

NYSBA CPLR Committee
Affirmative Legislative Proposal - CPLR 4013

NEW YORK STATE BAR ASSOCIATION CPLR COMMITTEE

JUSTIFICATION FOR PROPOSED AMENDMENT TO CPLR 4013 PERMITTING THE USE OF REMOTE AUDIO-VISUAL TECHNOLOGICAL MEANS AT JUDICIAL PROCEEDINGS

CPLR 4013, in its original form since 1962 (L.1962, ch. 308), authorizes the judge presiding at a trial to direct that it be conducted in whole or in part at a place other than the courthouse. The statute recognizes that there are occasional circumstances where a trier of fact might benefit from conducting certain proceedings at an alternate location, such as to view an accident site in a personal injury action. The conduct of trials within the courthouse is the implicit rule, with trials outside the courthouse being the expressed exception. While the statute vests the trial judge with discretionary authority to direct that the trial of an issue be performed outside of the courthouse, that discretion is restricted by an important qualifier – that it be exercised “[u]pon stipulation of the parties.” The statutory language therefore requires that for trials to ever be performed at a location other than the courthouse in whole or in part, there must be a unanimous consensus to do so between the stipulating parties on the one hand and the court directing it on the other.

The language of CPLR 4013 has become problematic in light of the covid-19 virus and the development by the courts of the modalities for conducting trials and evidentiary hearings by remote audio-visual technological means. It is conceivable that even after the full re-opening of the courts, trials and evidentiary hearings may be conducted in the event of future public health crises, significant weather events, or unexpected emergencies such as accidents or illnesses involving attorneys or witnesses. Arguably, trials and evidentiary hearings conducted using remote audio-visual technological means are “at a place other than the courthouse,” as judges, clerks, stenographers, attorneys, parties, and witnesses are at scattered locations. If a court directs the conduct of remote proceedings over objection, as has been reported in certain recent case law (*e.g. Bonilla v State*, 71 Misc.3d 235 [Ct. of Cl. 2021]; *Perez v 1857 Walton Realty Corp.*, 71 Misc.3d 1203[A] *3-4 [Civ. Ct. Bronx Co. 2021]; *Matter of a Proceeding Pursuant to Social Services Law 384-B*, 71 Misc.3d 1218[A] *3 [Fam. Ct. Kings Co. 2021]; *C.C. v A.R.*, 69 Misc.3d 983 (Sup. Ct. Kings Co. 2020); *A.S. v N.S.*, 68 Misc.3d 767 [Sup. Ct. N.Y. Co. 2020]), the current form of CPLR 4013 is, at least technically, violated, notwithstanding the practical necessities of proceeding in those instances by remote means.

CPLR 4013 should be amended to address the conduct of trials and evidentiary hearings outside of the courthouse by remote audio-visual technological means, in light of the availability of new technology and the practical demands upon courts to use it, where and when warranted by circumstances. In-person proceedings should remain the preferable method of conducting jury and non-jury trials and evidentiary hearings, which also provide an

easy means of satisfying the open-to-the-public requirements of Judiciary Law 4 (*Hearst Corp. v Clyne*, 50 NY2d 707, 715 [1980]).

The proposed amendment to CPLR retains the original core of CPLR 4013. But additionally, it permits the court to direct trials and evidentiary hearings using remote audio-visual technological means, in whole or in part, upon consent of the parties. Where consent is not obtained from a party, the proposed amendment to CPLR 4013 sets forth a series of well-balanced factors that are to be considered by the court in determining, in the exercise of discretion, whether to direct the use of remote audio-visual technological means over a party's objection. Chief among them is whether a proceeding, with a reasonable adjournment, can be conducted in-person in a timely fashion, without resort to other modalities, and whether a witness is unable to testify for a variety of statutorily-recognized qualifying reasons. Additionally, the proposed amendment to CPLR 4013 requires the court to consider whether the objection to remote proceedings is withheld unreasonably or whether there would be undue prejudice or hardship upon another party or witness.

The proposed amendment to CPLR 4013 specifically requires the court, in ordering the trial or evidentiary hearing to be conducted remotely over a party's objection, to state its reasons on the record or in a written order. This language is included for purposes of facilitating informed appellate review of the determination to conduct remote proceedings over a party's objection. While the proposed amendatory language avoids directing how remote audio-visual technological means shall be utilized in any given instance, it does specify that it be used in a manner that assures public access in accordance with Judiciary Law 4, and that participants be able to hear and see one another. It also clarifies that oaths be administered by a person authorized to do so under CPLR 2309, and that such an oath be deemed taken, and the testimony given, at the place where the action is pending.

The general language of Judiciary Law 2-b(3) authorizes courts to devise methodologies necessary to effect its powers and jurisdiction, which has been expansively used in some instances as authority permitting the use of remote audio-visual technological means, even over a party's objection. In our view, Judiciary Law 2-b(3), standing alone, may not be read as to permit courts to violate other more specific procedural statutes, such as the stipulation requirement of CPLR 4013, as specific statutes are to take precedence over conflicting general statutes (*Brusco v Braun*, 84 NY2d 674, 681 [1994]).

Nothing in the proposed amendatory language to CPLR 4013 interferes with the right of the chief administrator of the courts and individual judges and justices of the courts from promulgating additional rules, consistent with the terms of the amended statute, regulating the use of remote audio-visual technological means, or the right of parties to pre-videotape and use civil deposition testimony under Uniform Rule 202.15.

The proposed amendatory language to CPLR 4013 is as set forth below:

Rule 4013. Trial or evidentiary hearing elsewhere than at courthouse.

AN ACT to amend the civil practice laws and rules, in relation to the conduct of trials or evidentiary hearings at a specified place other than the courthouse, including the use of remote audio-visual technological means.

(a) *Alternate place of trial or evidentiary hearing.* Upon stipulation of the parties, the court may direct that a trial or evidentiary hearing be held in whole or in part at a specified place other than the courthouse.

(b) *Trial or evidentiary hearing by audio-visual technological means.* Upon stipulation of the parties, the court may direct that a trial or evidentiary hearing be held in whole or in part using remote audio-visual technological means.

(c) *Use of audio-visual technological means over a party's objection.* If a party withholds consent to the use of remote audio-visual technological means for the trial of an issue, the court, upon the request of any other party, may exercise discretion to direct that a jury trial proceed in part, or a non-jury trial or evidentiary hearing proceed in whole or in part, with the use of remote audio-visual technological means over the party's objection, provided that:

(i) circumstances prevent all or part of the trial or evidentiary hearing from being timely conducted in person, and a witness is unable to attend and testify in person because of difficulty related to significant distance from the place of trial, age, sickness, infirmity, or imprisonment, and

(ii) either consent is withheld unreasonably by the party, or there would be undue prejudice or hardship to another party or witness.

Upon ordering that a trial or evidentiary hearing be held in whole or in part over the objections of a party, the court shall, after giving due regard to the importance of presenting the testimony of witnesses orally in open court, state its reasons on the record or in a written order.

(d) *Conduct of trial or evidentiary hearing by remote audio-visual means:*

(i) A trial or evidentiary hearing held in whole or in part by remote audio-visual technological means must be conducted so as to permit the participants to see and hear each other and to assure public access to the proceedings in compliance with section 4 of the Judiciary Law. The court may, in its discretion, exclude prospective witnesses who are not parties from the courtroom and from access to the proceedings by remote audio-visual technological means.

(ii) An oath or affirmation may be administered to a witness using remote audio-visual technological means by a person authorized by subdivision (a) of section 2309 of this act, and the oath or affirmation shall be deemed to be taken, and the testimony shall be deemed to be given, in the place where the action is pending.

(iii) The chief administrator of the courts may adopt rules further regulating the conduct of the trial or evidentiary hearing by remote audio-visual technological means. The court may provide additional directions in a particular trial consistent with the rules of the chief administrator.

Respectfully Submitted,
NYSBA CPLR Committee

Dated: May 20, 2022