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Remote Depositions In The Era Of COVID-19

The logo for Robins & Kaplan LLP is displayed on a dark red background. The text "ROBINS" is in white, followed by a red diagonal slash, and "KAPLAN" is in white. Below "KAPLAN" is "LLP" in a smaller white font.

The COVID-19 pandemic has created an urgent necessity to conduct depositions remotely. Several court reporting companies have developed proprietary, remote, audio-visual deposition technologies, and others have partnered with software-as-a-service (SaaS) companies to provide the same. Here's a primer on how to navigate some common issues that may arise in remote depositions.

Taking the witness's oath. Many states' rules of civil procedure traditionally require a court reporter or officer before whom the deposition is to be taken to "personally" administer the witness's sworn oath.¹ Similarly, Fed. R. Civ. P. 30(b)(5) includes the requirement that, unless the parties stipulate otherwise, the deposition be "conducted before an officer appointed or designated under Rule 28," and that the deponent be placed under oath by that officer.

Several courts recently issued emergency COVID-19 Orders, allowing an oath to be taken remotely, via audio-video conference. The Massachusetts Supreme Judicial Court articulated its temporary provision as follows:

Until further order of the court, at any deposition . . . an officer or other person before whom the deposition is to be taken is hereby authorized by the court to administer oaths and take testimony without being in the presence of the deponent, so long as the officer or other person before whom the deposition is to be taken can both see and hear the deponent via audio-video communication equipment or technology for purposes of positively identifying the deponent.²

Many other state supreme courts have implemented similar or identical provisions,³ whereas others have not yet addressed the issue. The Hon. Lewis J. Liman, U.S.D.J. in the U.S. Southern District of New York, addresses the ambiguity of Fed. R. Civ. P. 30(b)(5) in the Court's COVID-19 protocols:

For avoidance of doubt, a deposition will be deemed to have been conducted 'before' an officer so long as that officer attends the deposition via the same remote means (*e.g.*, telephone conference call or video conference) used to connect all other remote participants, and so long as all participants (including the officer) can clearly hear and be heard by all other participants.⁴

Thus, when planning a remote video deposition, a practitioner should be cognizant of the oath swearing requirements mandated by both the relevant jurisdiction and the individual judge.⁵ If there is ambiguity as to how an oath can be administered remotely, counsel should seek further guidance from the court.

In addition, under most of the COVID-19 orders entered by courts, both parties should stipulate that an oath can be administered remotely. The court reporter can positively identify the witness on the record, and request the witness present a photo ID to the camera, such as a driver's license, prior to administering the oath.

HIPAA compliance, unintended attendees, and witness coaching. While several court reporting services provide audio-video conferencing, some are more secure than others. For example, depositions involving private healthcare information may implicate the need for HIPAA compliance by the software provider. Not all out-of-the-box video conferencing software securely encrypts and transmits data point-to-point, and not all video conferencing software companies offer the HIPAA Business Associate Agreement⁶ where the company agrees to be responsible for keeping all patient information secure and to immediately report any breach of personal health information. Before choosing to work with any vendor for a deposition concerning private healthcare information, you should confirm that the company meets these security standards.⁷

Certain services log and show all participants, while others simply provide a forward-able call-in number or URL. Regardless, there is always chance that an uninvited participant is listening in on a legitimate participant's broadcast. A court-ordered remote deposition protocol requiring all attendees to announce themselves at the beginning of the deposition is an advisable but imperfect solution.

It is also more difficult to prevent improper coaching of a witness when all attendees are remote. It may be impossible to tell if someone is in the room with the witness, and depending on the camera view of the witness, it could be hard to tell if the witness is receiving typed instructions in real-time. One solution is to request the witness sit several feet back from his or her laptop, so he or she cannot read messages while giving testimony. Noting long pauses between questions and answers for the stenographic record may also discourage coaching. Practitioners should inform the court if they have an inkling the other side is attempting to circumvent proper protocol and ethical rules.

Marking and using exhibits. First, a practitioner should be well-versed on how to utilize a court reporting service's exhibit sharing features *before* the deposition. These features are not always intuitive or easy to use on the fly. But, these companies are eager to train customers and demonstrate their products, and many have good screen-sharing features for marking exhibits at depositions that allow all parties to view the exhibit in real-time.

Many services allow practitioners to pre-upload their exhibits, and share the exhibit with the witness when the exhibit is marked at the deposition. Services vary concerning when these exhibits become available to all participants, as well as, whether during the deposition, a practitioner can change exhibit numbers or the order of the exhibits. For many reasons, the

deponent should be able to review the exhibit in its entirety, just like he or she would at an in-person deposition, before answering questions or confirming its veracity. It is untenable for the questioner to simply hold a multi-page document in view of the camera and ask questions about the exhibit, without the witness having the opportunity to review it.

Other options for exhibit-sharing with the deponent include sending the deponent exhibits electronically during the deposition (or beforehand), which can be problematic for several reasons, as well as, sending the deponent physical copies of the exhibits prior to the deposition. If giving your deponent the roadmap to your deposition beforehand is unpalatable—it should be, if the deposition is adversarial—then one option is to come to an agreement beforehand that the deponent will only break the seal of the box on-camera at the deposition. Most reporting services' technologies allow in-time exhibit sharing, obviating the need for such measures.

Some remote deposition services also allow the questioner the ability to electronically annotate, highlight, and scroll through the screen-shared exhibit. If, however, you want to personally handle the exhibit as well, highlight portions by hand, and draw in the margins, while having an image of the document on the remote deponent's screen, you should consider purchasing a high definition document camera, such as the Ipevo.⁸ If you intend on using a document camera, you should run a demo well before the deposition, and make sure you have a dedicated video window for exhibits under your document camera.

Arguing away from the deponent. Traditionally, when counsel places arguments on the record, or when the need arises to discuss a topic that the deponent should not hear, the witness can leave the room. What do you do in a remote deposition? Many services, such as, Zoom, offer virtual breakout rooms, where a host can invite specific meeting participants, and the meeting can be recorded or not.⁹ Some services also feature private chat text. Another practical option is to simply have a separate conference call between the practitioners and the court reporter.

Conclusion. COVID-19 is truly a crisis, but it is not necessarily a reason to delay all depositions in all cases. Fortunately, many court reporting and SaaS companies provide remote audio-visual deposition services that can assist litigators to move cases forward in these difficult times. When you have chosen a service that fits your needs, do a practice or training session before the deposition. With this technology, you will be able to go into your deposition confidently and focus on the substantive issues of your case.

For more COVID-19 resources, please visit Robins Kaplan's [COVID-19 Resource Center](#).

¹ See, e.g., Mass. R. Civ. P. 30(c); NY CPLR 3113(b); Ill. Sup. Ct. R. 206(2)(h).

² Massachusetts Supreme Judicial Court Order for the Administering of Oaths at Depositions via Remote Audio-Video Communication Equipment (Mass. Mar. 20, 2020), *available at* <https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-order-for-the-administering-of-oaths-at>.

³ See, e.g., Supreme Court of Florida Order for COVID-19 Emergency Procedures for the Administering of Oaths Via Remote Audio-Video Communication Equipment (Fla. Mar. 18, 2020), *available at* <https://www.floridasupremecourt.org/content/download/632105/7182680/AOSC20-16.pdf>.

⁴ Hon. Lewis J. Liman, COVID-19 Emergency Individual Practices in Civil and Criminal Cases (S.D.N.Y. Mar. 19, 2020), *available at* https://nysd.uscourts.gov/sites/default/files/practice_documents/LJL%20Liman%20COVID-19%20Emergency%20Individual%20Practices%20in%20Civil%20and%20Criminal%20Cases_FINAL_3.19.2020.pdf.

⁵ Some courts have suspended depositions and appearances of certain types of medical professionals altogether. See, e.g., Order Suspending Depositions and Appearances of Medical Professionals Involved in Addressing COVID-19 (N.J. Mar. 24, 2020), *available at* <https://bergenbar.org/notice-to-the-bar-order-suspending-depositions-and-appearances-of-medical-professionals-involved-in-addressing-covid-19/?ct=%E2%80%A6>.

⁶ More information on HIPAA-compliant Business Associate Contracts is *available at* <https://www.hhs.gov/hipaa/for-professionals/covered-entities/sample-business-associate-agreement-provisions/index.html>.

⁷ An analysis of HIPAA-compliance using the Zoom audio-video conference service is *available at* <https://www.hipaajournal.com/zoom-hipaa-compliant/>.

⁸ One popular brand is the Ipevo document camera: <https://www.ipevo.com/>.

⁹ Zoom's Breakout Room Instructions are featured here: <https://support.zoom.us/hc/en-us/articles/206476093-Getting-Started-with-Breakout-Rooms>.