

CONDUCTING REMOTE DEPOSITIONS DURING COVID-19

By Drew Harbur

We have all experienced innumerable changes to our personal and professional lives over the last month. Many of us are working remotely and navigating the various challenges accompanying that shift. Additionally, it seems that each day brings new orders/guidance with subsequent revisions, modifications and adaptations. For those of us practicing in multiple jurisdictions and across state and federal courts, it has required considerable diligence to monitor each court's varying approach to the pandemic. But despite the uncertainty surrounding the courts, one thing is certain: as trial attorneys, we must continue to find new ways to litigate our cases and prepare to win them at trial.

Last week, I took a deposition using Zoom. I've received numerous emails over the last month, mostly from court reporting vendors, about how this *could* work. I've also seen a number of articles and MCLE fliers touting hypothetical "tips and tricks" for conducting remote depositions. However, I have not read an article written by an attorney describing their real-world experience. As such, my hope is that the below saves you some time/anxiety as you continue preparing your own cases for trial.

The Setup

I used two, 24-inch monitors, a Logitech web-cam/microphone combination (to pick up my video and speech), and a speaker-bar (to hear others). I was fortunate enough to be able to use a hard-wired internet connection, rather than Wi-Fi which, as I'm sure you've found over the last month, can be frustrating.

The left-side monitor contained (1) a video-feed of the court-reporter, the witness, opposing counsel, me, (2) an electronic copy of my deposition outline, and (3) a blank Word document for note-taking. The right-side monitor was reserved for screen-sharing and introducing exhibits (addressed below). In other words, the participants could only see me and the right-side monitor, if/when I chose to share it.

Additionally, I had an additional paper copy of my outline on a document stand (see far left). Finally, I had yellow legal pad on standby because, you know, we are lawyers and some things will never change.

Proceedings

Practice Run

The court reporting service offered the parties and the witness the opportunity to conduct a test-run two days before the actual deposition. I would highly recommend either doing this or requesting that it be offered. You will immediately detect technical issues and hopefully have time to address them to prior to the deposition. Also, the court reporting service will likely have a representative attend to walk everyone through the basics. If you are going to be introducing exhibits through screen-share, share some similar-looking documents and make sure the witness' setup allows him/her to adequately view the exhibit. Also, I've found that many audio issues, at least those unrelated to spotty Wi-Fi, can be solved by using headphones plugged directly in to your device. Make sure the headphones also have a microphone. You can find these for under \$20 online and they work far better than the average microphone on your computer. Additionally, most headphones will eliminate the echoes we often hear when someone is sitting in a makeshift home office with hard floors/walls.

Oath

The Judicial Council's recently issued Emergency Rule 11 allows witnesses to be sworn in remotely by the deposition officer, without the need for a stipulation or further order. This alters the requirements of California Rule of Court 3.1010(c)-(d). (See Judicial Council Emergency Rule 11: Depositions through remote electronic means, issued April 6, 2020). This was a non-issue. The court reporter read some additional verbiage into the record, making clear her legal authority for administering the oath in this manner.

Exhibits

My opposing counsel prepared hard copies of exhibits in advance of the deposition and mailed them to the witness, the court reporter, and me. By contrast, I prepared all of my exhibits as individual PDFs and saved them on my computer. Under this method, introducing the exhibits involved the following steps: (1) Manually modifying the title of each pdf to include the next-in-order exhibit number, (2) opening the PDF and moving it into the "screen-share" portion of the Zoom software, (3) scrolling through the document so the witness and opposing counsel could review, (4) being able to "stop," "scroll up," and "scroll down," upon request.

I chose this approach because most of the exhibits I introduced were relatively brief email chains and I preferred, for strategic reasons, not to share them with the witness/counsel in advance. I would have considered a different approach if the deposition required the introduction of lengthy documents (medical/financial records) or documents in alternative formats, like excel charts. Had that been the case, I would have pre-marked a set of electronic exhibits and emailed them to the witness/opposing counsel just before the deposition began or at the start of my questioning.

Note that the screen-share approach assumes your witness will be using a large enough monitor to effectively review the exhibits. This particular witness was using a standard iPad, which was plenty large, especially because Zoom allows participants to enlarge and orient documents during screen-share.

At the conclusion of the deposition, I created a zip-file of each exhibit I had introduced and emailed them to the court reporter.

Objections

As with any deposition, counsel needed to make objections. This took place in exactly the same way it would have during an in-person deposition. Sure, there were a few occasions where we spoke over one another (to the court reporter's chagrin) and had to retrace to ensure the record was complete. But, let's be honest, this happens all the time during in-person depositions.

Bottom Line

Overall, the deposition proceeded far more smoothly than I would have expected. In fact, based on my experience, I am expecting to take 4-5 more remote depositions in the next month and on various types of cases and involving both party and third-party witnesses. Of course, there are many strategic considerations to taking depositions in this manner. However, as we've all now discovered, it is going to be some time before courts return to normal. As such, it may be time to incorporate remote depositions as part of your trial preparation and strategy.

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