



Professional Perspective

# Mastering the Virtual Deposition

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# Mastering the Virtual Deposition

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The legal profession has long remained unchanged in core aspects, including key tools of advocacy such as evidence gathering and witness testimony. Now, almost overnight, the Covid-19 crisis and shelter-in-place orders have forced counsel to re-invent the main mode of deposition, a critical component in the U.S. system of discovery and civil trial work. Covid-19 may change the profession for good.

Depositions, for now, have to be taken entirely online, with witnesses, counsel, court reporters, and others all participating remotely and from different locations. This abrupt change from in-person practice to a virtual construct presents a host of challenges. But, ultimately it could lead to a “Law 2.0,” where remote deposition taking is the norm rather than the exception.

Indeed, adapting to this new technology is not a choice, but a necessity. It is arguably mandated by the ABA Model Rules. Model Rule 1.1 requires that “A lawyer shall provide competent representation to a client. Competent representation includes the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Comment 8 to this rule makes clear that technological competence is a core aspect of this duty: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology ....” The new normal of remote depositions, and the technology that enables them, likely falls within this duty. Lawyers cannot simply put their cases and their obligations to their clients on hold until they can take depositions the old-fashioned way. Competent representation requires technological adaptation, now more than ever.

## Challenges and Considerations

### **Now or Later?**

Strategy questions are critical when it comes to any deposition. They are magnified for a remote deposition. They begin with an array of up-front considerations of whether to go forward with a remote deposition at all, including the importance of the witness to the case, the difficulty in coordinating the logistics, how contentious the case is, the trustworthiness (or lack thereof) of opposing counsel, any risks of witness coaching, and broader witness cooperation, among other factors. Right now, when in-person depositions may not yet be possible, certain depositions may need to be postponed if they cannot be effectively taken by remote means.

### **Remote or In-Person?**

But even when there is a return to the office, counsel will need to consider the strategic impact of taking a virtual deposition, if, for no other reason than to assess whether the witness warrants the time and expense of taking it in person. Indeed, there is no doubt that budgeting and case management, including scheduling orders filed with the court, will now encompass the question of how and when to deploy remote practice capabilities. Clients may become more selective about whether an in-person deposition is worth the expense, especially when it involves attorney travel, if there is a viable remote deposition-taking alternative.

### **Technology Capabilities**

As practitioners and clients are learning, taking a remote deposition has a variety of unique challenges. These include threshold connectivity and technological issues, including whether all of the participants have a computer, microphone, camera, and stable internet connection (note that the witness is likely the weakest link for technology and connection purposes).

### **Deposition Exhibits**

The most significant challenge in the remote deposition context, however, is the use of the deposition exhibit. This bears directly on which documents the lawyer uses to question the witness and how and when to use them (including whether and how to mark up any exhibit). Other challenges arising from the use of remote exhibits include how to simultaneously

present a document in real time to participants in different locations each remotely attending the deposition, how to introduce the document to the court reporter and witness, and how to have it stamped as an exhibit after it is introduced.

### ***'Reading the Room'***

Challenges in taking a virtual deposition do not stop at logistical and exhibit issues. The art of taking a deposition in person changes complexion in the remote context. For one, the ability to read the people in the room diminishes, since the camera shows only the face on a screen, often in a "Brady Bunch" style alongside other participants. Similarly, the remote deposition format may make it harder to establish a rhythm during questioning.

### ***Monitoring Opposing Counsel***

Unfortunately, taking a deposition remotely also makes it difficult, if not impossible, to monitor opposing counsel and prevent them from engaging in unethical or improper conduct. This poses a real risk to the integrity of the deposition. For example, in a remote deposition in which the defending counsel alone is physically present with the witness (not a practice recommended), the questioning attorney cannot prevent the proverbial kick under the table.

Even in the likelier scenario of the defending attorney also being physically separate from the witness, the taking attorney cannot fully police opposing counsel's ability to text or otherwise electronically communicate with the witness during questioning. The following tips and tricks address some of these issues.

## **Technology Solutions**

There are three key mechanical aspects of a deposition that require technical adaptation to operate in a remote environment—video, real-time transcription, and document exchange. The best technological solution may change depending on the deposition or other intended use (such as interviews or hearings). The unicorn in this remote universe is the platform that seamlessly integrates video, real-time transcription, and document introduction and delivery.

Various legal vendors have attempted to provide an all-in-one solution. To date, though, the available options for such a comprehensive solution fall short. As a result, the best offerings currently on the market address each requirement individually. The applications can then be run simultaneously in split-screen or through multiple computers or tablets.

### ***Video Streaming***

In many ways, the video stream is the most important technical aspect to the deposition. That is how the witness, and each participant, will virtually appear to one another. The only remote alternative to a video-streamed deposition is a telephonic one. This will likely continue to be used, but may fall out of favor as video options become increasingly robust. Counsel must determine how to manage the video stream or multiple video streams that come from each participant—deponent, opposing counsel, and client representative. They must also determine how the video will be recorded, including whether a separate videographer should be present to formally memorialize the viewing deposition.

Even less tech-savvy lawyers can take comfort here that multi-party video is relatively easy to manage, so long as all attendees have a computer or tablet, a decent connection, a camera, and a microphone. There are a number of multi-party video streaming platforms available. That being said, Zoom is fast becoming ubiquitous in this area, so much so that many vendors are not bothering to create their own video streaming technology. Instead, they are building on the Zoom platform, adding additional layers of security. Many vendors also offer active management of the video platform and on-the-fly trouble shooting, all of which can be done by the videographer taking the recording or another hired technician.

### ***Real-Time Transcription***

During in-person depositions, court reporters already have a tough enough time transcribing when a witness and counsel speak over each other, or when counsel interrupt during in-person depositions. In a remote deposition, there are new complications for the transcriber when, for example, it is not clear who is talking, when there are errant background noises, where there is confusion as to which document is being referenced, or when one party is on mute or has technical issues. These are serious challenges for even an experienced court reporter.

As a result, real-time transcription becomes much more critical, and must account for the reality that the court reporter will likely not be in the same room as the witness or other deposition participant. Testimony may be harder for the court reporter to hear, and accurately transcribe, in real time. Real-time transcription allows counsel to confirm the accuracy of

the record as it is being created, rather than waiting for the transcript to come back only to find out there were gaps or errors. To avoid these issues, it is important to make sure that the court reporter has experience taking a remote deposition or to practice with them in advance.

### **Document Handling**

Remote depositions prevent the attorney from taking a large box of documents, handing them to the witness across the table for the court reporter to mark them as exhibits as would be done in an in-person deposition. Historically, counsel taking a remote deposition were often required by practice, if not by rule, to present their deposition exhibits to the court reporter and opposing counsel before the deposition took place in order to ensure each party had accurate copies. This had obvious strategic downside for taking counsel, who was generally required to “tip their hand” by providing opposing counsel with their exhibits, and the order, in advance.

Although hard-copy documents can be shipped ahead of time, this also requires that counsel prepare significantly in advance and makes it difficult to make any additions or changes close in time to the deposition or on-the-fly. That is true even if the disclosure risk is mitigated by sealing the exhibits until they are introduced during the deposition. Sending hard copies also precludes the use of video or native files.

Advances in remote technology have improved the way in which exhibits can be used in remote depositions. Now, counsel are not required to send exhibits in advance. Rather, counsel in remote depositions can distribute and introduce exhibits in real-time. The best method depends on the circumstances of the case. Zoom and other video-streaming platforms have a share-screen function, which allows users to share their screen, a portion of the screen, or a specific program. In small cases, where there are fewer documents or where the exhibit is a video or other native file, this is a good method to show the document. However, this method does not address the issue of delivery and may not be good for voluminous depositions or more complex cases.

Documents may also be delivered via email. Email is not ideal because it is cumbersome and hard to track, requiring multiple emails and limiting the size of the file that can be sent. Zoom and other platforms generally offer a function that allows documents to be sent directly to all participants. The court-reporter would then stamp and distribute a set of the official exhibits after the deposition. Here, too, however, the downside is that it can become difficult to track these documents, there is no running log, and control over the documents is lost once the documents are sent to the participants.

Perhaps the best solution for cases with voluminous documents or a number of depositions is to use a platform specifically designed for this precise purpose. There are several on the market, but the idea is that this platform runs alongside the video and real-time feed. Taking counsel, opposing counsel, and the witness will each have a separate login.

Taking counsel can drag and drop their potential exhibits into a case library. During the deposition, counsel can mark-up, stamp, and introduce documents that have been loaded to the platform in real-time. These documents then feed into separate libraries containing only the stamped and introduced exhibits, which opposing counsel and the witness can independently access and review. These platforms allow quick and easy on-the-fly document loading (even during the deposition).

The applications also allow access to any document introduced in the case at another deposition if the platform was previously used. This becomes a significant advantage over traditional depositions, particularly in cases using continuous exhibit numbering in multiple depositions over many months or years. A second chair co-counsel, or perhaps a paralegal or technician, can provide support during the deposition and, through the platform, run the exhibit function. In this way, the exhibit applications best simulate the distribution and introduction of documents during in-person depositions.

The downsides of these platforms—which are cloud-based systems—include a limitation on the type of files that can be distributed (no native files) and file size (only short videos). In such cases, screen-share and file delivery through the video platform can be used. Cost considerations also come into play. The performance concerning exhibit use may be better with the help of a junior associate, with whom the taking attorney can practice ahead of time and develop a joint familiarity with the key documents. But exhibit technicians generally charge out at materially less per hour than a junior associate performing some of the same preparation work.

## Best Practices

There are many moving parts in the remote deposition. It is important to become familiar with each aspect, your preferred technological solutions, and how to use them. Plan for things to go wrong and how to respond in each instance. By identifying potential issues ahead of time, many can be avoided or, if not avoided, contingency plans can be set up in the event there is a platform failure. Preparation, testing, and “live-fire” practice is key. In addition, there are a number of best practices that can facilitate a successful virtual deposition.

- Confirm that the witness and opposing counsel have the necessary devices. Test internet access, audio, and video feeds in advance, ideally by at least two days before the deposition. The court-reporting service may do this for you as part of their offerings. If possible, arrange for the person acting as the court reporter to be the same person involved in the advance testing.
- Know the capabilities and limitations of your virtual deposition platforms and how to use them.
- Consider conducting a mock virtual deposition using the technology that will be used at the actual remote deposition, with colleagues acting as the remote witness, court reporter, and opposing counsel.
- Review local law on introduction of deposition testimony, transcripts, and videos, including requirements for certified records and authentication. In general, and depending on state/local rule, a transcript from a remote deposition should be indistinguishable from a transcript from an in-person deposition for purposes of how it can be used in the case.
- Obtain stipulations from opposing counsel and the witness that the remote video deposition, along with remote swearing in of the witness, is acceptable, and confirm the time and date.
- Consider a broader stipulation and agreement concerning objections, conduct during the deposition, and the authentication and admissibility of the deposition transcript and recording.
- Confirm the non-waiver of privilege and work product arising from any inadvertent sharing of privileged or work product documents, or communications in a virtual break-out room.
- Confirm non-retention of any confidential documents by those not subject to a protective order.
- Confirm that anyone appearing in the deposition can potentially be recorded by audio or video.
- Determine where all of the attendees will be located, and share contact information for each location.
- Schedule the deposition with the vendor, specifying in the notice that the deposition will be remote and providing the email address for each attendee.
- Adjust questioning style for the virtual environment.
- Modify deposition techniques, considering factors like uncomfortable silences and eye contact.
- Speak slowly and clearly and confirm an accurate record.
- Be very descriptive and identify documents specifically and by Bates number for the record.
- State any peculiarities on the record, for example, if the witness keeps looking down.
- Remember that the virtual deposition is on the record and consider dress and virtual background.
- Consider opportunities for junior attorneys to observe for training purposes.

Like any new skill, mastering the remote deposition and the related tools and applications takes time, research, and practice. Yet, it is incumbent upon senior and junior counsel alike to become proficient with remote technologies, because clients, especially sophisticated ones, will expect it. And based on discovery rule amendments and court reopening orders that are already being issued, courts will expect it too. Even after the pandemic ends, a broader use of remote practice will be the new normal.