

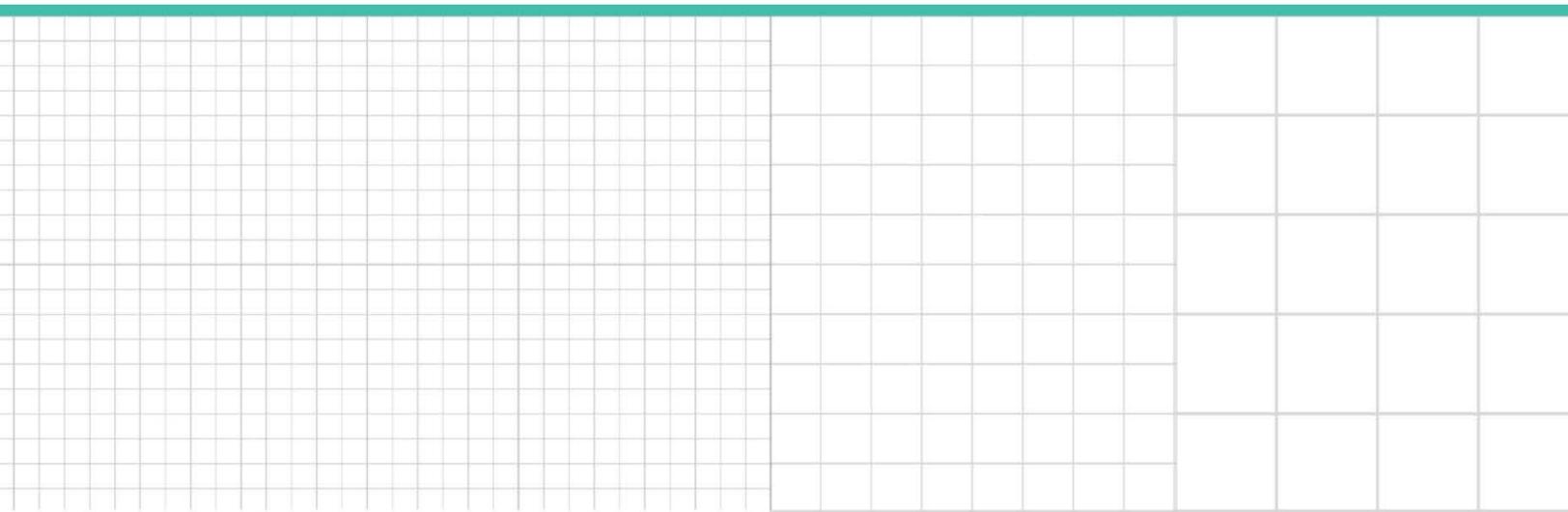


Professional Perspective

Key Counsel Agreements for Remote Depositions

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The legal industry has been on a steep learning curve adapting to the new normal of remote depositions. Attorneys have been managing new hurdles presented in the online environment, such as preparing witnesses, handling hearings, and managing large documents remotely, while also benefiting from unexpected positives in this new world—travel savings and an efficient war-room setup in home offices.

But, to make this new reality work, it is even more important to reach agreements with counsel on how to handle discovery remotely. Here are a few examples:

Agree Court Reporter Can Be Remote

For remote depositions, parties should agree and stipulate to the court reporter being remote, and to the oath being administered remotely. Some parties will further stipulate that the court reporter is not required to be licensed in the state where the witness is located, thus allowing the parties to use the same CSR-licensed court reporter to transcribe depositions for the entire case, regardless of where the witness is physically sitting during the deposition.

Agree How Exhibits Will Be Managed

For depositions with many exhibits, parties can agree to use one exhibit management system like AgileLaw, or a file sharing platform, like Egnyte or eDepoze. And, when exhibits are very complex—for example, huge spreadsheets—parties may decide to hire a trial technician to manage the exhibits during the deposition through a trial presentation platform like Trial Director or OnCue.

Agree How Exhibits Will Be Shared

If not using an exhibit management or file sharing platform, agree on the process for sharing exhibits beyond just a shared screen. For example, parties sometimes agree to mail hard copies of the exhibits to counsel and the witness in a sealed envelope before the start of the deposition. Or, parties could agree to email or share electronic versions of the exhibits through the Zoom chat to all parties and the witness either before or as soon as the exhibit is introduced at the deposition. Depending on the content of the documents, and the nature of the relationship between parties, sending exhibits in advance may not be a viable option for all depositions.

Agree to Number the Exhibits Sequentially

This will allow easier access for all counsel likely to have copies of relevant documents already in their files and will make it easier when preparing an exhibit list for trial.

Agree on Ethical Issues

The parties can agree that the witness will state under oath that no one will be in the room with the witness during the deposition, and that the witness will not communicate with anyone about the case or deposition during the course of the deposition testimony. Parties might also agree that, during breaks, the witness and counsel can speak consistent with court rules and ethical obligations, but there will be no off-the-record communication between the witness and counsel during the deposition.

Agree How Objections Will Be Handled

For multi-party depositions, parties might agree that the objection of one party is considered an objection by all parties, which minimizes disruptions. Parties can even agree to reserve all objections until trial, or before, with the exception of objections based on privilege, or instructions to a witness not to answer. The latter approach is used to avoid disruptions caused by parties lodging form objections.

Agree About Method of Video Recording

Agree on whether the parties need a certified legal videographer to videotape the remote depositions. Unlike in-person depositions, parties do not need to hire certified legal videographers to videotape remote depositions. All that is needed is a person to push “Record” on Zoom, and that recording should be provided to parties free of charge.

However, it is still questionable whether that video is admissible in court. To ensure that the video is admissible in court, parties may either elect to use a certified legal videographer to record the deposition, or they may agree to self-record the deposition, stipulating that no party will object to the use of that video in court. If the parties intend to sync the video to the transcript, they should consider using a certified legal videographer who can go on and off the record and make sure the transcript lines up with the video post-production, thus allowing for the sync.

Agree About Scope of Video Recording

The parties should agree on who and what is actually recorded if the deposition is recorded. Parties usually agree to continuously record only the witness, or the witness and the exhibits as a picture-in-picture, with no other attorneys or participants videoed on the platform. If the witness is in the room with their own counsel, and only the taking attorney is remote, the parties might also consider recording a wide angle of the room for the remote parties to view the room during the deposition.

Agree on Technical Capabilities of All Parties

Counsel might agree that all witnesses and parties shall make reasonable efforts to have the necessary technology and bandwidth to appear for remote depositions. If a witness does not have all the devices or bandwidth to appear on a camera for the deposition, that must be communicated to all counsel, so that accommodations—e.g., shipment of equipment, setup of a video teleconference center—can be made before the start of the deposition.

Conclusion

Most courts have few, if any, rules or guidelines for handling depositions remotely. Stipulating to procedures like those above will make the deposition process in the new virtual world run smoothly and with fewer conflicts during and after the depositions.