

CLIENT ALERTS

The New Age of Video Depositions

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Because of the health, law and social-based distancing impact of COVID-19, the practice of the law and, in particular, taking depositions has had to evolve at a speed that the industry and its practitioners have never before seen. Prior to the COVID-19 pandemic, video depositions were subject to expensive, cumbersome, and, in hindsight, rudimentary technological procedures. Now, a video deposition can be scheduled and arranged with just a few keystrokes and access to a videoconferencing platform (such as Zoom, BlueJeans, GoTo, or Microsoft Teams). However, while *scheduling* a video deposition has been made easier, it is not necessarily easier for lawyers and their witnesses *to take* a deposition. This alert addresses some of those challenges.

On March 10, 2020, Governor Gretchen Whitmer declared a state of emergency in the state of Michigan and the Governor's initial stay-at-home executive order went into effect on April 17, 2020. Based on the Governor's initial order, and numerous successive orders, in-person depositions were prohibited. While the general stay-at-home order has since been lifted, the Governor's executive orders continue to encourage that a host of activities be done remotely and, in particular, all businesses and operations in the state are required to "promote remote work to the fullest extent possible" and offices are required to "suspend all nonessential visitors" (EO 2020-114). These include public meetings (EO 2020-129), remote notarization (EO 2020-131), state administrative procedures (EO 2020-132), and telehealth (EO 2020-138).

These legal restrictions, as well as the health and social-based restrictions that COVID-19 has created, have led to the proliferation of videoconference depositions and the benefits and detriments associated therewith.

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While recording a video deposition no longer requires hassle and cost of scheduling a separate videographer to work with a court reporter – almost all videoconferencing platforms have a “record” feature – the simplicity of the modern-day video deposition basically ends after issuance of the video deposition notice.

In the past, video depositions were depositions that were taken by video but *in person*. Today, the term “video deposition” has come to mean “remote deposition.” In the past, remote depositions were taken in only the rarest of circumstances. Usually, they were taken based on cost or geographic considerations and they were almost always for secondary witnesses. Critical witnesses were rarely, if ever, deposed remotely.

Most lawyers will advise that not being in the same room with the witness they want to depose gives an advantage to the witness. However, it will be an uphill climb to compel an unwilling witness to allow the deposing lawyer into the room with them. As one federal magistrate judge in Michigan has written: “because of the manner in which respiratory droplets spread in a closed room, its inhabitants are not protected by mere social distancing” and “video or teleconference depositions and preparation are the new normal.” This sentiment is why lawyers and litigants should not expect to have success in compelling a witness, lawyer or court reporter to participate in an in-person deposition.

Video depositions make the strategic use of exhibits more difficult. There are three basic ways in which exhibits can be delivered to the witness: (1) pre-delivery to opposing counsel; (2) use of video “screen-sharing”; and (3) pre-delivery to the court reporter. Each methodology has downsides.

The downside of pre-delivering exhibits to opposing counsel is self-evident: the other side will have the opportunity to examine the exhibits you intend to use for the day. In a deposition where the anticipated exhibits are obvious, such as the fifth deposition in a case, this is not a big issue. However, there are many situations where a lawyer will feel that delivery of the exhibits in advance will provide the witness and their counsel with a strategic advantage. Ways to mitigate this advantage include delivering the exhibits to the witness on the day of the deposition or delivering more exhibits than one intends to actually use at the deposition.

“Screen-sharing” is the process where a lawyer uses their videoconference platform to “share” a document on their computer screen with the other participants of the videoconference. While screen-sharing will allow a lawyer to preserve the “element of surprise” associated with exhibits at a deposition, it has downsides. Witnesses are entitled to review any document that is presented as a marked exhibit and screen-sharing does not allow the witness to navigate through a document. Therefore, especially for documents that are more than a few pages, screen-sharing has the potential to be overly cumbersome and counter-productive.

Pre-delivering exhibits to the court reporter is likely the most efficient and strategically-beneficial method of delivering exhibits to a witness. Of course, the method presumes that both the witness and the court reporter are comfortable being in the same room with one another. However, this requires the lawyer to be meticulous in the preparation of their exhibits (all pre-marked), and synchronization between the lawyer and their court reporter as exhibits are being introduced during testimony.

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Like with all new technology, practice makes perfect and some measure of sacrifice comes with the increased efficiency (and personal comfort) video depositions offer. In order for the business of the law to continue, at least under the current circumstances, lawyers may have to sacrifice their Perry Mason-induced dreams of “gotcha” moments at the deposition table.

However, lawyers do not have to simply waive the white flag to in-person depositions in situations where they cannot be delayed and the benefits of being in-person with the witness are paramount. Through compromise or court intervention, relief in the form of in-person depositions is possible. The baseline of the Michigan Court Rules is that depositions are to be taken in person. No provision of the court rules explicitly prohibits a party from attending an in-person deposition. COVID-19 tests can be taken with relative ease prior to in-person depositions. Because of existing executive orders, hotels and banquet facilities have large rooms available which can ensure that social distancing measures are taken.

One silver lining to the impact of COVID-19 on the practice of law is that lawyers have been called on to work together in negotiating mutually-agreeable solutions during these difficult times. Driven by practical realities and common sense, lawyers and their clients have been forced to engage in the all-too-often ignored skill of patience and cooperation in the prosecution and defense of their cases. The conduct of a deposition is a critical component of the legal process and many of the difficulties associated with video depositions can be avoided through patience, cooperation, and communication between attorneys.

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