

The Legal Intelligencer

Virtual Depositions in the Time of the Coronavirus Pandemic

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Even as in-house lawyers tackle myriad issues on a minute-by-minute basis during the COVID-19 era, outside lawyers are still continuing with litigation to the extent court orders, and practical considerations, permit. As litigation presses on, these lawyers and their in-house counterparts must be prepared for remote depositions—not just where only one person is remote, but where every single person participates remotely. In this article, we offer some practical tips for in-house lawyers to be aware of as they supervise their teams of in-house and outside counsel.

Our recent experiences taking and defending virtual depositions taught us a great deal. Nearly every aspect of the depositions were affected by logistical issues created by working from home and by the inability to sit in the same room as the deponent, be it our adversary or client.

TECHNOLOGY

Working with the virtual deposition vendor

A virtual deposition will need to be scheduled with a virtual deposition vendor that has the capability to do an entire deposition remotely. The vendor will be able to assist with the setup and general requirements of a virtual deposition. It sounds simple, but the first step in ensuring a successful remote deposition is making sure that everyone on the team has received an email from the vendor in advance of the deposition and has followed all of the set up instructions at least a day in advance of the video deposition. When preparing to take a deposition, it is advisable to ensure that the adversary has done what he or she needs to do to prepare logistically. Without proper preparation, there is a high risk of a long delay at the outset of the deposition.

Equipment

To participate fully, everyone will need internet access on a computer or tablet with audiovisual capabilities. If either counsel or the deponent is lacking these capabilities, the vendors will be able to ship them equipment as needed.

While virtual depositions take place over computer or tablet, earphones and telephones are crucial to their success. Most virtual deposition platforms recommend against using computer audio, as it puts extra strain on internet connections and there can be significant lags and echoes for the person speaking. Be sure that each participant tests their computer audio beforehand if that is their preferred audio source. If there are issues with the computer audio or internet connection,

counsel will likely have to connect with their phones and listen to the audio through earphones. If they then want to have conference calls with the legal team during breaks, a second phone has to be available—not something everyone has at their homes these days. The dial-in process for the virtual deposition audio is finicky and the lines are more crowded than ever. So in order to avoid losing connection to the deposition audio, it is ideal to have a second phone on which to talk with the team. Finally, everyone should be told to mute the video conference line and to stop sharing their video feed while counsel and the deponent (or counsel taking the deposition and their colleagues) are conversing, otherwise the privileged conversation will inadvertently be shared with other participants.

While not part of the bare necessities, having multiple monitors certainly helps. Attorneys can enlarge shared exhibits (more on this below) and have more organizational control of how they view the deposition and related documents. Plugging a standalone monitor into a laptop is an easy way to have two screens.

Connectivity on the day

On the day of the deposition, no matter how easy the vendor may make it seem, lawyers should give themselves thirty minutes before the start-time to address unforeseen issues. They may run into issues with lighting, connecting to the phone line, or with the video quality. Ideally they should practice with the vendor in the days before to ensure that all hardware and software works, in case items need to be shipped or uploaded.

EXHIBITS

When it comes to exhibits, counsel should be prepared with hard copies and send them to the witness and opposing counsel. While virtual deposition vendors offer exhibit sharing capabilities, they can be cumbersome. Depending on the size of the deponent's screen, even one page documents may require awkward scrolling—controlled by the lawyer taking the deposition—in order to view the entire page. When it comes to large multi-page documents, e.g., contracts, the perils of slow scrolling only worsen. The deponent needs context when pointed to a particular part of a document, and that is very difficult to provide without constant scrolling. In an in-person deposition, a deponent will flip through a document. With virtual depositions, the quick flipping turns into slow scrolling. In a live deposition, if the deponent wanted to refer to a section of the document other than that which is on the screen, he or she would simply find the section and point everyone else to it. But with the virtual deposition exhibit share, the deponent has no direct control over how the document is viewed and has to telegraph his or her thinking by asking the document displayer to go to a certain page.

Providing physical copies to all individuals involved is the best option for exhibit sharing in a virtual deposition. Attorneys should distribute documents in advance, in sealed and labeled envelopes if practical, or in a binder. All recipients should be instructed not to open any envelopes, or the package containing the binder, until they are onscreen during the deposition. When it is time to review an exhibit, instruct the deponent and opposing counsel to open the envelope labeled with the exhibit number or direct them to the appropriate tab in the binder. That way, everyone has a physical copy and can review in the way they prefer. Of course, if there is a concern about transmission of the virus, then alternative means will need to be considered, including perhaps a second screen and sending a pdf to the deponent at the time the document is identified.

Providing physical copies does not prevent you from also supplementing your documents with virtual exhibits on the fly. It is impossible to plan for everything, so make sure to have someone ready to pull documents and share them digitally via the virtual deposition platform. While this will entail some slow-scrolling, it is worth it in order to include important afterthought documents. If you end up supplementing with virtual exhibits, be sure to take note of the exhibit number and deliver the supplemental exhibits to the court reporter shortly after the deposition ends.

The last thing is marking exhibits. If counsel is able to collect the exhibits far enough in advance (typically 72 hours) and get digital copies to the court reporter, the reporter will be able to mark exhibits for counsel. Otherwise, make sure counsel has a strategy in place for marking exhibits and is prepared to send them to the court reporter after the deposition.

Needless to say, these virtual depositions require the attorney taking the deposition to plan well in advance. For example, for a Monday deposition, we self-imposed a deadline of COB the previous Wednesday for exhibit choices, subject to supplementation as described in the text above and game day decisions not to pursue certain exhibits in the binder. In this way, we could produce the binders and send them via overnight courier for delivery by Friday, leaving time to address last-minute issues. We ended up using more than 80 of the 95 documents we included in our binder.

INSTRUCTIONS FOR DEPONENT

Lawyers defending a virtual deposition should ensure that the deponent is oriented to a clean desk, as if they were in an actual conference room. In this way, the deponent can avoid the temptation to check his or her phone or read emails.

Lawyers taking a virtual deposition should ask the deponent to describe his or her surroundings and to list any electronic devices within reach or sight. Any devices other than the one being used for the video should be turned off while the deposition takes place. It also is prudent to have the witness promise that they will not use their video device to communicate with others or seek answers in any way during the deposition.

OTHER UNIQUE ISSUES

Who is listening in?

Virtual deposition platforms have the feature of allowing a participant to call in while not appearing on video. The platforms should also show counsel who is participating in the deposition, and if a participant is just calling in, it should reveal the phone number. Make sure that counsel knows the identity of each individual on the participants list. An unknown number could be an unannounced person listening in.

Recording

Some platforms allow for recording of the entire session free of charge and others do not. Make sure counsel thinks about what is needed and what works best. Note that, if a court-admissible video recording of the deposition is needed, counsel will need to hire (through the vendor) a separate videographer to film the deposition. Of course, counsel should ensure that the deposition notice or subpoena properly notices the video recording, and that the fact of the recording is disclosed to the witness and counsel on the day of the deposition. Subpoenas and notices set forth an address for the deposition. We simply noted that the deposition will be conducted virtually.

Court reporter location and rules

When scheduling the deposition, be sure to let your vendor know where the court reporter needs to be located geographically. Unless the parties stipulate, the court reporter will likely have to be in the same state as the deponent and follow the rules for remote oath taking of that jurisdiction if there are any. Many states have issued orders allowing for completely remote depositions, but it is wise to check. Absent a state law allowing for remote oath taking, either a court order or stipulation will likely be necessary.

Additionally, court reporters are traditionally in the same room as the deponent, and they themselves may never have taken a totally remote deposition before. Make sure that the court reporter meets all of the requirements under the applicable rules, e.g., FRCP 30(b)(5)(A), to avoid any challenges to the validity of the deposition.

Communication during the deposition

In a typical deposition, lawyers pass notes to fellow members of the legal team. In a virtual deposition, you will likely rely on Skype or other internal messaging system, email or both. Without headphones, the alert that sounds when the messages come through an unmuted participant's speakers can be distracting and signal to opposing counsel that something important is going on. It may also be more distracting for the person taking the deposition to have alerts popping up on the screen. If your team is taking the deposition, it is best to only send important time-sensitive messages to the attorney who is asking the questions and save the other observations for a phone call during a break.

CONCLUSION

While we adjust to the effects of this pandemic, both in-house and outside counsel will benefit from these practical tips for ensuring a smooth virtual deposition. We also suspect that—once the kinks have been resolved and the process becomes routine—the use of these tools may continue once life has returned to normal, due to their low cost. Unlike live depositions, virtual depositions do not require expensive travel of the parties and counsel. Conducting depositions virtually should moot the related issues of determining the location of the deposition and any cost shifting attendant to that issue. It is important, therefore, for all lawyers to be aware of their availability and to understand how they work.

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