

VIRTUAL DEPOSITIONS – CAN’T LOOK BACK NOW

Covid-19 has substantially changed the landscape of federal and state litigation. Depositions, for example, are now primarily being conducted virtually using audio and video technology (such as Zoom, WebEx and Skype) to avoid the spread of infection that may occur from an in-person deposition (with numerous individuals, gathered in tight quarters, for extended periods of time). Virtual depositions are likely to become more ingrained in federal and state litigation once the pandemic is over because of significant advancements in technology, the ease with which virtual depositions can be conducted, and the cost efficiencies they generate.

The proliferation of virtual depositions in such a short period of time means litigants are navigating novel issues on a daily basis, including establishing a framework for consistent rules and procedures to govern them. The purpose of this report is to enumerate best practices when conducting virtual depositions. Accordingly, below is a list of provisions that may be incorporated into stipulations between counsel for parties and non-parties governing virtual depositions.

- Court Reporter. The stipulation should provide that: (i) a court reporter may administer the oath to a witness remotely (even if the court reporter is not in the physical presence of the witness);¹ (ii) the transcripts and video recordings may be used by or against all parties in the litigation;² (iii) the recorded video provided in digital form by the court-reporting service may be used as if it were recorded by a certified videographer and each side waives objections based on authenticity;³ and (iv) the individual administering the oath to the witness shall ask the witness to swear that the witness is who the witness claims to be.
- Cooperation. The stipulation should provide that the parties and any non-parties involved in the virtual deposition will cooperate on technical issues regarding the digital file (*e.g.*, assuring audio and video quality, displaying exhibits, ascertaining that only those portions of the deposition that are on record should be recorded, and affixing time stamps) and work collaboratively in good faith with the video-conferencing service to assess each witness’s technological abilities and to troubleshoot any issues in advance of the deposition. Federal Rule of Civil Procedure 30(b)(4) provides that a remote deposition in a federal proceeding is permitted by stipulation of the parties or order of the court. Non-parties would be subject to this stipulation or order because they generally may not refuse to proceed with a deposition merely on the grounds that they object to the manner of recording set forth in the subpoena, although in rare circumstances they may seek a protective order.⁴ The

¹ This would comply with Federal Rule of Civil Procedure 28 and New York Civil Practice Law and Rules 3113(d).

² This would be in accordance with Federal Rule of Civil Procedure 30(b)(5) and New York Civil Practice Law and Rules 3117.

³ This would be under Federal Rule of Civil Procedure 29(a) and 22 NYCRR 202.15.

⁴ According to the 2005 Advisory Committee Note to Federal Rule of Civil Procedure 45, “A subpoenaed witness does not have a right to refuse to proceed with a deposition due to objections to the manner of recording. But under rare circumstances, a nonparty witness might have a ground for seeking a protective order under Rule 26(c) with regard to the manner of recording or the use of the deposition if recorded in a certain manner.”

stipulation should further provide who will bear the burden of ensuring that the witness has the proper software, hardware, and other relevant equipment to attend a deposition by video conference; when that technology will be made available to the witness; and a mechanism for a “test run,” if needed.

- Vendor. The stipulation should provide for the name of the court reporting service and platform used to record the deposition. Unless otherwise agreed, the stipulation should require that the witness and all counsel be displayed on the platform at all times during the deposition, except when one or more counsel must be taken off to display an exhibit. The stipulation should also state that counsel may elect to have a technical specialist attend the deposition to address technical issues and administer any virtual breakout rooms or an exhibit specialist to ensure that exhibits are properly displayed during the deposition. The stipulation should provide that confidential information may be disclosed to any such specialists involved in the deposition without violating any confidentiality restrictions.
- Exhibits. The parties may stipulate to the timing under and means by which deposing counsel could send the witness and defending counsel exhibits to be potentially marked during the deposition. Such means may include: (a) sending them, pre-marked, by overnight courier in a sealed envelope or banker’s box(es) in advance of the deposition; (b) making them available through a pre-arranged FTP or file-sharing site or emailing pre-marked exhibits to the witness, defending counsel, all attending counsel, and the court reporter in advance of the deposition; (c) using a video-conferencing platform or other electronic application for presenting exhibits which will enable deposing counsel to share exhibits with the witness, court reporter, and all counsel attending; or (d) any other means agreeable between counsel. For hard-copy exhibits transmitted in advance, the stipulation should provide that the sealed exhibits must remain sealed and unopened until the deposition begins and the witness is instructed on the record to open a sealed hard-copy exhibit (at which time others in possession of sealed exhibit folders may open the sealed exhibit, as well). The parties should also provide for a mechanism to address last-minute exhibits not provided to the witness or defending counsel in advance.
- Witness Notes. Witnesses should testify on the record that they do not have any notes or documents available to them while the deposition is pending, except that which they disclose and provide to all parties. Any documents reviewed, or notes made, by witnesses while on the record shall be preserved and made available to all parties, appropriate non-parties and counsel.
- Witness Communications. The stipulation should provide that there should be no unrecorded conversations between the witness and any counsel involved in the case during a remote deposition while the witness is on the record. All counsel may be asked to confirm on the record and at the beginning and end of each deposition that they will not communicate and have not communicated with the witness while the witness is on the record other than in the presence of the court reporter and videographer. However, nothing in the stipulation should prevent a witness from seeking advice regarding the application of a privilege or immunity from testifying during the course of a deposition, nor should the stipulation prevent defending counsel from initiating a private communication off the record with a witness for the purpose of determining whether a privilege should be asserted or for another authorized purpose, so long as defending counsel first states his or her

intention on the record before initiating such communication. Nothing in the stipulation should prevent the questioner from asking the witness at any time who else, if anyone, is in the room with the witness.

Virtual depositions are becoming more prevalent in federal and state litigation every day, causing a major shift in the manner in which cases are litigated on a rapid basis. It is important that litigants adapt and embrace technology permitting the use of virtual depositions in place of in-person ones. In anticipation of a virtual deposition, parties and non-parties should enter into a clear stipulation to ensure the deposition is streamlined, minimizes the risk of technical problems, focuses on maintaining the integrity and reliability of the record, and governs the conduct of the parties and non-parties involved. A copy of a model stipulation incorporating is set forth in Exhibit A to demonstrate how these objectives may be achieved.

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EXHIBIT A
REMOTE DEPOSITION STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for Plaintiffs, on the one hand, and counsel for Defendants, on the other hand, that:

Purpose of this Stipulation. In light of the ongoing Covid-19 pandemic, the Parties and Non-Parties shall meet, confer, and cooperate with one another regarding the scheduling of Depositions and the procedures for taking Depositions. Parties agree to take reasonable steps, in good faith, to enable witnesses, Deposing Counsel, Defending Counsel, and Attending Counsel to complete Depositions in a manner that takes into account and accommodates, as necessary, the needs of dependent care and personal health and safety.

Definitions

“Attending Counsel” means any legal counsel for a Party or Non-Party that is attending a Deposition, other than Deposing Counsel or Defending Counsel.

“Court Reporter” means an individual retained by the Party or Parties taking a Deposition to transcribe the Deposition who is authorized to administer oaths under either federal or state law.

“Defending Counsel” means the legal counsel for the Party, Parties, Non-Party, or Non-Parties being deposed who is principally defending the Deposition. For a witness who is represented by personal and company counsel for the purpose of his or her Deposition, both personal and company counsel shall be treated as “Defending Counsel.”

“Deposing Counsel” means the legal counsel for the Party or Parties noticing a Deposition.

“Deposition” means any deposition upon oral examination taken pursuant to Federal Rule of Civil Procedure 30 or any court order in the litigation.

“Exhibit” means any document or electronically stored information that is marked as an exhibit at a Deposition.

“Party” or “Parties” means any plaintiff, any defendant, and any of their current or former employees, executives, officers, or directors.

“Non-Party” or “Non-Parties” means all natural or legal persons that are not Parties from whom a Party is seeking a Deposition in the litigation.

In-Person Depositions

Nothing in this Stipulation shall prevent a Deposition from proceeding in person if Deposing Counsel, Defending Counsel, and the witness agree.

If the noticing Party, the responding Party or Non-Party, and the witness agree, a Deposition may take place in person at an agreed upon location with the noticing Party, responding Party or Non-Party, witness, court reporter, and videographer appearing in person.

All Parties and appropriate Non-Parties should confer in advance to ensure that only those attorneys who plan to question or represent the witness will appear in person. Any other Party may participate in any in-person Deposition by telephone or via video conference.

Deposing Counsel and Attending Counsel intending to participate by telephone shall cooperate in good faith to facilitate such participation.

Remote Depositions

Notice of Remote Deposition: Any Party may notice a Deposition to be taken remotely pursuant to the terms of this Stipulation by so indicating in the notice of deposition. All objections to the use and admissibility of the transcript or video of a Deposition taken pursuant to this Stipulation based solely on the fact that the Deposition was taken by remote means are deemed waived. The Party that noticed the Deposition shall be responsible for procuring a written transcript and video recording of the Deposition. The Parties and any Non-Parties shall bear their own costs in obtaining a transcript or video recording of the Deposition and copies of any Exhibits.

Notice of Change from In-Person to Remote Deposition: If a Deposition was previously anticipated or agreed to be an in-person Deposition, the witness or that person's attorney may request the Deposition be changed to a remote Deposition. Such a request to change the format for the Deposition should be provided as soon as reasonably practicable, but no later than seven days in advance of the Deposition. The Parties and any appropriate Non-Party will work cooperatively and timely to arrange for the necessary logistics required for the change in format of the Deposition.

Remote Administration of Oath and Recording of Video: The Parties agree that a Court Reporter may administer the oath to a witness remotely, even if the Court Reporter is not in the physical presence of the witness. Further, if a Court Reporter is not authorized to take oaths in the place of examination pursuant to Federal Rule of Civil Procedure 28, the Parties agree that (i) extenuating circumstances warrant proceeding with the administration of such oaths remotely and (ii) the transcripts and video recordings may be used by or against all Parties in the litigation to the same extent that would otherwise be permissible under applicable court orders, rules of court, rules of procedure, and rules of evidence, including Federal Rule of Civil Procedure 30(b)(5). The Parties further stipulate, pursuant to Federal Rule of Civil Procedure 29(a), that the recorded video provided in a digital file by the court-reporting service or platform vendor may be used as if it were a recording prepared by a certified videographer and that each side will waive any objections based on authenticity. The individual administering the oath to the witness shall ask the witness to swear that the witness is who the witness claims to be, and, if appropriate, have the witness show identification.

The Parties and any appropriate Non-Party will cooperate on technical issues regarding the digital file (*e.g.*, assuring audio and video quality, displaying exhibits, ascertaining that only those

portions of the deposition that are on record should be recorded, and affixing time stamps). The time shown on the transcript and video shall be the local time in the place where the witness is located. Absent a special need, the witness will not have access to or use of a real-time feed from the Court Reporter at any time during the Deposition. Both the Court Reporter and the Deposition vendor or videographer will maintain an official record of the Deposition. Accordingly, both will need to agree when proceedings are on or off the record. Once proceedings go on the record, absent extenuating circumstances, all Parties and appropriate Non-Parties must agree before the record stops.

Video-conferencing: Where the witness, Defending Counsel, or the Deposing Counsel are appearing for the Deposition remotely, then a video-conferencing service will be used, and such video may be recorded for later use in proceedings in this case, including trial. The video-conferencing software must have sufficient security features in place to prevent the public disclosure of protected information designated under the Confidentiality Order in the litigation. The Parties and any appropriate Non-Parties will discuss any further details related to the video-conferencing service in advance of the Deposition, and, if there are any disagreements, will raise those with the Court. To the extent possible, the video-conferencing service should display the witness, Defending Counsel, and Deposing Counsel on the video screen at all times, unless one or more counsel must be taken off screen to display an Exhibit; however, the witness should always be on screen. Statements by the witness, Deposing Counsel, Defending Counsel, Attending Counsel, the Court Reporter, and the videographer shall be audible to all participants, and they should each strive to ensure their environment is free from noise and distractions.

The Parties and any appropriate Non-Party will cooperate on technical issues regarding the digital file (*e.g.*, assuring audio and video quality, displaying exhibits, ascertaining that only those portions of the deposition that are on record should be recorded, and affixing time stamps). Deposing Counsel and Defending Counsel shall meet, confer, and cooperate to ensure that the witness has technology sufficient to attend a Deposition via remote means. If necessary, this shall include arranging for the witness to participate in a “test run” of the Deposition video-conferencing software at least three business days or five calendar days before the scheduled date of the Deposition (whichever is longer).

Vendor and Platform

Plaintiffs are using _____ for court reporting, videography, and remote video deposition services in this case. _____ intends to use the _____ platform, which allows for the witness, Attending Counsel, Deposing Counsel, Defending Counsel, Court Reporter, and videographer to participate in a Deposition without attending the Deposition in person. Defendants are using _____ for court reporting, videography, and remote video deposition services in this case. _____ intends to use the _____ platform, which allows for the witness, Attending Counsel, Deposing Counsel, Defending Counsel, Court Reporter, and videographer to participate in a Deposition without attending the Deposition in person. _____’s and _____’s cost structures for the services being rendered are attached to this stipulation. To the extent any Deposition will proceed using a service other than as set forth above, details regarding the video conferencing to be used for each Deposition will be made available to all Parties and any appropriate Non-Parties at least five business days before the Deposition.

Deposition Recording

In addition to recording the Deposition by stenographic means, the deposing Party may record the Deposition by video. The video recording shall be limited to the witness; however, this provision is separate from, and does not supplant, Section ___ above as to the individuals that should be *displayed* (rather than recorded for the official Deposition video) during the Deposition. Deposing Counsel is responsible for ensuring that the remote means used for a Deposition allow for the Court Reporter to accurately record the witness's testimony. Either Deposing Counsel or Defending Counsel may elect to have a technical specialist attend a Deposition taken by remote means to ensure that technical issues are dealt with in a timely manner and to administer any virtual breakout rooms. Deposing Counsel may also elect to have an exhibit specialist attend a Deposition taken by remote means to ensure that Exhibits are properly displayed during the Deposition. If Deposing Counsel uses an exhibit specialist, Deposing Counsel will act in good faith to make their exhibit specialist available to assist the Defending Counsel or other Parties or appropriate Non-Parties to present any Exhibits to the witness during cross-examination or redirect. For purposes of clarity, Confidential or Highly Confidential information may be disclosed to such technical or exhibit specialists during the course of a Deposition without violating the Court's Confidentiality Order, and such technical and exhibit specialists shall be bound by the Confidentiality Order.

Exhibits

Generally: Deposing Counsel shall be responsible for ensuring that any Exhibits that they wish to mark and use at the Deposition can be shown to the witness and Defending Counsel in a manner that enables the witness and Defending Counsel to independently review the Exhibits during the course of the Deposition. Such means of marking and using Exhibits for the Deposition shall include, by way of example: (a) using a video-conferencing platform or other electronic application for presenting Deposition Exhibits (*e.g.*, Remote Counsel/Cameo, eDepoze, or Zoom screen-sharing) which enables Deposing Counsel to share Exhibits with the witness, Court Reporter, Defending Counsel, and Attending Counsel; (b) sending via overnight courier sealed courtesy copy or pre-marked Exhibits to the witness (and Defending Counsel, if requested) in advance of the Deposition; (c) making available via a pre-arranged FTP or file-sharing site or emailing pre-marked Exhibits to the witness, Defending Counsel, Attending Counsel, and the Court Reporter in advance of the Deposition; or (d) any other means to which the Deposing Counsel and Defending Counsel agree. If the remote means used do not permit marking of Exhibits remotely, Deposing Counsel shall either pre-mark Exhibits or direct the witness and other attendees as to how Exhibits should be marked.

Electronic Exhibits: A Party may use electronic Exhibits in connection with a Deposition so long as the Party provides notice to the witness and Defending Counsel and arranges for the technology to permit the presentment of the electronic Exhibit at the Deposition to the witness, Defending Counsel, and Attending Counsel. The Parties will provide electronic copies of Exhibits introduced during the course of a Deposition, either via email, deposition exhibit software, or via a pre-arranged FTP or file-sharing site, to ensure that Defending Counsel and Attending Counsel may participate in the Deposition. Similarly, where an Exhibit is used electronically and was not

provided in hard copy before the Deposition, the Parties will provide electronic copies of that document by the same means described in the previous sentence. Deposing Counsel shall not begin questioning a witness concerning an electronic Exhibit until that Exhibit has been received by Defending Counsel and Attending Counsel.

Hard-Copy Exhibits: At the sole discretion of the noticing Party, a remote Deposition may be conducted using sealed, pre-marked, hard-copy paper Exhibits as the official Exhibits. Such hard-copy Exhibits shall be transmitted so that they are received at least by noon of the business day before the Deposition (with tracking information available upon request) to the witness, Defending Counsel, and the Court Reporter. Upon delivery, each recipient shall confirm by email to Deposing Counsel receipt of the Exhibits. Anyone receiving sealed hard-copy Exhibits agrees pursuant to this Stipulation that the sealed Exhibits must remain sealed and unopened until the Deposition begins and the witness is instructed on the record to open a sealed hard-copy Exhibit (at which time others in possession of sealed exhibit folders may open the sealed exhibit, as well). Deposing Counsel may ask the witness and others receiving sealed exhibits to confirm on the record that no exhibit was opened prior to the time they are opened during the Deposition. At the conclusion of a Deposition, any unused exhibits will remain sealed and, within two business days, shall be returned, unopened, to the counsel who provided those exhibits with a prepaid, self-addressed return shipping label or envelope. All counsel planning on questioning the witness with an Exhibit will attempt in good faith to include in their hard-copy set all the exhibits on which they plan to question the witness; however, nothing in this Stipulation is intended to prevent, nor in fact prevents, counsel from preparing for the Deposition until the time that it occurs or from introducing during the Deposition additional Exhibits not previously transmitted in hard copy.

Courtesy Hard Copies for Depositions Conducted with Electronic Exhibits: Upon request by the witness or Defending Counsel, courtesy hard copies of Exhibits will be provided to the witness and Defending Counsel at an agreed upon time (*e.g.*, 48 hours) prior to the Deposition. Voluminous exhibits upon which only a portion of the document will be the subject of questioning (beyond authentication and evidentiary questions) need not be transmitted in hard copy and may be presented electronically, but Deposing Counsel will provide excerpts of key portions of the document as part of the hard-copy courtesy set. If these hard copies are delayed in arriving, the Parties and any appropriate Non-Parties will meet and confer on rescheduling the Deposition, if necessary. All counsel planning on questioning the witness with an Exhibit will attempt in good faith to include in the courtesy hard copies all the Exhibits on which they plan to question the witness. For the avoidance of doubt, the official Exhibit will remain the electronic copy presented to the witness and all participants.

Last-Minute Exhibits: The Parties recognize that there may be last-minute Deposition Exhibits, which are not able to be provided to the witness or Defending Counsel in advance. Nothing in this Stipulation is intended to prevent, nor in fact prevents, Deposing Counsel from preparing for the Deposition until the time that it occurs or from introducing during the Deposition additional Exhibits not previously transmitted in hard copy. Questioning about a last-minute Exhibit shall not commence until Defending Counsel has received a copy of the exhibit electronically via one of the electronic methods specified in this Stipulation.

Witness Notes

Witnesses will testify on the record that they do not have any notes or documents available to them while the Deposition is on the record, other than any that are disclosed and provided to all Parties and appropriate Non-Parties. Any documents reviewed, or notes made, by witnesses while on the record shall be preserved and made available to all Parties, appropriate Non-Parties and counsel. Upon conclusion of the Deposition, the Court Reporter will make available or circulate the Exhibits to all counsel attending the Deposition.

Witness Communications

There should be no unrecorded or unnoted conversations between the witness and any counsel involved in this case (including Defending Counsel) during a remote Deposition while the witness is on the record, and Deposing Counsel may ask the witness and Defending Counsel to certify, on the record, that no such conversations have taken place. Further, witnesses in Depositions taken pursuant to this Stipulation shall not use or consult any means of communications while on the record during the Deposition (other than audio and video communications used to conduct the Deposition itself), including, without limitation, electronic communications (email, text, social media, or the chat function in a video-conferencing system) and other communications (telephone). All counsel attending the Deposition will also stipulate, on the record and at the beginning and end of each Deposition, that they (and any individual working with them) will not communicate and have not communicated with the witness orally, in writing, or electronically (including, but not limited to, emails, texts, or posts). Nothing in this Stipulation prevents a witness from seeking advice regarding the application of a privilege or immunity from testifying during the course of a Deposition taken pursuant to this Stipulation. Nothing in this Stipulation prevents Defending Counsel from initiating a private communication off the record with a witness for the purpose of determining whether a privilege should be asserted or for another salutary purpose (e.g., admonishing the witness to answer the question asked), provided Defending Counsel first states Defending Counsel's intention on the record before initiating such communication. Nothing in this Stipulation shall prevent Defending Counsel from being physically present in the same room as the witness regardless of whether a Deposition is treated as in-person or remote under this Stipulation.

During breaks in the Deposition, the Parties may use a breakout room feature provided and controlled by the video-conferencing service, which simulates a live breakout room and may be used to discuss a topic the deponent should not hear. Conversations in the breakout rooms shall not be recorded. Off-the-record communications are or are not discoverable to the extent permitted under the rules and practices in the court where the case is pending.

Technical Audio or Visual Issues

Should technical issues, such as audio or video issues, prevent the Court Reporter, witness, Deposing Counsel, or Defending Counsel from reliably seeing one another, hearing one another, or, in the case of the Court Reporter, transcribing the testimony at any point during a Deposition taken pursuant to this Stipulation, the Deposition shall be recessed until the technical issue is resolved. Should technical issues prevent the Court Reporter from reliably hearing or transcribing the testimony at any Deposition taken pursuant to this Stipulation and such technical issue cannot be remedied in a timely manner, Deposing Counsel, Defending Counsel, and Attending Counsel shall meet, confer, and cooperate with one another to address the problem, including, but not limited to, rescheduling or continuing the Deposition. These provisions shall not be interpreted to compel any Party or appropriate Non-Party to proceed with a Deposition where the witness cannot hear or understand the other participants or where the participants cannot hear or understand the witness. The Parties and any appropriate Non-Parties will also act in good faith to account for any time lost to technical issues to permit the deposing Party to use the full time it is permitted for the Deposition.

If a technical issue prevents Defending Counsel from hearing a question or interposing a timely objection on the record, then Defending Counsel shall notify the Deposition attendees as soon as possible (*e.g.*, by using the chat features of the video conference or emailing counsel). Defending Counsel's objection to that question is preserved if (i) the objection is asserted promptly on the record after the technical issue is resolved, or (ii) if the technical issue cannot be resolved and the Deposition is continued, the objection is asserted in writing to Deposing Counsel, Attending Counsel, and the Court Reporter within three business days of receiving the rough or final transcript, whichever comes first, that includes the question at issue.