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# REPORT

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## BEST PRACTICES FOR REMOTE DEPOSITIONS



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While remote depositions rose in popularity (and necessity) during the pandemic, many clients and attorneys are now voluntarily opting for them—even as travel and social distancing restrictions are scaled back—due to their efficiency and cost-savings. This article provides guidance on how to make these depositions not just efficient but also effective.

**The Mechanics of Remote Depositions.** How do remote depositions differ in practice from in-person depositions?

First and foremost, the participants—the deponent, the taking attorney and her team, the defending attorney and her team, the court reporter, and the videographer—are typically not in the same room, and instead, are connected to each other through a videoconference platform like Zoom or Webex. Discovery vendors generally have their own proprietary version of the platform that is more suitable for a deposition where just the witness is spotlighted.

Dealing with exhibits presents another stark difference, as the taking attorney cannot physically hand the deponent the exhibit that she intends to introduce. One option for a remote deposition is for the taking attorney to arrange for exhibits to be printed and shipped in advance. This practice is highly discouraged, however, because it is costly and invites the curious party to preview the sealed documents.

The more typical practice is to handle exhibits electronically. This requires the taking attorney to upload each of her expected exhibits to a file-sharing platform prior to the deposition, and then, either she or the vendor will publish specific exhibits as the deposition proceeds. When the exhibit is published, it is displayed

on the screen for all participants to view simultaneously, and either the witness or the taking attorney will have control over the exhibit. The full exhibits are also made available to all of the parties on the file-sharing platform but not until they are published.

The final major difference is that there is no lunch provided! Just kidding. But it is important to know that breaks are different. They often take place through a breakout room your vendor provides where each member of your team can click into and out of a separate virtual room distinct from the one that is being used for the deposition. Alternatively, you can have your own preferred videoconference platform available to your team and keep it open during the deposition (just make sure you've muted yourself on the deposition platform).

Other than those items, most else is the same, including that each on-the-record word is transcribed and the transcripts hold the same weight as in-person deposition transcripts.

**Tips on Taking Remote Depositions.** Remote depositions are undoubtedly efficient. They save time and resources on travel and printing, and they are easier to schedule. When attorneys balk at taking remote depositions, it is because they are concerned about losing the natural connection, flow, and nonverbal read of an in-person deposition. But those limitations are not immutable. Below are tips that will help you maximize the benefits of a remote deposition by minimizing the technical “fourth wall”; the less that technology interferes with the deposition, the more it will feel like you are taking it in person.

First, enter into a remote deposition protocol in advance of the deposition. The protocol should establish clear instructions for the foreseeable and flexibility for the unforeseeable. Some common terms include prohibiting the deponent from communicating with anybody during the deposition (especially via text or instant messaging) and prohibiting others from being in the same room as the deponent. It is also helpful to identify the vendor who will be

used for the deposition, require that the participating parties register with the vendor and become familiar with the deposition software before the deposition, and establish how the parties will address technical difficulties that arise (i.e., on-the-record, off-the-record, agreement that time spent addressing technical difficulties will not count towards any time limit, agreement to address and resolve issues in good faith, etc.).

Second, do a dry run of your vendor's software at least a couple of days before the deposition. The dry run helps you confirm that you have appropriate audio and video settings, and it allows you to familiarize yourself with identifying and publishing exhibits, using exhibits that have been published, and entering and exiting the breakout room.

Third, employ a uniform naming mechanism for the file names of the exhibits you intend to use. The preferred approach is to use the date prefix and the Bates number of the document as the file name—i.e., 19870628\_Bates0001—because it makes the documents easily sortable and identifiable. You should also use the same naming convention to describe documents in your written outline.

Fourth, consider whether the added cost of a virtual support technician is appropriate. Technical and human errors are bound to happen. Most vendors make a support technician available during the deposition for an added cost, so if the deposition you are taking is particularly important or will run up against a time limit, it may be worthwhile to make that technician available for the entire deposition (or even the first couple of hours).

Fifth, be patient and flexible. Everybody is working out the kinks of this new practice, and courts are uninterested in hearing counsel bicker with each other, especially over technical aspects of a remote deposition.

**Tips on Defending Remote Depositions.** Defending a remote deposition is not that different from defending an in-person deposition—i.e., while you need to be attentive, your actual participation is limited. Nevertheless, there are some best practices that you should follow to make sure your witness is prepared and protected during a remote deposition.

Some of those best practices include (a) conducting a dry-run of the deposition software with your witness so the witness feels comfortable with the format and is not distracted by it, (b) arranging for your witness to have an appropriate background and a quiet place for the deposition where she can focus on the questions asked, and (c) instructing your witness that she may scroll through an exhibit on the virtual screen and that she should not feel constrained by

the fact that only one page of an exhibit displays at a time (even if the taking attorney wishes to direct her attention to only one page).

It is likewise important for you, as the defending attorney, not to feel restricted by the deposition format. For instance, if you do not have access to a document or cannot see the screen, you should ask the taking attorney to hold questions until you do have access or can view the document. Keep in mind that, just as it is important for the taking attorney, you should similarly be flexible and agreeable as technical and human errors arise.

**Unusual Incidents.** The rise of remote depositions has led to some unusual incidents. Those experienced by my firm include a husband standing behind the computer screen audibly feeding his wife answers to the questions posed to her; a defending attorney answering a call from his bank on the record because he thought he was on mute; a witness having a personal and private conversation with his son intermittently throughout the deposition; a witness abruptly leaving the deposition because his phone battery died and having to move to a location closer to the outlet to continue, which delayed the deposition because the documents were not readily available on his phone; and a witness taking the deposition from his phone in his car (though the deposition was suspended for that reason). Following the best practices set out above could have avoided these problematic events.

To close, while remote depositions are limited in certain ways that in-person depositions are not, there are best practices you can follow that will help you make this now-ubiquitous event not just efficient but also effective.

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