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Remote Depositions and Other Remote Testimony: Representing Clients in the New Normal

The world changed in 2020. Many of the activities formerly conducted in person now occur remotely and will likely occur remotely for the foreseeable future. This includes depositions, interviews, and other forms of testimony. While remote depositions have always been permitted, they were rarely used in the normal course, perhaps because technology had not quite caught up, or because of the difficulty observing deponents and documents. *See Republic of Turkey v. Christie's, Inc.*, 326 F.R.D. 402 (S.D.N.Y. 2018).

This update provides some recent lessons learned with remote depositions that apply to both those who take and defend remote depositions. These lessons apply whether the remote deposition is part of a court hearing or trial, deposition, government investigation, or internal investigation.

The flexibility and new questions raised by the remote nature of the deposition require particular thoughtfulness—more so than for the in-person depositions of the past. For example, unique issues to consider are: (1) using the available technology effectively and comfortably; (2) document handling; and (3) privacy during breaks and discussions with clients. These issues and others are addressed below.

- **Check local rules.** The Federal Rules of Civil Procedure allow remote depositions in civil cases, and the CARES Act permits courts to authorize their use in criminal cases during the COVID-19 pandemic. *See* R. Civ. P. 30(b)(4); H.R. 748, § 15002. As a result of the pandemic, federal district courts have issued blanket administrative orders encouraging counsel to utilize videoconferencing services, *see, e.g.*, Admin. Order. No. 2020-1 (M.D. La. Mar. 13, 2020), and, pursuant to their individual rules of practice, federal district court judges have explicitly stated that depositions can be taken remotely. *See, e.g.*, U.S. District Court Judge Lewis J. Liman, COVID-19 Emergency Individual Rules of Practice, § 3.A. Judges have also provided guidance on remote depositions on a case-by-case basis. Although Rule 30(b)(5) of the Federal Rules of Civil Procedure requires that, unless the parties agree otherwise, depositions must be "conducted before an officer appointed or designated under Rule 28," at least some judges have simply required an officer to attend the deposition via the same remote means as the parties.
- **Coordinate with opposing counsel.** Particularly given the lack of applicable rules, and the lack of clarity and consistency in rules that do apply, coordination with opposing counsel is paramount. Seek agreement where possible and note disagreements on the record where appropriate. Unique features of the technology platform to be used should be discussed, negotiated, and coordinated well before the deposition.
- **Get comfortable with the technology.** The ability to take or defend against a deposition remotely ultimately turns on success at transcending technological limitations and exploiting technological capabilities. To do so, lawyers must get comfortable with the deposition technology platform (and ensure the client is comfortable with the technology when defending). Some best practices include the following:
 - Ensure correct lighting.
 - Consider the background. Plain backgrounds, such as blank walls are preferable to bookcases, artwork, or windows that cast you in shadow.
 - Make sure the camera angle is looking straight at the speaker on an "eye level"; this may require elevating the camera or laptop to ensure this angle is possible.
 - Ensure the speaker's voice comes across as crisply as possible. Avoid relying on computer audio alone since it can create a vacant, echo quality. The ideal configuration is to use an unobtrusive set of wired earbuds with a microphone that plug into the computer.
 - Confirm that devices, including microphone or headset, are completely charged.
 - If participating from outside of the office, ensure a strong internet connection by hardwiring into the router and exiting virtual private networks (VPN) that can compete for bandwidth.

- Conduct mock depositions on the actual platform that will be used for the real deposition.
- Rehearse using documents in the same manner as during the deposition.
- Practice making objections when defending, considering issues such as whether to stay unmuted throughout the proceeding or only when lodging an objection.
- Schedule as many instructional sessions as necessary with in-house technology consultants and the platform vendor.
- **Understand the technology platform.** Related to the above, the capabilities of remote-deposition platforms vary. For example, depending on how they are configured, some platforms will record entire proceedings, regardless of whether parties are formally "on the record." It is important to understand how the chat function works, such as whether chats are visible to every participant (note, however, that nobody should be communicating by chat function with the deponent during a deposition). Lawyers should also ensure that only authorized participants, potentially including a vendor representative, are able to monitor the remote deposition.
- **Arrange to have a technology consultant on standby.** Before the deposition, it is essential to seek advice from trusted technology consultants. During the deposition, the consultant has a particularly important role in case there are problems using the platform. Ensure the consultant is available immediately before and throughout the proceeding to help ensure that any problems are efficiently addressed.
- **Consider location.** Carefully consider the location for preparation and participation in the deposition. It is important to know whether local rules and health considerations permit in-person preparation sessions, which remain the gold standard. Other considerations include whether the location will provide sufficient bandwidth to support audio and video connectivity, and whether sites will be protected from interruptions, such as the sounds of children playing in an adjoining room. When defending, consider whether it is possible to safely co-locate with the client so that the deposition is only remote with respect to opposing counsel. For example, consider holding the deposition in adjacent conference rooms to maximize the ability to communicate with the client during the proceedings.
- **Plan for breakout sessions.** When defending a deposition or if co-counsel is participating in the deposition remotely, have a plan for secure breakout discussions to review urgent issues, such as application of the attorney-client privilege. Some technology platforms have secure "breakout rooms" that separate remote participants from each other virtually (thus, counsel and client will disappear from the deposition session and can temporarily converse in a separate virtual "room"). If this is the case, rehearse this feature before the deposition. On the other hand, the most straightforward approach to private discussions may be muting audio, walking off-camera, and having a private conversation by cell phone.
- **Address the uniqueness of remote depositions on the record.** When taking a deposition, prepare a set of questions to supplement the usual preliminary questions that address the unique situation of a remote deposition. For example, consider asking the deponent:
 - To confirm the deponent can clearly hear and see the interviewer, and to agree to indicate if that changes.
 - To confirm the deponent's location and whether anyone is in the room with the deponent.
 - To identify the device the deponent is using, to close any applications (other than the remote platform) on the device, and to agree not use any other device, such as a mobile phone, while on the record.

When defending a deposition, prepare the client to expect these types of questions and agree on a strategy to respond to these questions. (As an aside, in nearly all cases, private communications between attorney and client via text, email, or otherwise while a question is pending is not permitted, even in a remote deposition.)

- **Anticipate limited nonverbal interaction.** During typical in-person depositions, attorneys study physical cues to help interpret key nonverbal communication. Unfortunately, the ability to observe opposing counsel and witnesses during a remote deposition is limited by current technology. Even with the largest

video monitor, it can be difficult to notice a revealing nonverbal "tell" in opposing counsel or a witness. When taking a remote deposition, it is critical to pay even closer attention than usual to the testimony.

- **If defending, prepare the witness for a flattening effect on dynamism.** Related to the above point, the video medium diminishes the appearance of a witness's energy, even if the witness feels lively. Because dynamism is *the* key predictor of credibility, encourage witnesses to speak at a strong volume and at a slightly faster than conversational pace to help compensate for the enervating effect of video. Speaking too quickly will create difficulties for the court reporter, but speaking at a pace slightly faster than a conversational pace conveys confidence, intelligence, and engagement.
- **If defending, prepare the witness for a heightened focus on demeanor because the "close up" video medium places a more prominent focus on faces.** Although remote-deposition technology makes interpreting nonverbal communication more difficult, the close video focus places greater emphasis on facial expressions. If defending a remote deposition, during preparation encourage the witness to make strong eye contact with the camera, to smile when appropriate, and to keep an interested-looking expression even when a question feels abrasive. When a witness envisions the questioner as someone who is simply mistaken, but demonstrates respect, this creates a more credible nonverbal demeanor than a defensive one.
- **Plan for document handling.** Document management is a significant concern in a remote deposition. From a defense perspective, it is optimal to receive hard copies of exhibits ahead of time (in contrast, deponents may want an agreement beforehand that defenders will not access the hard copies until particular exhibits are introduced). If the exhibits will be shared electronically through the deposition platform, parties should decide in advance whether the witness will be given electronic control of documents for review during the examination.
- **Remember the client's needs.** Regardless of the unique issues raised by remote depositions, remember that the need to represent the client is paramount. When taking the deposition, the guiding principle should be using the remote process, or overcoming its limitations, to obtain key admissions. If defending, the focus should be on thinking how the remote deposition may complicate preparation and safeguarding the client's interests during the examination, where usually simple issues, such as making sure the witness has reviewed a document that is the subject of questioning, can be challenging.

Attorneys are often rightly criticized for their Luddite tendencies and rigid attachment to form. In this new world, attorneys should embrace remote depositions, and find ways to make this new medium support their litigation goals. Considering the recommendations above will help attorneys adapt to the new normal, overcome the limitations of advocacy from a distance, and even find ways to leverage and exploit these new conditions to the benefit of clients.

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