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ATTORNEYS AT LAW

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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. <u>Depositions and Subpoenas:</u> 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**<u>, video conference</u>** 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. 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. 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. Bench Trials and Jury Trials: 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."

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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