

Expert Q&A on Remote Depositions

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An Expert Q&A with Wes Earnhardt, Scott Reents, and Matthias Thompson of Cravath, Swaine & Moore LLP on the key issues and considerations for remote depositions. This Q&A offers guidance on taking and defending depositions when all participants attend by teleconferencing or videoconferencing tools, including virtually handling exhibits and anticipating technological issues.

Due to the ongoing 2019 novel coronavirus disease (COVID-19) outbreak, many courts suspended or modified their rules and procedures to accommodate remote depositions. For the latest developments in all US federal district and appellate courts and select state courts (including court closures, trial continuances, deadline extensions, changes in filing procedures, and remote procedures), see [Federal Courts Update: Impact of COVID-19 \(W-024-4634\)](#) and [Select State Courts Update: Impact of COVID-19 \(W-024-5131\)](#).

Taking and defending remote depositions permits litigants to advance discovery when the deposition participants are in separate locations. Litigants may conduct depositions remotely either by agreement or in accordance with a court order. Remote depositions, however, can present challenges to counsel taking the deposition, including effectively using exhibits, ensuring all participants' technology

capabilities, and controlling the pace of the deposition. Defending a remote deposition can also present challenges, including effectively preparing the witness, making timely objections, and communicating confidentially with the witness during breaks when permitted.

This Q&A provides an overview of key considerations and best practices for remote depositions in civil actions, with references to the Federal Rules of Civil Procedure (FRCP). Counsel conducting remote depositions in state court should consult the corresponding state civil procedure rules.

Practical Law asked Wes Earnhardt, Scott Reents, and Matthias Thompson of Cravath, Swaine & Moore LLP for their insights on preparing to participate in remote depositions.

WHAT IS A REMOTE DEPOSITION?

A remote deposition is one in which all participants are in different locations and appear by telephone or videoconference. The participants in a remote deposition are the same as those who attend an in-person deposition, including:

- The witness.
- The counsel taking the deposition.
- The counsel defending the witness at the deposition.
- The court reporter.
- An interpreter, if necessary.
- A videographer, if necessary.
- Co-counsel to either or both of the taking and defending counsel.
- Counsel for other parties to the litigation.

A fully remote deposition has historically been rare, but becomes more common due to extraordinary circumstances, such as the stay-at-home and travel restrictions imposed during the 2019 novel coronavirus disease (COVID-19) outbreak. In contrast, partially remote depositions have been more common during the normal course of a litigation. In a partially remote deposition the witness, court reporter, deposing counsel, and defending counsel are generally together in one location while other participants, such as a party's co-counsel, participate by telephone or videoconference.

This Q&A focuses on the fully remote deposition that presents counsel with unique challenges and considerations.

WHAT ARE THE RULES GOVERNING REMOTE DEPOSITIONS?

Federal Rule of Civil Procedure 30 allows parties to conduct remote depositions if they either:

- Stipulate to the remote deposition under FRCP 29.
- Obtain a court order permitting the remote deposition (see, for example, *Sinceno v. Riverside Church of N.Y.*, 2020 WL 1302053, at *1 (S.D.N.Y. Mar. 18, 2020)).

Counsel intending to conduct or defend depositions remotely should also consult:

- The district court's local rules.
- The judge's individual rules.
- Any relevant standing orders (usually posted on the court's website).
- Any case-specific orders and stipulations.

To safeguard a remote deposition from an opposing party's procedural challenge, counsel should ensure:

- **Adequate notice.** FRCP 30 requires reasonable written notice to the witness and the parties about the time, location, and the method for recording the testimony. Deposition notices for remote depositions should clearly state that the deposition will be conducted and recorded by remote means.
- **Valid oath administration.** Some courts have interpreted FRCP 28 and 30 to require that the oath administered to the witness be conducted in person by the court reporter or officer authorized to administer oaths. However, through a stipulation by the parties or by court order, the oath may be administered remotely. Some courts have specified certain requirements for the proper administration of a remote oath, including:
 - the person administering the oath attends the deposition by the same remote means (for example, teleconference or videoconference) used to connect all other remote participants;
 - the person administering the oath can verify the witness's identity; and
 - all participants (including the court reporter or officer) can clearly hear and be heard by all other participants.
- (See, for example, Hon. Lewis J. Liman, COVID-19 Emergency Individual Practices in Civil and Criminal Cases (S.D.N.Y. Mar. 19, 2020); *Sinceno*, 2020 WL 1302053, at *1.)
- **Recording.** FRCP 30 requires that non-stenographic recordings not distort the appearance or demeanor of the witness or counsel, which could occur if the quality of the videoconference or recording method is low (FRCP 30(b)(5)(B)). Parties should take steps to ensure reasonable levels of quality. Rules may also require the court reporter or officer to directly supervise the recording, which could be read to require that the court reporter and videographer be co-located (FRCP 30(c)(1)). Where these rules apply, counsel should stipulate or move for a court order permitting the court reporter and videographer to appear in separate locations.

Counsel should review all applicable rules to understand these potential issues and whether the participants can address them by stipulation or seeking a court order. Counsel should also review the court's website for any recently issued standing orders that address extenuating circumstances, such as the conduct of proceedings in light of the COVID-19 pandemic. For example, Judge Liman in the Southern District of New York released specific individual rules in response to the COVID-19 pandemic that state that all depositions may be taken by telephone, videoconference, or other remote means and oaths may be administered through these remote means (Hon. Lewis J. Liman, COVID-19 Emergency Individual Practices in Civil and Criminal Cases (S.D.N.Y. Mar. 19, 2020)).

WHAT ARE THE KEY INITIAL CONSIDERATIONS FOR COUNSEL PREPARING FOR A REMOTE DEPOSITION?

Adequate preparation for the unique circumstances presented by a remote deposition can help counsel successfully conduct or defend the deposition. Counsel should:

- Stipulate with opposing counsel on a protocol that covers the relevant technical and legal details, such as:
 - the availability of a high-quality webcam and microphone for the witness;
 - the method by which counsel introduces and marks exhibits; and
 - complying with confidentiality requirements under any protective order entered in the case.
- Plan to conduct a "dry run" of the remote deposition before the real event to get a feel for how taking (or defending) a deposition remotely differs from doing so in person and to resolve any technical problems.
- Keep the court informed and where necessary, seek court approval of the remote deposition arrangements.

WHAT ARE THE MAIN CONSIDERATIONS FOR COUNSEL CHOOSING A COURT REPORTER FOR A REMOTE DEPOSITION?

Many court reporting agencies offer solutions for facilitating remote depositions. Generally, these solutions have one or more of the following components:

- Videoconferencing to allow participants to see and hear one another.
- Exhibit sharing for the remote introduction and presentation of exhibits.
- A live feed of the court reporter's transcript.
- Remote video and audio recording of the witness.

Different agencies have different levels of experience and technical offerings, and counsel should inquire about an agency's platform and capabilities before retaining the agency to conduct a remote deposition. Counsel should also inquire about the information security the agency provides and confirm the capability to comply with any applicable confidentiality requirements.

WHAT ARE THE OPTIONS FOR INTRODUCING AND SHARING EXHIBITS AT A REMOTE DEPOSITION?

One of the most important technical considerations in a remote deposition is how counsel introduce and share exhibits. Counsel should weigh the advantages and disadvantages presented by the following three common ways that participants can handle exhibits in remote depositions:

- Pre-mark and circulate the exhibits before the deposition. This option is technologically simple, as counsel can send the exhibits by email as PDF attachments or by mail in hard copy. Also, deposing counsel can confirm the delivery of the documents to the witness. However, this option does not allow counsel to introduce new exhibits during the deposition and it can give the witness and defending counsel the advantage of knowing ahead of time the exhibits that deposing counsel may use.
- Use the “screen share” feature common to videoconferencing software to show exhibits during the deposition and then provide the exhibits to the court reporter following the deposition to enter into the record. This option gives counsel flexibility to show new exhibits and the witness and defending counsel do not have advance notice of the documents that deposing counsel may use. However, this option does not allow the witness and the defending counsel to review the documents independently on their own time and may require deposing counsel to page through the entire document on screen for the other participants.
- Use specialized exhibit sharing software that allows participants to upload, mark, and share exhibits during the deposition. Certain court reporting agencies provide this capability as part of their service. This option gives counsel the flexibility to introduce exhibits on the fly and allows all participants to review the documents independently. However, this option requires use of a platform that may add costs to the deposition. It may also require practice in advance by the counsel taking the deposition to assure an organized and error-free presentation.

Regardless of which method counsel chooses, it is important that there is a process for making sure that the exhibits that counsel introduces and shows to the witness are the same as what becomes part of the official record of the deposition.

WHAT ARE THE KEY CONSIDERATIONS FOR THE TECHNOLOGY INVOLVED IN REMOTE DEPOSITIONS?

One of the main challenges of a remote deposition is that it relies on the technological capability of each participant, such as individual computers, microphones, webcams, and internet connections. A single participant’s poor connection or hardware can make it difficult for them to effectively participate, and can also create background noise that may interfere with the other participants’ ability to meaningfully participate and create a comprehensible record. This may be particularly true for a witness with access to lower quality equipment and internet connection. Frequent interruptions that require troubleshooting technical issues can frustrate and significantly interrupt the flow of the deposition.

Counsel can take steps to minimize the potential for technology problems that interfere with the remote deposition by:

- Agreeing with opposing counsel before the deposition on a minimum set of technical requirements for all participants, and potentially providing adequate equipment to the witness, if necessary.
- Ensuring that counsel and their team have appropriate equipment and internet connections to ensure the fidelity of the audio and video recordings.
- Requiring all participants to test the conference and exhibit platforms before the deposition and troubleshoot any issues with a participant’s configurations.
- Stipulating that participants take steps to avoid distractions during the deposition, including by being in a quiet location and minimizing third-party use of the same network to maximize bandwidth availability.
- Having an “operator” available during the deposition to address technical issues that will inevitably arise.
- Having a fallback option, such as a telephone bridge, if a planned technology fails.

WHAT CHALLENGES SHOULD COUNSEL TAKING A REMOTE DEPOSITION ANTICIPATE AND HOW CAN COUNSEL MITIGATE THOSE CHALLENGES?

Taking an effective remote deposition is challenging. Establishing rapport with the witness and working with exhibits may be more difficult and complex questions may be harder to effectively communicate. Also, the increased potential for errors and misunderstandings by the court reporter could compromise the fidelity of the transcript.

Counsel can mitigate these challenges by considering additional steps as part of their deposition preparation and during the deposition, including:

- Practicing exhibit sharing ahead of time.
- Considering having a colleague’s participation in the deposition to assist with exhibits and track the fidelity of the record.
- Pre-highlighting exhibits so the witness can easily see the section of the document that is relevant to the line of questioning.
- Considering whether to permit longer depositions, by stipulation or court order, beyond the seven-hour default duration to compensate for an anticipated slower pace of the deposition (FRCP 30(d)(1)).
- Having a clear outline and plan so that counsel avoids unnecessarily complex questions and time does not run short for important topics and questions.
- Ensuring appropriate placement of the camera of both the witness and deposing counsel to facilitate eye contact with the witness and to improve witness engagement.

WHAT CHALLENGES SHOULD COUNSEL DEFENDING A REMOTE DEPOSITION ANTICIPATE AND HOW CAN COUNSEL MITIGATE THOSE CHALLENGES?

When defending a remote deposition, it may be more challenging to read the level of discomfort or fatigue in the witness. While multiple parties talking over one another is always a problem in a deposition, it is even more of a problem during a remote deposition, since audio

typically captures only one person speaking at a time. As a result, timely objections may be more difficult to make. Also, background noise, such as rustling papers, may prevent participants from hearing counsel or the witness and interfere with and hamper the recording.

Defending counsel can mitigate these anticipated challenges by addressing these potential issues during counsel's deposition preparation session with the witness and during the deposition itself, including:

- Planning on regular breaks to ensure the witness does not become overly fatigued.
- Ensuring the witness has time to appropriately review documents displayed on their screen.
- Establishing ahead of time with the witness an effective means of conferring during breaks (to the extent allowed in the relevant jurisdiction), such as calling the witness's cellphone and agreeing that the witness will not speak until they leave the room in which they are testifying.
- Practicing sample questions and answers with the witness in which the witness pauses before answering to allow time for any objection.
- Practicing using the exhibit sharing software, including having the witness review the document and allowing time for counsel to review the document.

WHAT ADDITIONAL ISSUES ARISE WHEN THE REMOTE DEPOSITION IS OF A WITNESS LOCATED IN A FOREIGN JURISDICTION? ARE THERE WAYS TO MITIGATE THOSE ISSUES?

Under certain situations, remote depositions may be the only feasible option for conducting depositions of witnesses in foreign jurisdictions. For example, during the COVID-19 pandemic, travel restrictions prevent parties and witnesses from traveling into the US. However, there are additional challenges to conducting a foreign deposition that exist regardless of whether the deposition would be in-person or remote.

Some countries, such as Brazil, China, and Russia effectively prohibit the taking of US-style depositions within their jurisdictions, and conducting the depositions remotely will not overcome these prohibitions. Other countries, such as France and Switzerland, place procedural requirements on the taking of depositions that require careful forward planning to satisfy. The US State Department provides a useful guide on overseas judicial assistance, which includes a summary of restrictions on the taking of US-style depositions in countries in which the US has a diplomatic mission (see *International Judicial Assistance: Obtaining Evidence*).

Other countries' requirements for taking depositions may make remote depositions impractical, such as during the COVID-19 pandemic. For example, Germany requires that depositions take place in the US Embassy or Consulate, which have both suspended routine consular services in response to the pandemic. Alternative means of dealing with restrictions, such as having the witness travel to a nearby jurisdiction with more permissive deposition rules (for example, Finland instead of Russia, or Hong Kong instead of mainland China), may not be feasible while COVID-19 travel restrictions are in place.

Also, a US court's ability to enforce deposition requirements on an overseas witness may be limited, whether counsel conducts the deposition remotely or not. One issue is whether perjury is a credible threat to a witness located overseas. While the relevant federal perjury provision (18 U.S.C. § 1621) covers untruthful statements made outside of the US, seeking redress for perjury against a non-party foreign witness could be impractical.

These limitations notwithstanding, several jurisdictions do permit US-style depositions. Conducting these depositions remotely is an important means of allowing discovery to proceed when normal litigation channels are disrupted, such as during the COVID-19 pandemic travel restrictions. Careful consideration of the challenges described above and robust stipulations between the parties will be crucial to ensuring that the discovery is effective and the testimony reliable.

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