

**STATE OF WISCONSIN  
IN THE SUPREME COURT**

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In the Matter of the proposed amendment to Wisconsin Statute § 804.03, relating to the remote administration of oaths at depositions.

**PETITION 21-\_\_\_\_  
Memorandum In Support**

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The petitioner, the Wisconsin Association for Justice (WAJ), submits this memorandum in support of its petition to amend the Rules of Civil Procedure, WIS. STAT. § 804.03, to allow for the remote administration of oaths at depositions. This petition is filed pursuant to the Court’s rulemaking authority under WIS. STAT. § 751.12 and its administrative authority over all courts conferred by Article VII, § 3 of the Wisconsin Constitution.

**Introduction**

The Wisconsin Supreme Court has the authority to make the rule changes proposed by this petition.<sup>1</sup> While this authority is shared with the legislature, the Court has the power to modify “[a]ll statutes related to pleading, practice and procedure.”<sup>2</sup> While the statute makes no distinction between those rules promulgated by the court and those created by legislative act, the language that this petition seeks to supplement was promulgated by this

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<sup>1</sup> Wis. Stat § 751.12(1).

<sup>2</sup> Wis. Stat. § 751.12(2).

Court.<sup>3</sup> The Supreme Court also has administrative and superintending authority over Wisconsin Courts and the judicial system.<sup>4</sup> The Chief Justice of the Supreme Court is the administrative head of the judicial system and has the power to exercise administrative authority consistent with procedures adopted by the court.<sup>5</sup> The only limitations on the Court's authority here are those posed by statute, including that it must hold a public hearing.<sup>6</sup>

### **Litigants Have Embraced Remote Depositions**

The global pandemic of 2020-2021 prompted a widespread shift in the way that many civil litigation proceedings are conducted. The pandemic, however, only sped up technological changes that were taking place. This petition seeks to make permanent the emergency language that allowed the civil justice system to continue functioning when it was unsafe to conduct in-person depositions.<sup>7</sup> While in-person depositions have resumed in many places, the cost and convenience of remote depositions makes them an appealing option. The continued use of remote depositions after December 1, 2021 requires a

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<sup>3</sup> This petition proposes analogues to Wis. Stat. §§ 804.03 (1) and (2) to allow for remote oaths. Those sections, created by Sup. Ct. Order, 67 Wis. 2d 585, 663 (1975), have remained unchanged. Wis. Stat. § 804.03(3), a subsection not relevant to this petition, was amended by the legislature in 2003. See 2003 Wisconsin Act 227.

<sup>4</sup> Wis. Const. Art. VII, §3 (“The supreme court shall have superintending and administrative authority over all courts”).

<sup>5</sup> Wis. Const. Art. VII, §4.

<sup>6</sup> Wis. Stat. § 751.12(2) and (3).

<sup>7</sup> *IN RE THE MATTER OF THE REMOTE ADMINISTRATION OF OATHS AT DEPOSITIONS VIA REMOTE AUDIO-VISUAL EQUIPMENT DURING THE COVID-19 PANDEMIC*, March 25, 2020; *IN RE THE MATTER OF THE REMOTE ADMINISTRATION OF OATHS AT DEPOSITIONS VIA REMOTE AUDIO-VISUAL EQUIPMENT DURING THE COVID-19 PANDEMIC*, April 28, 2020; *IN RE THE MATTER OF THE EXTENSION OF ORDERS CONCERNING REMOTE ADMINISTRATION OF OATHS AT DEPOSITIONS, REMOTE HEARINGS IN APPELLATE COURTS, FILING OF DOCUMENTS IN APPELLATE COURTS, AND APPELLATE COURT OPERATIONS DURING THE COVID-19 PANDEMIC*, May 22, 2020; *IN RE THE MATTER OF THE REMOTE ADMINISTRATION OF OATHS AT DEPOSITIONS VIA REMOTE AUDIO-VISUAL EQUIPMENT*, June 18, 2021.

permanent amendment to the rules to maintain this choice. The Court invited such a request in its June 18, 2021 order.

As we emerge from the pandemic, many parties to civil litigation wish to continue relying on remote depositions. Allowing remote depositions does not abridge, enlarge or modify the substantive rights of any litigant, witness, or party to civil litigation. The ongoing, long-term use of remote depositions aids the administration of justice by encouraging efficiency and the faster resolution of disputes.

### **Proposed Amendment to Wis. Stat. § 804.03**

The Court should take the opportunity to modernize the rules. The rules governing depositions in Wisconsin, most specifically Wis. Stat. §§ 804.03 and 804.05, have served litigants well since their enactment. While the current rules allow for the modification of deposition procedures, the need to secure written stipulation presents a barrier to widespread use of video conferencing technology situations where parties cannot come to an agreement.<sup>8</sup> Without stipulation, the current statutory language creates uncertainty about using live video-conferencing technology to conduct depositions. This uncertainty undermines public health and safety while imposing unnecessary costs on litigants.

There is a dearth of case law interpreting these statutes governing depositions because the terms have generally not been subject to dispute. Other than when relying on Wis. Stat. § 804.05(7), governing telephone appearances; or Wis. Stat. § 804.06, governing

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<sup>8</sup> See Wis. Stat. § 804.04.

depositions upon written question; depositions in Wisconsin have customarily been conducted in-person.

At onset of the pandemic, member and non-member attorneys contacted our organization expressing concerns about their ability to meet their obligations under Wis. Stat. § 804.03 when conducting depositions remotely. Specifically, Wis. Stat. § 804.03 (1) provides that:

[A deposition] shall be taken before an officer authorized to administer oaths by the laws of the United States or of this state or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

Similar language is found regarding foreign depositions in Wis. Stat. § 804.03(2). The most common practice, however, is that a court reporter, acting as a notary, administers the oath “before” a witness while standing in their physical presence and then proceeds to create the record of a civil deposition proceeding.

This petition seeks to amend Wis. Stat. § 804.03, adding a new subsection (4) to expressly address the administration of an oath via live video conferencing technology. The language is adapted from the current statutory language as well as the Court’s emergency orders. The section makes clear that an oath may be administered via video conferencing technology by a court reporter in a different location. Sub section (a) allows for the practice for any person qualified to administer an oath in the state to administer an oath to a remotely located individual within Wisconsin whereas proposed sub section (b) applies to situations where the witness is not located in Wisconsin.

The result of these changes is that the rules for in-person depositions remain undisturbed while the right to notify parties and conduct remote depositions may continue with predictability for all involved.

Court reporters play an important role in the making of the record in civil depositions. They take their responsibilities before the court and as notaries seriously. Because court reporters have responsibility to and face discipline in multiple forums, our members also discovered that some were reluctant to conduct remote depositions without clarity in the law. Even if the cautious reading of these sections were to be rejected by this Court, parties would be forced to undergo the unnecessary expense and delay of presenting the issue on appeal.

The rules of civil procedure and the statutes regulating court reporters leave remote oaths unaddressed. Shortly before the pandemic halted in-person activities in 2020, 2019 Wisconsin Act 125 went into effect.<sup>9</sup> The legislation details procedures for remote notarial acts using video conferencing technology. Act 125, however, did not address the responsibilities of a notary when swearing in a witness at a deposition.<sup>10</sup> Acting on this petition honors the legislative choice to leave to this Court the ability to promulgate the rules of practice, pleading and procedure as necessary to keep the justice system functioning.

The detailed language contained in Act 125, as well as in other areas, such as that governing video conferencing in circuit court appearances, suggests that the intended

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<sup>9</sup> 2019 Wisconsin Act 125, effective March 5, 2020.

<sup>10</sup> See Wis. Stat. § 140.145(3) (“Except for the administration of an oath before a witness at a deposition[.]”).

reading of Wis. Stat. § 804.03 be confined to the technology available at the time of enactment, which would not have envisioned being used for remote depositions.

When the Court has wished to embrace video conferencing, the language has typically been explicit.<sup>11</sup> For example, when this Court adopted several changes in 1986 allowing video conferencing in circuit court proceedings, it also amended the rules of civil procedure governing depositions to enact Wis. Stat. § 804.05(8), allowing appearances by telephone.<sup>12</sup> The court did not take the opportunity then or subsequently, likely due to the limitations of then-available technology, to adopt language contemplating live video depositions.

Depositions, though recorded and part of the official proceedings in a case, are less formal and litigants benefit from flexibility. Because of the formality and rights implications, it is appropriate that uniform standards be set in circuit court proceedings. Where the court has promulgated detailed procedures for the use of video-conferencing technology in circuit courts, and continues to evaluate substantial changes, litigants have already shown the ability and willingness to adapt and embrace this technology without substantive legal harm.<sup>13</sup>

This petition seeks to enact narrowly tailored language, adapted from the Court's emergency orders, that facilitates the use of live video-conferencing technology without limiting the ability of parties to stipulate to other conditions and modifications as currently

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<sup>11</sup> See, e.g., Wis. Stat. Ch. 885 Subchapter III USE OF VIDEOCONFERENCING IN THE CIRCUIT COURTS.

<sup>12</sup> In re the Amendment of Rules of Civil, Criminal and Appellate Procedure: Proceedings by Telephone and Audio-Visual Means, 141 Wis.2d xiii-xxxiii (1987).

<sup>13</sup> Rule Petition 20-09; Videoconferencing Technology, Filed December 11, 2020.

permitted. The Court's emergency orders struck a careful balance, allowing the use of new technology, while providing parties with the flexibility to experiment and adapt. Acting on this petition will allow litigants to continue refining ways to efficiently prosecute and defend their cases without limiting the Court's ability to examine detailed and long-term reforms.

### **Impacted Parties and Organizations**

WAJ has circulated the proposed language with the State Bar of Wisconsin and obtained feedback from the Litigation Section and Family Law Sections. Suggested changes have been incorporated into the final proposed language. Copies of the petition, as well as this supporting memo, have been sent to local and specialty bar organizations throughout the state. We have obtained support from the following organizations:

- The State Bar of Wisconsin
- The Wisconsin Defense Counsel
- The Waukesha County Bar Association
- The Outagamie County Bar Association
- The Dane County Bar Association

We invite continued dialogue from relevant stakeholders before this court as to how best to make this change on a permanent basis.



## Conclusion

The proposed changes to Wis. Stat. § 804.03 will allow this Court to expressly authorize remote depositions without disrupting Wisconsin's longstanding rules of civil procedure. Remote depositions allow for more effective and efficient resolution, enhancing the administration of justice in Wisconsin.

Dated: October 8, 2021

Respectfully Submitted,

Wisconsin Association for Justice



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## **APPENDIX 1**

### **Letter of Support from the State Bar of Wisconsin**