

Not Remotely Law as Usual: Remote Depositions – The Same But Different

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The COVID-19 pandemic has done more than rock the world on its heels — it has become a wake-up call to businesses and industries lagging behind in digital transformation. The legal field, an institution rooted in laws and systems dating back hundreds of years in their current form, is in many ways defined by its steadfastness. However, social distancing is challenging us to redefine essential face-to-face interactions to mitigate exposure for our employees, clients and personal networks. These changes are greatly impacting the practice of law and, when we eventually leave our homes and transition back to the workplace, the practice of law should expect an even more scrutinized evaluation of what requires in-person appearances for litigation proceedings.

The vast improvements to video, recording and transcription technology are impacting how trial attorneys approach litigation. Attorneys have already been experiencing how the courts have begun embracing change by leaning on advancements in technology, from excusing personal appearances for case management conferences and motion hearings to pre-trial conferences in favor of telephone conference calls. Client meetings can now be conducted via videoconferencing, allowing attorneys to meaningfully interact with clients regardless of where either is located. The in-person deposition should consider itself on the endangered species list along with other soon-to-be obsolete practices and professionals unable to embrace the benefits of these tools.

As we continue in this imposed hiatus and when we return to the workplace, we can expect the breadth of acceptable circumstances to continue to widen. It will be critically important that attorneys take advantage of these new technologies and the benefits that they offer in order to bring a more cost-effective approach to the practice of law.

We will be publishing additional articles addressing how technology is changing the litigation landscape. The first topic is remote depositions (video or telephonic) and "best practices" on how to prepare and conduct these remote depositions. The next article will address additional topics including how these advances in technology may change the "end-game" of the litigation process such as remote mediations and trials.

Remote Depositions – The Same But Different

The concept of remote depositions is not a new one. Many organizations see remote depositions as a cost-effective and efficient strategy for achieving litigation objectives and streamlining the discovery process. These benefits have been recognized by the court system.

The Federal Rules of Civil Procedure and all 50 states allow for depositions to be conducted by remote video conference or telephonically. While there are slight variations among jurisdictions in the procedure and circumstances under which depositions can be conducted remotely, all agree that it is an acceptable and permissible practice.

While the use of remote deposition is not new, your task doesn't end when you make the decision to conduct your next deposition remotely. There are important differences in how any attorney prepares for a remote deposition versus a live deposition. We have outlined in this article several best practices unique to remote deposition proceedings that should be followed beyond the most obvious need to practice with the video streaming solutions you'll be using. Applying these best practices will help ensure that you can

achieve the best outcome possible and be technologically prepared for the remote deposition proceeding.

I. The Deposition Notice

All jurisdictions permit depositions to be conducted in response to a formal notice of deposition. While the content of the deposition notice can drastically change depending upon the status and position of the individual being deposed, the taking of a remote deposition typically requires the notice of deposition to include specific language about the recording method of the deposition, *i.e.* video conferencing. If the original notice was delivered weeks or months prior without the required language, an amended notice can be submitted within a reasonable time prior to the deposition (typically five to ten days prior to the deposition) depending on the state. If the notice window has passed, a stipulation with opposing counsel as to the intended recording method will usually suffice.

II. Involve the Client

After sending your remote deposition notice, it's a good practice to notify your client and invite them to participate in the deposition process. While a "party" to a litigation has the right to attend any deposition, some attorneys (and clients) prefer for this to not occur for a variety of reasons from strategic to economic. The use of remote depositions, however, can reduce or eliminate some of these concerns by allowing clients to attend depositions from a great distance without being seen or heard by others to minimize any possible disruption created by their presence.

If the topic of the deposition is technical or industry-specific, clients may have some valuable insight that can support your efforts. The client can now remotely participate in the deposition by listening and taking notes on the testimony and propose follow-up questions that help with technical issues or place certain testimony into the appropriate context. Most clients are also non-lawyers and therefore, come from an "outsider's" perspective that can allow them to appreciate and understand the testimony as a juror would. This insight is critical to an attorney who can apply it real-time during the deposition. Typical "breaks" during the deposition will allow the attorney and client to interact and exchange notes on any follow-up inquiries or additional lines of questioning.

III. Document Sharing

Today's remote depositions incorporate much more than simply streaming video and audio of the deposition. Many platforms have features that enable you to upload exhibits and documents in advance, and then share them with the witness during the proceeding in real-time. This allows the attorney to avoid the security issues and potential strategic disadvantages of sending paper copies of the documents to the deponent in advance, particularly when the case involves a high volume of documents, and to confront the witness with critical documents organically through the proceeding.

Certain platforms such as Trial Director allow the attorney and the witness to incorporate electronic markings on a document in real-time, such as highlighting or call-out boxes, to emphasize critical portions of the document such as relevant contract language or accident scene photographs. You can use these features to quickly identify these portions of the document, ask the witness questions about these particular sections and move on with your line of questioning. These markings can then be saved as part of the exhibit for later use as part of any dispositive motion or at trial.

It is a good practice that a request should always be made when defending remote depositions that any documents intended to be used during the deposition be distributed to all parties a sufficient time in advance of the deposition (typically five days). This is critical to ensure that the witness is properly prepared for the deposition, can better anticipate lines of questioning and is familiar with the topics that will be discussed as reflected in the distributed documents.

IV. Witness Instructions

Instructions given to the deponent prior to the deposition become even more important in a remote setting. It is critical that the witness understand and appreciate each and every question asked before an answer is given. Depending upon the speed of the remote connection, there may be a small delay or lag in the questions and answers making it critically important that all participants wait until a question or response is given before moving on to another question or topic. Deposition instructions that direct the witness not to have any substantive discussions with his/her counsel during breaks from the deposition also become more important given the remote nature of the proceedings. The witness should be reminded of these instructions before any break is taken.

V. Objection for One, Objection for All

A critical part of the deposition process is raising objections to improper questions in a timely manner before the witness answers. During a live deposition, this is relatively straightforward. Remote depositions present a unique challenge as it can lead to attorneys talking over one another on the video feed in order to preserve their objections. Certain limitations in video conferencing technology may also prevent multiple participants from talking at the same time, leaving an attorney to assume that an objection was raised but not recorded by the stenographer.

One solution to this issue during a remote deposition is an agreement or stipulation between counsel that one objection raised by one party applies to all other parties. This will allow participants to adopt (without speaking) objections raised by another and creates a more streamlined and efficient deposition proceeding. Another option is a pre-arranged physical signal on the video feed, like a simple raise of the hand, which would indicate that an attorney has an objection before the witness answers.

VI. Confronting the Witness

An important tool of a trial attorney is the ability to confront the witness in person in order to gauge the witness's credibility and truthfulness through expressions of body language and physical cues in response to questions. Therefore, it is important that remote depositions allow for a clear and uninterrupted view of the deponent. Testing of the video feed before the deposition is critical to ensure that any lags or delay in the audio or video streams can be addressed before the deposition begins. For those using Zoom video conferencing, distorted audio can be addressed by linking your audio feed through your phone or other device and not the computer through which the video feed is running. "Cross-talk" can be avoided by participants muting their microphones when not speaking.

VII. Real-Time Transcript Streaming

Another advantage of remote deposition is the ability to have a live feed of the deposition transcript as the court reporter is typing. This allows the attorney to take advantage of the efficiencies of word processor applications such as bookmarking topical areas of questions/answers, keyword searches and inserting comments and outlines around testimony for further follow-up questioning.

VII. Off-Site Collaboration

Remote deposition technology (and technology available outside of the remote deposition such as phones and work computers) allows for private chat features that enables participants to discuss important issues/responses raised during the deposition without the need to take a break for off-the-record conversations. This private chat feature allows clients and consulting expert witnesses to participate real-time with the deposition which can help shape key testimony from the deponent.

These are just a handful of best practices that should be applied when participating in remote depositions. Technology has created new mediums and processes that have awakened trial attorneys to using these approaches now and well into the future after the pandemic concerns have passed. A new normal is upon us.

Please be sure to check back in as we will be posting additional articles on technology's impact on the practice of law in the near future.

If you have questions or need more information, contact Victor J. Zarrilli (zarrilliv@whiteandwilliams.com; 856.317.3672), Robert G. Devine (deviner@whiteandwilliams.com; 856.317.3647) or Michael W. Horner (hornerm@whiteandwilliams.com; 856.317.3658).

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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