

NAVIGATING REMOTE DEPOSITIONS: A PRACTITIONERS' GUIDE

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The complications COVID-19 create are plentiful. Not least among them is the balance attorneys must strike between actively moving cases forward while simultaneously adhering to various executive, stay-at-home and Centers for Disease Control orders. For litigators, remote depositions are a great way to strike that balance, but there are countless nuances that litigators must consider when executing these types of proceedings.

While there exists a rhetorical debate as to their efficacy, remote depositions could quickly become the new standard, even after COVID-19 abates. Akin to the advent of the telephone or computer, remote depositions allow for instantaneous and cross-platform connection, to achieve numerous goals. As remote depositions are in their infancy, it remains to be seen just how broad the impact of videoconferencing could have on our profession. Will mediations be able to be remotely completed? Estate plans? Real estate closings? Other transactions? Administrative hearings? Trials? Certainly, these questions could be continuously debated and, in actuality, are more academic, than pragmatic. This guide focuses not on that debate but, alternatively, on the practical considerations a litigator will face when their clients inquire as to the availability of videoconference remote depositions.

Summary of Best Practices

If you do not have time to read this article in its entirety, review this summary list of best practices to consider in scheduling, anticipating and executing a remote deposition.

- Start working on the logistics of your deposition at least a week in advance to ensure your deposition proceeds smoothly.
- Plan how to handle exhibits and ascertain who should receive copies of exhibits, whether electronically or hard copy.
- Subject to the needs of the deposition or potential issues such preferences could cause the deponent/client, defer to the court reporter when considering issues related to exhibit management.
- Do not to assume that merely because a remote video deposition was requested, the parties implicitly agreed to a recorded video deposition for use at trial.
- If you know you are an individual who has difficulty utilizing technology, consult your client and, regardless of who pays for the service, retain a technical support assistant to be present during the proceeding.
- Consider reaching out to opposing counsel or the unrepresented deponent to formulate an agreement that previously requested/subpoenaed documents will be produced a certain number of days prior to the deposition.

- See the discussion in the sections "Days Before the Deposition: What to Consider?" and "Day of the Deposition: What to Consider?"
- If you are taking the deposition, follow-up with the court reporting service to ensure it conducts a diagnostic test on each participant's equipment prior to the proceeding to ensure it has the capacity to effectively conduct the proceeding and knows how to use the platform.
- Ensure that the court reporter obtains a list of contact information for all participants for the day of the proceeding, and designate an emergency conference call coordinator in the event of total technological failure.
- Practice on the platform in advance to ensure that you know how to use all features, including screen sharing, video and audio features.

What Platform is Most Appropriate?

WebEx

WebEx is the approved CISCO provider. WebEx is easy to use and has similar capabilities and appearance to Zoom. Both platforms offer easy screen sharing and the ability to share exhibits. To set up a deposition, simply provide the email contact information for the parties involved to the vendor and they will coordinate sending out meeting invitations. As long as the parties have access to the internet and a device with a camera, they will be able to attend. It is best practice to work with the vendor at least one week prior. On the day of the proceeding, arrive at least 15 minutes early to check connections and make any accommodations which may be necessary.

Zoom

As stated, Zoom is equally equipped to handle the demands of remote deposition by offering a similar interface to WebEx. Zoom, however, has had a number of [data security](#) issues brought to light. It is best to insist that the highest levels of security are used by the host in any Zoom meeting. Zoom does [collect data](#) on its services and these data privacy issues has led to several government agencies avoiding its use.

Other Platforms

Many court reporting services offer remote deposition software to integrate the deposition and court reporting process. Veritext Legal Solutions is a court reporter vendor used by multiple firms that also has its own remote deposition platform. This platform offers video recording and editing. The platform has a shared area to save and introduce exhibits and real-time transcript review allowing parties to see what the court reporter is writing. The Veritext website is user friendly and it is easy to schedule both a court reporter and remote deposition.

Using a Court Reporter Provided Service

Some jurisdictions approve court reporters to administer oaths online. See the discussion in the section "The Current State of Administrative Orders." It is best to check with your jurisdictional rules when evaluating the use of a court reporter for a remote deposition or mediation.

Many of these court reporting services offer their own remote deposition platform. Two of the largest are [Planet Depos](#) and [Veritext Legal Solutions](#). These companies provide the opportunity to book a remote deposition platform and find a court reporter familiar with the platform in the same location. These companies offer a unified platform to avoid the need for additional programs to introduce exhibits or modify recordings to use at trial.

These platforms offer pre-deposition trainings and have posted video recordings of the technology at work to show the ease of use. The court reporting transcripts can be viewed during the deposition to allow review of previous answers. Both also have advanced exhibit technology which allows ease of admission, marking and annotation of exhibits. Planet Depos utilizes Zoom and advertises that its software is end-to-end encrypted, and FedRAMP (Moderate) and SOC2 rated. Veritext Legal Solutions technology meets

HIPAA (Health Insurance Portability and Accountability Act) security standards as a business associate and meets PII (Personally Identifiable Information) federal and state requirements. Veritext maintains an SSAE 16 certified data facility.

These platforms may be preferable to booking a court reporter separately because the reporter will be familiar with the remote technology. Additionally, the ability to view the deposition transcript during the deposition is an added feature which will make it easier to check answers.

It is highly recommended that, if you are defending a deposition and, thereby, are subject to the videoconference platform of opposing counsel's choosing, that you confer with the court reporting agency to determine what software is slated for use during deposition. Remote use complicates parties' ability to troubleshoot so understanding what platform is being used and how it operates is critical.

How Do I Manage Exhibits Remotely?

You decided to proceed with a remote deposition and, if you are the attorney taking the deposition, you have decided what platform to utilize. The deposition is approaching and the time has come to consider the management of your selected exhibits. Preliminarily, there are a couple of choices to make. Either forward the exhibits: (1) to the court reporting service only for the court reporter's live upload of materials during the proceeding; or (2) to the court reporting service and all counsel, or, if the deponent will not be present with any counsel, the deponent. Keep in mind that it is usually easier for a witness to review a hard copy of exhibit and the court reporting agency can also simultaneously show the exhibit on the deposition platform. To retain the true element of surprise that can be so critical in the context of a deposition, the best practice is to provide hard copy exhibits to the court reporter and opposing counsel in advance in a sealed envelope. Then, stipulate that any hard copies of exhibits will be opened on camera once the deposition begins. After forwarding the exhibits to the court reporter, or if the court reporter is not in the same room with the deponent, via email or ShareFile, confirm that the court reporter received the exhibits, the exhibits are accessible and that the exhibits are formatted properly (i.e., transmission did not mess with the integrity of the documents).

Parties should consult the court reporter regarding the court reporter's plan on printing or marking exhibits before the deposition. If the service has that capability, consult with opposing counsel to place an agreement on the record that the exhibits will be formally entered before (if pre-marked), or after (if marked during deposition) the deposition. If the service does not have printing capability, confirm that the court reporter can, and has no problem with, simultaneous maintenance of exhibit marking or printing as the deposition progresses. As you likely know, keeping court reporters happy by deferring to their preferences is highly advisable. As such, best practice is to defer to the court reporter, subject to the needs of the deposition or potential issues such preferences could cause the deponent/client.

What Are Anticipated Issues That Can Be Proactively Mitigated?

Remote ≠ Video

Remember, a remote videoconference deposition is not the same as a videography-based deposition. This point seems simple but could be easily overlooked. Best practice is not to assume that, merely because a remote video deposition was requested, the parties implicitly agreed to a recorded video deposition, or for use of that video at trial. In fact, the standard remote deposition merely insinuates the parties virtually appeared, but the resulting transcript would mirror an in-person deposition. Instead, if your intention is to record the deposition for use of video testimony at trial, consult the local rules and indicate your intention to all parties when scheduling the deposition, acquire any necessary consent and be sure to make the distinction in your notice of deposition. Finally, consult with your court reporting service to ensure that the assigned court reporter is a certified videographer.

Not a Tech Giant

Certainly, the law is notorious for being slow on the uptake regarding technology in the workforce. While larger firms do better than most in embracing the efficiencies technology provide, such resources are

often intimidating to even the most technologically-apt attorneys. These apprehensions can be compounded by the difficulty of working with foreign software that is duly critical to the seamless execution of the remote deposition. Some court reporting services will allow, in exchange for a supplemental fee, to provide a technical support assistant who is present during the deposition to manage switching from screen-to-screen, uploading exhibits, etc. Retention of such a person, who would be present during the proceeding, allows you to focus on the duties owed to your client and, most importantly, to do what you do best. Best practice dictates that if you know you are an individual who has difficulty utilizing technology, you consult your client and, regardless of who pays for the service, retain a technical support assistant. The estimated \$100.00 will be well worth worry-free technology woes during the proceeding.

Days Before the Deposition: What to Consider?

Numerous depositions involve requested documents from opposing counsel or the deponent (by discovery or subpoena) that are needed prior to, or at, the deposition. This is particularly true with expert witnesses. Often, expert witnesses appear at deposition with massive files, which, clearly, would complicate, if not obviate, the remote deposition. Best practice dictates that the attorney considers reaching out to opposing counsel or the unrepresented deponent to formulate an agreement that the requested documents will be produced a certain number of days prior to the deposition. Such production effectively acknowledges that the deponent complied with the subpoena or local/court rules by "bringing" requested documents to the deposition. Having adequate time to review these files is invaluable, as opposed to having to object and maintain an open record, pending review of the files.

Remote deposition requires integration with various audio and video equipment and best practice, in turn, demands multiple considerations prior to remote deposition. The parties should determine:

- where the deponent will be physically located during the proceeding;
- how the deponent plans to connect to the remote deposition;
- whether the deponent has necessary video equipment to conduct the proceeding;
- that the proper video conference link was properly distributed to all parties, including any of your clients; and
- whether the court reporter will physically be with the deponent during questioning.

If possible, opt for the court reporter to be with the deponent to ensure a more accurate transcript. If, as is likely the case for the foreseeable future, it is not possible that the court reporter can be with the deponent during questioning, consult your local rules or the table at the end of this document as to the ability for a deposition in your state to proceed, under oath, without the court reporter being present with the deponent.

Sufficient testing should include more than merely appearing on screen. Work with your court reporting service to have it run a couple of practice questions between all connections and present a representative exhibit to ensure there is no audio/video lag and that such connections are strong.

Prepare for the worst, but hope for the best – unfortunately, sometimes, for reasons beyond most of our control, technology fails. Best practice is to anticipate failures. That way, in the event the video system fails, you can, as seamlessly as possible, switch to a telephonic deposition (typically, this is done by working with your court reporter). Finally, in the event this happens, and before actually proceeding with a telephonic deposition, remember to place on the record the time the system crashed, the time the telephonic deposition begins and that the parties have all agreed to continue the proceeding telephonically.

Day of the Deposition: What to Consider?

The following are suggested best practices for consideration on the day of the deposition. Preliminarily, place a stipulation on the record that the deposition will be conducted remotely, by videoconference, and that the oath will be administered remotely, with specific citation to the rule in your jurisdiction that allows for oaths to be administered in that format. Request, on the record, that all electronic devices, *not* necessary for the deposition, be put on silent. At all times, demand that the deponent be readily visible, on screen. To do so, ensure that videoconference windows display a "trial-like" view of the witness, the court reporter and all counsel. After all, being remote does not mean the written/unwritten professionalism rules are relaxed.

More importantly, the appearance of propriety must be maintained at all times. No counsel should have the opportunity to discuss a deponent's testimony with the deponent during the proceeding merely because the parties are remote. To that end, request that chat functions be solely controlled by the court reporter and obtain an affirmation from the deponent that they will not communicate with anyone, in any form, during the deposition.

Finally, many jurisdictions place time limits on counsel's ability to conduct a deposition longer than eight (8) hours. Consider stipulating with opposing counsel to extend such time to allow for what you can expect will be longer procedural hurdles, increased frequency of breaks, potential technical difficulties, presentation of exhibits, etc.

During the Deposition: What to Consider?

The following are suggested best practices for consideration during the deposition. Allow the court reporter ample time to put all appearances on the record; the proceeding will likely take a bit longer than normal, so it is important to clearly communicate who each attorney represents. Typical indicators of representation are more difficult on a software platform (i.e., the deponents' counsel will not be sitting next to deponent). Akin to the electronic device recommendation, if not speaking on the record, mute your microphone to avoid background noise and other distractions. As with all depositions, speak slowly, one at a time, read slowly from documents, and, as to any identifiers (names, streets, witnesses, etc.), request that the deponent spell out the names of each to ensure an accurate record. At the conclusion of the deposition, do not rush out, but, instead, ensure that the court reporter has what is needed to create as accurate a record as possible. In this vein, such steps will likely mirror in-person proceedings (confirming number of exhibits, that all exhibits are properly marked, etc.). Upon completion of the deposition, review the procedural differences that were agreed to so there is no confusion as to how exhibits will be disseminated, whether the record will remain open, etc.

The Current State of State Administrative Orders

Below is brief survey of numerous State Administrative Orders that affect remote proceedings. This list is not to be construed as exhaustive and can only be interpreted to represent the current state of administrative orders in the referenced jurisdictions. COVID-19 is rapidly changing and, as such, it is likely, by the time you have the opportunity to digest this information, some jurisdictions will have already issued new Administrative Orders that could affect the considerations contemplated in this document.

ADMINISTRATIVE ORDERS AS TO REMOTE PROCEEDINGS¹

Jurisdiction	Administrative Order
Fed. R. Civ. P.²	Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28 "[A] deposition may be taken before any person, at any time, or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition." Fed. R. Civ. P. 29

<u>Alabama</u>	Permitting court reporters to administer oaths by audio-visual technology and suspending all contrary rules.
<u>District of Columbia</u>	DC R RCP Rule 30, which expressly addresses depositions taken by remote means in part (4), provides that "[t]he parties may stipulate--or the court may on motion order--that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place in the District of Columbia and where the deponent answers the questions." The Rule goes on in part (5) to provide that "[u]nless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28."
<u>Florida</u>	Provides for oaths to be administered remotely and suspends any Florida rules, orders, or opinions that might be read to limit or prohibit the use of audio-video equipment to do so.
<u>Georgia</u>	If a deposition is to be taken by remote means, a stipulation is required: "Notwithstanding the foregoing provisions of this paragraph, a deposition may be taken by telephone or other remote electronic means only upon the stipulation of the parties or by order of the court. For purposes of the requirements of this chapter, a deposition taken by telephone or other remote electronic means is taken in the state and at the place where the deponent is to answer questions." Ga. Code Ann. § 9-11-309(b)(4). Section 9-11-29 permits the parties to stipulate, unless the court orders otherwise, to "[p]roved that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and, when so taken, may be used like other depositions."
<u>Louisiana</u>	Parties may stipulate to any manner of administering oaths or taking of depositions: "Unless the court orders otherwise and except as provided by Article 1425, the parties may by written stipulation provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and modify the procedures provided by these rules for other methods of discovery."
<u>Maryland</u>	Provides for conduct of evidentiary and non-evidentiary proceedings by remote means.
<u>Mississippi</u>	Provides that any person qualified to administer an oath in the State of Mississippi may swear a witness remotely by audio-video communication technology from a location within the State of Mississippi, provided they can positively identify the witness.
Texas	Allows all Texas courts to suspend all deadlines and procedures for specified time, permit any hearing, deposition, or other proceeding to occur remotely, consider as evidence sworn statements or testimony taken remotely, extend statutes of limitation, and more; effective March 13-May 8, 2020.
<u>Virginia</u>	Sup.Ct.Rules, Rule 4:7A specifically permits depositions to be taken by telephone or videoconference: (a) When Depositions May Be Taken by Audio-Visual Means. Any depositions permitted under these Rules may be taken by audio-visual means including, but not limited to, videoconferencing and teleconferencing, as authorized by and when taken in compliance with law. (2) In addition, all counsel present on behalf

	of any party or witness shall identify themselves on camera. The oath for witnesses shall be administered on camera.
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¹ Under the "jurisdiction" column, each such jurisdiction is hyperlinked with a copy of the respective order applicable to the jurisdiction. Be sure to review the Order to ensure you are taking proper action as to remote deposition proceedings.

² Numerous Administrative Orders that are applicable to federal jurisdictions are issued, individually, by the court of the respective district where each such court sits. In addition to this list, it is recommended that consultation of any such orders be completed prior to proceeding with a remote deposition in a federal case.