

Adapting Remote Proceedings in the Post-Pandemic Era: Depositions

Virtual depositions are destined to remain a fixture in the post-COVID era, but must also be balanced against the return of in-person depositions.

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The option to conduct depositions remotely is codified in the federal rules, but before last year, it was used sparingly. One pandemic later, litigators around the country now have over a year's worth of experience taking depositions almost exclusively through Zoom or other remote platforms. Virtual depositions are destined to remain a fixture in the post-COVID era, but must also be balanced against the return of in-person depositions. Litigants' growing reliance on remote capabilities therefore presents potential challenges for deposition practice going forward, and there are several ways that federal courts may seek to address them.

The challenge starts with the existing legal framework—in particular, Rule 30(b)(4) of the Federal Rules of Civil Procedure—which makes in-person depositions the default position and permits remote depositions only by stipulation or court order. If all parties agree to proceed virtually, then everything runs smoothly. But that will not always be the case. Some attorneys may hold out for in-person depositions as a matter of personal preference, or because a given witness's testimony is deemed to be particularly important. Others may insist on virtual depositions,



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despite an opponent's stated preference that they be conducted in person, because a witness seems better suited to testify at a distance. And in-person depositions may be requested for other strategic reasons, either to drive up fees in the hopes of forcing settlement, or as part of tit-for-tat gamesmanship after an adversary insisted on taking other depositions in person.

In any of these scenarios, if one party holds out, then under the federal rules, the matter must be briefed and submitted to the court for resolution. The problem, though, is that Rule 30(b)(4) does not specify the standards to be applied in determining whether to grant a request for a remote deposition. The existing case law generally considers "hardship" on the party being deposed, and prejudice to the party seeking the deposition. During the height of the pandemic, this was an easy test to apply. As one

judge in the Northern District of Illinois explained in ordering remote depositions over a party's objection, the pandemic "may necessitate the taking of remote depositions unless litigation is going to come to an indefinite halt until there is a cure or vaccine for COVID-19."

Today, vaccines abound and the exigencies of the COVID-19 pandemic are quickly fading, meaning that the pandemic-related "hardship" and "necessity" arguments that helped make virtual depositions so prevalent in the last year will hold less water. If the legal community opts to capture efficiencies and cost savings by making remote depositions an easy substitute for in-person depositions, new rules and written guidelines will be needed.

Courts themselves may, of course, issue rules and rulings allowing more permissive use of remote depositions. But those changes may be ad hoc, slow to take hold, and result in standards that differ across jurisdictions. Practitioners litigating cases in venues across the country would benefit from more uniform standards and predictable results. Shared expectations translate to fewer disputes.

One suggestion might be to amend Rule 30(b)(4) to more

clearly explain or even enumerate the circumstances in which remote depositions are deemed appropriate. For inspiration, drafters might look to a proposal currently being considered in New York state courts, where the existing standard mirrors that used in federal courts. The New York proposal would codify factors that may show or support the existence of "hardship" in a broader sense, including the "distance," "time" and "costs of travel" associated with bringing lawyers and witnesses together for an in-person deposition; whether the witness is a "party to the litigation"; and the "likely importance or significance of the testimony." These factors give parties clearer guidance and expectations about the types of depositions for which remote is preferred (non-party witnesses, minor factual witnesses) and the types for which in-person is preferred (party witnesses, witnesses testifying on key factual issues).

The Judicial Conference's Committee on Rules of Practice and Procedure may also consider amending the Federal Rules to involve courts in the decision-making process before costly disputes can take root. In particular, Rule 16 could be amended to make remote



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versus in-person depositions a topic of discussion when creating a case management plan at the outset of the case. At that time, courts can exercise their own judgment, or articulate their own views, about the appropriateness of in-person depositions for certain types of witnesses or issues, thereby nipping in the bud unnecessary disputes between the parties during discovery.

Federal courts should consider these and other ways to set guardrails for the parties about when and how to conduct remote depositions.

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