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Video Depositions: The Case for Their Continued Relevance in a Post-Quarantine World

In this article, the authors note the COVID-related rise to prominence of video depositions, outline various key considerations and argue for their continued relevance in a post-quarantine world.

By John C. Browne and Jeremy P. Robinson | December 29, 2020



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In March 2020, as COVID-19 spread and the quarantine began in earnest, it became clear that in-person depositions in federal civil cases could not proceed in the normal course. Even aside from the travel difficulties and “stay-at-home” orders, it was too risky to gather multiple people in close proximity in a conference room for 8 to 10 hours to conduct a traditional deposition. In many cases, depositions ground to a halt. But clients and their attorneys quickly began to adapt to the “new normal” and sought ways to advance their federal cases.

Video depositions were the obvious path forward. Of course, remote depositions are not new. The Federal Rules of Civil Procedure formally authorized telephone depositions with the 1980 amendments. Then, the Federal Rules were amended again in 1993 to include depositions by other remote electronic means, including for example by “satellite television.” But, in the decades since then, video depositions were rare—and very much the exception rather than the rule. The technology never seemed to work well, hardcopies of exhibits had to be sent in advance, which was burdensome and risked tipping-off the other side, and the blurry video images and sketchy video feeds were a poor substitute for taking live testimony.

Fortunately, those days are in the past. Technological advancements have now made video depositions a truly viable alternative to taking “live” testimony. Below we discuss some advantages and disadvantages of video depositions and argue for their continued relevance in a post-quarantine world.

Remote Depositions Under the Federal Rules: Stipulation or Court Order?

Federal Rule 30(b)(4) authorizes civil litigants to stipulate, or the court to order, that depositions “be taken by telephone or other remote means.” In deciding whether to proceed with a stipulation or to seek a court order, a key consideration is whether the depositions will consist mostly of witnesses under the control of one party, such as current employees of a corporate defendant or the plaintiff representative. If so, the parties’ stipulation to proceed by way of video depositions should generally suffice.

Alternatively, if the deposition witnesses will be mostly third parties, one should consider seeking a court order formalizing the procedure for video depositions. That way, the parties are not forced to spend time and effort negotiating a stipulation, only to have it challenged by uncooperative third parties not bound by an agreement between the parties. The legitimacy and force of a court order should help things proceed smoothly even when faced with a recalcitrant non-party witness. Numerous authorities support the notion that the pandemic provides “good cause” for entry of an order requiring remote depositions. See, e.g., *Grano Sinceno v. Riverside Church in the City of New York*, 2020 WL 1302053, at *1 (S.D.N.Y. March 18, 2020); *Learning Resources v. Playgo Toys Enterprises*, 2020 WL 3250723, *3 (N.D. Ill. June 16, 2020); *Grano v. Sodexo Mgmt.*, 335 F.R.D. 411, 415 (S.D. Cal. 2020).

Either way, one will want to reach agreement with the opposing side on as much governing procedure as possible. Litigators should consider issues such as: which remote deposition platform will be used, who (if anyone) is permitted to physically attend with the witness, who can speak during the deposition, technological training for all participants, which local start time will be used (remember, counsel and the witness will no longer necessarily be in the same time zone) and how exhibits will be handled, including whether hard copies will be used at all. For the time being, remote depositions require more cooperation and forethought than the traditional process—and, as such, the more detail agreed to in advance, the better.

Are Video Depositions Really as Good as Live Testimony?

Somewhat to our surprise, our experience during the pandemic shows that video depositions have become a viable alternative to live testimony. To start, the technology has improved immeasurably from even a few years ago. By downloading a few files and logging into the remote video platform, deposition participants will find that the video and sound quality appears to be as close to “live” as technologically possible. As for working with exhibits—previously the bane of any remote deposition—the process is now as simple as dragging a document file from a private folder to a shared folder on the remote platform. Once a document is placed in the shared folder, a virtual exhibit sticker is automatically applied and all participants can view it, including the witness who can read the document while answering questions. In a major improvement to the old days, this “drag and drop” process allows documents to be marked as exhibits on the fly and eliminates any need to distribute hard copies of exhibits in advance of the remote deposition.

From examining counsel’s perspective, one common concern about remote depositions is that a lack of physical presence will detract from the interaction with the witness. While it is true that those rare moments when the air goes out of the room feel somewhat muted in a remote setting, a video deposition can still offer the opportunity to gain an intense level of direct interaction with the witness. For example, in a live deposition, there is always a buzz of surrounding activity, including shuffling papers, typing on laptops or phones, or lawyers pouring water or coffee. These features are absent or minimized in a video deposition. Thus, examining counsel and the witness are able to interact directly face-to-face via the video screen with fewer distractions, which can enhance the ability to connect with the witness.

From defending counsel's perspective, this facet may be the single biggest downside to video depositions. Simply put, when defending counsel is not in the same room with her witness, it is more difficult to object or stop the witness from answering a bad or improper question. As a practical matter, it is also more difficult to prepare a witness remotely. These obstacles can obviously be overcome with diligence and patience.

Video Depositions Save Time and Money

One aspect of video depositions that both plaintiffs and defendants can agree upon is that significant time and money can be saved by avoiding the need to travel for depositions. This is likely to be the greatest benefit to clients, who otherwise can bear the costs of their attorneys flying around the country attending depositions. Even a relatively straightforward deposition can involve two or three nights of hotel stays, airfare, meal and other costs. Remote depositions also provide clients the opportunity to personally monitor depositions in real-time without having to engage in expensive and disruptive travel. Armed with a laptop and WiFi access, a client can directly monitor a video deposition from the comfort of their own home. This cost efficiency supports the continued prominence of video depositions even in a post-quarantine world.

Additional Considerations

Given the efficiencies to be gained from video depositions, one consideration that bears discussion is whether Federal Rule 30 should be further amended to give noticing parties the ability to proceed automatically with remote depositions, without imposing the current requirements of a stipulation between the parties or a court order. This way, parties noticing depositions could simply identify the remote deposition protocol in the notice and the opposing parties and witnesses could object if they saw fit to do so. On the one hand, such an approach would save noticing parties the time and effort required in getting party consent and negotiating a remote deposition stipulation with opposing counsel—or moving for a court order. This process is rife with opportunity for an uncooperative opponent to delay. On the other hand, it is unlikely that any remote deposition can successfully take place without the cooperation of the witness and all parties. The technological requirements alone require some level of cooperation by everyone involved. Of course, as a practical reality, video depositions may eventually become so commonplace that parties start entering into remote deposition stipulations with the same regularity that they currently adopt confidentiality orders under Federal Rule 26(c). Time will tell whether this moots any need to further amend Federal Rule 30's provisions governing remote depositions.

Conclusion

There can be no dispute that the COVID-19 pandemic has impacted the conduct of civil litigation—and perhaps some aspects have changed permanently. It remains to be seen whether this will be true of depositions. But the pandemic has certainly revealed that video depositions are now a viable alternative to taking in-person depositions—and they should continue to be a tool in the litigator's toolkit even in a post-pandemic world.

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