orders as it deems appropriate.