



CRISIS PRACTICE

Coronavirus

MAY 11, 2020

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The Coming Wave of Remote Depositions

The competing interests of social distancing and litigation needs are forcing the legal profession to re-think the most fundamental functions. The Supreme Court of the United States is now hearing arguments by phone. Appellate and trial courts are hearing arguments through popular public videoconferencing services. Parties and lawyers are trying to figure out how to handle remote depositions.

We have been conducting some form of virtual depositions for years. After a few hundred, we have some considerations for you:

IS IT IN YOUR BEST INTEREST TO PROCEED WITH A REMOTE DEPOSITION?

Before you raise the issue of a virtual deposition or commit to a remote deposition raised by the opposing party, consider whether it is in your best interest to proceed with the deposition. Consider these factors if you are taking the deposition:

- When is your trial? What are the discovery deadlines? If discovery is about to close and this is a deposition that you *need* to take, then you may not have a choice. But if it is an important witness that you want to meet and trial has not yet been scheduled, then consider waiting until you can attend in person. In our experience, taking a deposition in person is almost always more effective.
- That said, is there a strategic reason to affirmatively advocate for a remote deposition? For example, a phone deposition of a plaintiff may be a far less emotionally charged event, which could have implications at trial.
- Is the witness likely to provide information that could change your discovery strategy going forward? If so, you should proceed without delay.
- Is the witness likely to have difficulty communicating? If your witness is sick, elderly or disabled and may have difficulty with a deposition under ideal circumstances, then consider waiting until you can be in the room with the witness.



- Is this witness more likely to be forthcoming in-person? If so, and the content of the deposition will be compromised by remote attendance, then you should wait.
- Is the deposition going to involve numerous exhibits? Exhibits are the most complicated part of taking remote depositions. We outline some technology options below, but fully consider whether using virtual exhibits will impair your effectiveness.
- Does the witness need a translator? Translated depositions are challenging on the best day. Adding an additional layer of technology may be a step too far, so consider delaying the deposition until the translator can be in the room with the witness.

WHAT ISSUES NEED TO BE WORKED OUT WITH OPPOSING COUNSEL IN ADVANCE?

Attendance. You should confirm in advance with opposing counsel that the witness will be alone in a room. You do not want to grudgingly agree to a remote deposition on the assumption that everyone will be remote, and then find out that your opposing counsel will be in the room with the witness. (If forced to proceed in this manner, be sure to insist that opposing counsel be seen on screen at all times so that coaching or other like behaviors can be seen and addressed.)

Length. Remote depositions take longer than in-person depositions. Technical glitches, sound quality, and other issues can nearly double its length. You should try to reach agreement in advance that the deposition will be longer because it is remote. This is especially true if the jurisdiction imposes limits on the length of depositions.

Cost. Many court reporting platforms charge for each connection – meaning that there is additional cost for every person who connects remotely. You must work out who will be responsible for the costs before the deposition.

Swearing in the witness. Many jurisdictions have recently modified their rules to allow court reporters to swear-in for witnesses remotely. If your jurisdiction has not adopted such a rule, you will need to reach a stipulation with opposing counsel to address this issue.

WHAT IS THE BEST TECHNOLOGY?

There is no single best technology. Rather, you should calibrate the technology to the type of deposition, the exhibits, and the sophistication of the witness and counsel involved.

Telephone. The telephone is the most basic option, and has the benefit of being widely available, familiar and affordable. The telephone is, however, a poor substitute for an in-person deposition because you can neither see the witness nor share exhibits.

Videoconferencing Technology. These platforms allow you to both see and hear the witness. You may also be able to share exhibit files with other participants during the deposition via the chat feature. Many of us regularly attend meetings on these platforms so there can be an added layer of familiarity with the technology.

File Sharing Services. These programs allow you to transmit large volumes of exhibit files to the various stakeholders attending the deposition. Upload and download times can be significant, so be sure to allow enough time before the start of the deposition. Also, these programs have varying levels of security, which means some users may not be able to access the system on a work computer. Such issues must be considered and worked out well in advance of the deposition. Also, these programs have varying levels of security, which means some users may not be able to access the system on a work computer. Such issues must be considered and worked out in advance of the deposition.



Proprietary Platforms. Court reporters across the country are offering evermore sophisticated products that incorporate added features such as Realtime and exhibit sharing. These programs can be excellent at replicating the in-person deposition experience, but they can be expensive and may require a computer with specialty software. They also warrant a little practice for even the most technically inclined.

No matter which program you use – there is no substitute for preparation. Plan and practice in advance.

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