

Continuing to Advance Discovery Through Remote Depositions During COVID-19 Pandemic

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While it may not be appropriate for every deposition, given the uncertainty surrounding the COVID-19 pandemic the need to conduct proceedings remotely has become a necessity to advance cases. The Federal Rules of Civil Procedure (FRCP) expressly provide for depositions through “remote means,” but there are a number of issues to consider if you intend to use the testimony at trial.

The following provides a summary of the relevant provisions, provides examples of local rules that may impact, and provides a list of considerations to include in a stipulation. Here is a sample stipulation you can use as a starting point.

A. Summary of Relevant Provisions

In pressing for remote depositions to keep your cases moving, you should remind the opposing party that Rule 1 states that the FRCP provides the overarching principle that they “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. While remote depositions have not been commonplace it will be part of the new normal for the foreseeable future.

The relevant rules to be considered when considering remote depositions are Fed. R. Civ. P. 28, 29, 30, and 32. The following are the relevant provisions you should consider in planning your remote deposition and negotiating a stipulation:

Rule 30(b)(4): “The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.”

Rule 30(b)(3): Permits deposition testimony to “be recorded by audio, audiovisual, or stenographic means.”

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Rule 28(a)(2): Defines the term “Officer” in Rules 30-32 as “a person appointed by the court under [Rule 28] or designated by the parties under Rule 29(a).”

Rule 29(a): “Unless the court orders otherwise, the parties may stipulate that: . . . a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition.”

Rule 28(c): “A deposition must not be taken before a person who is any party’s relative, employee, or attorney; who is related to or employed by any party’s attorney; or who is financially interested in the action.”

Rule 32(d)(2): “An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made: (A) before the deposition begins; or (B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.”

Rule 30(f): “The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness’s testimony. The certificate must accompany the record of the deposition.”

Rule 32(c): “Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well.”

Rule 30(b)(5)(A): “Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes: (i) the officer’s name and business address; (ii) the date, time, and place of the deposition; (iii) the deponent’s name; (iv) the officer’s administration of the oath or affirmation to the deponent; and (v) the identity of all persons present.”

Rule 30(b)(5)(B): “If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent’s and attorneys’ appearance or demeanor must not be distorted through recording techniques.”

B. Considerations for Your Stipulation

1. Given the current health crisis and spate of court orders curtailing operation, the assumption is the parties will generally be willing to stipulate to any procedures that help move the case and abide by the requirement to maintain adequate distance between people. A party may also seek a court order under Rule 30(b)(4) to conduct remote depositions.
2. The relevant jurisdiction is the one where the witness is located and not that of the questioner. Fed. R. Civ. P. 30(b)(4). *See also Tile Unlimited, Inc. v. Blanke Corp.*, 2013 WL 1668194, at *3 (N.D. Ill.

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Apr. 17, 2013) (discussing foreign depositions).

3. Look at relevant state law concerning telephone and remote depositions.
4. Check the jurisdiction's local rules concerning remote depositions. For example, the local rules issued by S.D.N.Y./E.D.N.Y state that "[t]he motion of a party to take the deposition of an adverse party by telephone or other remote means will presumptively be granted."
5. Check to see if your Judge's standing order has any provisions related to remote depositions.
6. Check the Bar's advisory opinions to determine if there are any limitations on conducting remote depositions.
7. Is the court reporter a licensed notary? Consult your notary/court reporter concerning the patchwork of state laws that determine who can preside over the deposition, administer the oath, and other potential limitations. There are a number of model acts, e.g., Revised Uniform Law on Notarial Acts, and Model Notary Act, Model Electronic Notarization Act, that states have adopted that will impact your deposition. The two questions that must be answered: (i) can a notary administer the oath; and (ii) does the notary have to be present with the witness. States are moving to suspend any requirements concerning the need for physical presence with the witness, but it will be necessary to run this down on a state-by-state basis.
8. Given the widespread restrictions on travel because of COVID-19 it is likely that the witness may not be able to travel to an office to conduct the deposition and may have to sit for the deposition at his or her residence. Make sure to include language requiring the parties to cooperate in good faith in assessing and testing the technology available in advance of the deposition.
9. The Rules permit "any person" to administer the oath under Rule 29(a) and you should include a waiver of any potential objections about the person's qualifications under Rule 32(d)(2). But, as noted above, state law may impact who may be qualified to administer the oath.
10. Make sure the officer present for the deposition does not run afoul of Rule 28(c) which prohibits the use of "any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action." Fed. R. Civ. P. 28(c).
11. You should include language requiring the noticing party to provide the stipulation and the relevant protective order in advance so any issues can be worked out well in advance of the deposition. This will ensure, for example, that the court reporter complies with the requirements of Rules 30(b)(5)(A) and (B) and 30(f). You should also consider including a provision that
12. Include a provision requiring the parties to cooperate in arranging any non-party depositions under Rule 45. You should consider serving the stipulation and protective order along with any notice.
13. Include a severability provision to ensure the agreement survives in the event a particular provision runs afoul of a state law.

14. Finally, if the deposition will be conducted telephonically and without a court reporter present, it's possible that opposing counsel could "pass notes" to the witness in real time. Such a practice would obviously be a serious ethical violation which should be a sufficient deterrent to engage in such a practice. At the very least, to curb this you should ask the witness on the record if any such communications have occurred.

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