

VIRTUAL DEPOSITIONS:
HOW THE PANDEMIC IMPROVED THE LIFE OF THE
LITIGATOR

Prepared and Presented by:

Leslie M. Luttrell
Luttrell + Carmody Law Group

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Occasionally really good things come from really bad events. The acceptance of the virtual deposition has made my life as a litigator much easier. Being able to conduct a deposition from the familiar surroundings of my office with all of my data readily available and my staff at hand to deal with issues as they arise has been a genuine gift from the Year of COVID. I remain optimistic that even as the country opens back up, litigators will no longer have to be “road warriors” traveling by plane or automobile across the State or the country taking depositions. Pre-COVID when taking a deposition most of us were lugging boxes of paper – hopefully pre-marked and organized – to the office of the opposing counsel or the court reporter’s neutral conference room.

Whether in person or remote, the key to a successful witness examination, whether via deposition or on the stand is **preparation**: know the facts, know the law, and know your witness. Whether taking or defending a deposition you need to have a solid understanding of the elements of proof required, familiarity with the documents that will be used in the deposition, and as much advance information about the witness as you can get so that you may maximize the benefits of the deposition.

In the post-pandemic world of deposition taking, a whole new layer of preparation is required: technological proficiency. The proficiency requirement goes not only to the management of the technology for purposes of dealing with exhibits, but to the interaction between the deposer and the deponent.

Over the last year, I have been involved in approximately 25 virtual depositions. I have both taken and defended depositions from locations remote to the witness, my client, the court reporter and the videographer. The notes that follow are my suggestions based upon the lessons that I learned along the way.

Negotiate the Rules with Opposing Counsel

Virtual depositions present logistical as well as technological challenges that don’t necessarily exist in an in-person deposition. First and foremost, coordinate with opposing counsel to determine the virtual platform through which the deposition will be conducted. Whether taking or defending, the virtual platform will impact the success of the deposition process. Next, coordinate whether breakout rooms will be required. Platforms like ZOOM permit the creation by the court reporting service of breakout rooms for the various sides to utilize during breaks in the deposition. Then, determine how the deposition exhibits will be handled: will the deponent be permitted to have a set of the exhibits or just review them when presented during the deposition. Finally, translation services for your deposition may call for some negotiation. If a translator is needed, you may want to consider the time required for the translation process, and arrange for additional time for the deposition.

Know Your Technology and Equipment

There are multiple platforms available now and many court reporting services have their own customized applications. In my experience, the platform most commonly used is ZOOM. Whether you decide to use a court reporter with a proprietary platform or one that utilizes ZOOM, make sure that you participate in their virtual practice sessions so that you can become familiar with the system that they use. In particular you should determine:

1. What is the delay time. When taking or defending a virtual deposition, you need to understand the period of delay that occurs in the questioning process and make sure that the opportunity for objections to questions can be preserved. This should be included in the negotiation of the “rules” with opposing counsel.

2. Who will control the exhibits. In the beginning before the streamlining of the “share screen” function, exhibits were provided in advance of the deposition. Now, my practice is to send the exhibits to my court reporter the day before the deposition. The court reporting service then manages the exhibits as I call them up for authentication and questions. This also permits the Court Reporter to maintain the “official” exhibits. I typically pre-mark all of my exhibits using the Adobe Dynamic Exhibit Stamps tool which can be found at <https://www.pdfscripting.com>

3. Is your computer properly equipped. Before you take or defend a virtual deposition, make sure that your camera and microphone work appropriately. It is also a really good idea, especially if you are still working at home, that you make certain ***that all filters have been turned off*** before you begin your appearance. An additional piece of advice: no matter where you are appearing virtually make sure that any filter you are using is the one that you intend to use.

For more detailed instructions on how to enhance your virtual identity, go to <https://snapcamera.snapchat.com>

For more detailed instructions on how to protect your virtual integrity, go to: <https://blog.zoom.us/how-to-use-remove-meeting-filters>

Every lawyer taking or defending a virtual deposition should vet and test the equipment they intend to use for their deposition in advance of the deposition. Issues relating to sound, audio interference, visual clarity, and internet access should be determined in advance of the deposition, not during it. Your court reporting service should be glad to guide you through this process.

Prepare Your Witness

If you are defending the deposition, work with your witness. In a virtual deposition where all of the participants are remote, none of the ques that we have learned and utilized in our practice are available. Accordingly, you should work with your witness ensure that they are comfortable and familiar with the ebb and flow of the deposition

process. If you have any expectation that opposing counsel may attempt to share control of a document with your client, you should also prepare your client to navigate the selected deposition platform. A dry run through how exhibits will be displayed is a very effective deposition preparation tool.

Dealing with the Documents: A Practical Approach

Your comfort level with technology should dictate how you handle the documents that you work from while taking a deposition. Just remember that if you decide to control the documents – presenting the exhibits – don't share the exhibits that you worked from and made notes on as you will find yourself in the throws of a privilege waiver.