

Why Remote Depositions Are Likely Here To Stay

By **Darren Goldman** (August 21, 2020, 3:38 PM EDT)

While many courts have held telephonic hearings for years, depositions have historically been conducted in person. The reasons for this are self-evident.

First, an attorney taking a deposition will often want to use exhibits, and those exhibits will need to be shared with and manipulated by the deponent and the deponent's counsel. Second, an attorney defending a deposition will want to be in the same room as his or her client, since it will give the attorney more control over the situation and allow the attorney to better protect the client. Third, the parties will often want the deposition videotaped, since a video recording of the deposition can be more impactful at trial than simply reading a transcript.



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As a result of the coronavirus pandemic, however, standard operating procedures have been turned upside down, and in-person depositions have become the exception rather than the norm.

To avoid the entire legal system crashing to a halt, courts, attorneys and parties have had to adapt. For example, in March, the Florida Supreme Court issued Administrative Order AOSC20-23, which permits the use of remote technologies to conduct proceedings.[1] It also allows for witnesses to be sworn in remotely.[2] The combination of these provisions have allowed litigants to use remote conferencing technologies, such as Zoom, Cisco Webex, Microsoft Teams and Skype, to depose witnesses.

While intended to be a temporary measure, Florida's administrative order has already been amended and extended three times, most recently on June 8. Other courts have issued and extended similar orders.

Given that there does not appear to be an end to the pandemic's effect on social gatherings in the near future, remote depositions are not going anywhere. And, as discussed below, because remote depositions work better than many expected they would and have resulted in unanticipated benefits, they will likely remain, even after COVID-19 passes.

Attorney concerns have been alleviated.

Remote deposition technology has taught us that everything that can be done in an in-person deposition can be done remotely.

For example, screen-sharing technology makes it possible for an attorney to use exhibits just as if the attorney and deponent were in the same room. The attorney can ask the court reporter to mark a document as an exhibit and then share his or her screen (or preferably have a paralegal share the screen) so that everyone attending the deposition can see the exhibit. Control of the mouse can then be turned over to the deponent so that the deponent can scroll through the document.

Though one might expect significant lags and technical issues with this approach, the reported problems have been few and far between. Indeed, they are no more prevalent than a miscopied or misstapled hard copy document at an in-person deposition.

The seeming inability to speak with those on the same side without the opposing party hearing has also been resolved through the use of separate "rooms."

The deposition host, which is usually a court reporting service, can create submeetings within a deposition. The parties can take a break, just like in an in-person deposition, and the host can separate the parties into the subgroups. Each subgroup is in its own room, which nobody else can enter or observe.

So, for example, all the plaintiff parties can be in one room and all the defendant parties can be in another. The plaintiffs can thus all see each other and speak freely without the defendants overhearing, and vice versa. Seeing each other is an advantage over communicating by phone or text messages.

A defending attorney, therefore, does not have to worry about the logistics of communicating with his or her client. During a break, the deponent and the defending attorney need only go request that they be sent into their personal room.

The technology also exists for the deposition to be recorded. The court reporter can choose the deponent's screen and make a recording of that screen throughout the entire proceedings. The court reporter can also stop the recording when the request is made to go off the record.

Moreover, the video can be synced with the transcript. Thus, if the deposition needs to be introduced at a trial, the synced video exists no different than if a videographer was recording an in-person deposition.

In other words, the supposed technical impediments one would expect from a remote deposition just do not exist. Indeed, many attorneys may prefer a remote deposition rather than having to travel to a different part of their state or the country, which can result in additional costs and time inefficiencies.

Clients will love the cost saving.

At the same time, remote depositions save money. Depositions are not cheap. In addition to an attorney's hourly rate, there are a number of expenses associated with a deposition. These include court reporting services, travel expenses such as plane tickets, train tickets, rental cars, gas and hotels, food during the deposition, word processing services like printing and copying, and the use of office space, to name a few.

While attorney rates and court reporting services remain regardless of the forum, many of the other expenses are eliminated with a remote deposition. Everyone who would attend the deposition in person can do so from the comfort of his or her own home or office. Thus, no more travel expenses, office

rental space and catering costs. And because exhibits can be shared remotely and electronically, the printing and copying expenses are also alleviated.

More often than not, these costs are passed through to the client. By conducting the deposition remotely, these savings are likewise passed through. Clients will like the idea of not having to pay for these costs, and may push for remote depositions once the pandemic passes.

It creates additional business opportunities.

While most analyses regarding remote depositions focus on the impact to the courts, the attorneys and the parties, there is another group to consider: vendors.

Whether it be document collection and storage services, court reporting services, background investigators, or service organizations, third-party vendors are necessary to the smooth operation of litigation. The use of remote depositions creates a business opportunity for third-party vendors.

For example, most court reporting services in Florida now offer remote deposition services. They have certified notaries who can swear in witnesses remotely. They have licenses with Zoom, Skype, Teams and other platforms to host remote depositions. And they have the ability to provide video recordings of the remote depositions.

All of these services come with a fee, of course. And these vendors are not going to want to give up this additional source of income once the pandemic is contained and society returns to normal. As a result, these vendors are likely to continue advertising the benefits of remote depositions. They will also likely lobby their clients and the bar to demand the ability to take remote depositions remains.

Conclusion

During the past few months, attorneys have gotten used to conducting remote depositions. They have seen firsthand how screen-sharing technology and the ability to separate parties into rooms can result in a remote deposition running just as smoothly — if not more smoothly — than an in-person deposition.

At the same time, clients have learned that conducting a deposition remotely can result in significant cost savings when extraneous costs such as travel, food and office services are eliminated. And third-party vendors, such as court reporting services, have created a new source of revenue to accommodate attorneys and parties who do not want to travel, or cannot travel, for an in-person deposition.

While the pandemic forced the legal community to accept this new way to conduct business, nothing will prevent the community from demanding these procedures remain in place. Given the benefits to all involved, there would be no reason for courts to require in-person depositions and swearing in. As a result, remote depositions are likely here to stay.

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[1] In relevant part, the administrative order states that "All rules of procedure, court orders, and opinions applicable to court proceedings that limit or prohibit the use of communication equipment for conducting proceedings by remote electronic means shall remain suspended," and that "the chief judge of each district court of appeal and each judicial circuit remains authorized to establish procedures for the use, to the maximum extent feasible, of communication equipment for the conducting of proceedings by remote electronic means, as are necessary in their respective district or circuit due to the public health emergency."

[2] Specifically, it states that "Notaries and other persons qualified to administer an oath in the State of Florida may swear a witness remotely by audio-video communication technology from a location within the State of Florida, provided they can positively identify the witness" and "[i]f a witness is not located within the State of Florida, a witness may consent to being put on oath via audio-video communication technology by a person qualified to administer an oath in the State of Florida."