

by Ryan Casey

Practice Tips

The Virtual Reality of Depositions during COVID-19

Ryan Casey is an associate at Panish Shea & Boyle LLP in Los Angeles, specializing in representing plaintiffs in complex catastrophic personal injury, product liability, and wrongful death cases.

By now, the strangeness of the post-COVID-19 world and many of the changes that everyone has had to endure because of it have become routine. Actions that once seemed so bizarre at the onset of the shutdown, such as commuting from bed to the kitchen table and only needing to dress for work above the waist, are now habits. One of these habits—talking to friends, family, and co-workers through video chat platforms such as Zoom—is likely second nature by now.

For many lawyers, these same virtual platforms have become an integral part of work life. One of the most significant ways this has manifested in legal practice has been in the context of the virtual deposition. Before COVID-19, many lawyers may have participated in a few depositions by phone or conducted the occasional video deposition when a witness was out of state or scheduling was otherwise an issue; however, the overwhelming majority of depositions pre-COVID-19 were in person. This reality has been diametrically flipped and depositions now are almost entirely virtual. Since

February 2020, many lawyers have participated in countless virtual depositions and are presently involved in them weekly.¹ It does not appear that the current legal landscape will be returning to the pre-pandemic baseline anytime soon. As difficult as the present circumstances have been for many in the legal practices, there are nevertheless benefits to having been forced to learn, understand, and utilize virtual depositions.

The virtual deposition process, like that of the traditional in-person deposition, includes coordination, preparation, and execution but differs in many key aspects from traditional depositions.

Emergency Rules

On April 6, 2020, the Judicial Council adopted emergency rules in light of the COVID-19 pandemic.² Included in these

was Rule 11, subdivision (a), regarding “Deponents appearing remotely,” which provides the authority and right to conduct depositions virtually and reads in pertinent part: “Notwithstanding any other law, including Code of Civil Procedure section 2025.310(a) and (b), and rule 3.1010(c) and (d), a party or nonparty deponent, at their election or the election of the deposing party, is not required to be present with the deposition officer at the time of the deposition.”³

The authority provided in Rule 11 effectively abrogates the need for the court reporter and witness to be physically present in the same place and thereby authorizes the taking of virtual depositions. Prior to the adoption of Rule 11, virtual depositions could occur only if the parties stipulated to the process. Now, an objec-



tion to virtual depositions is improper when the objection is made on the basis that the witness and court reporter will not be present in same room.

Rule 11 was set to remain in effect for 90 days after the governor declared the state of emergency due to COVID-19 lifted. This sunset provision is set forth in Rule 11, subdivision (b), and reads in pertinent part: "This rule will remain in effect until 90 days after Governor Newsom declares that the state of emergency related to the COVID-19 pandemic is lifted, or until amended or repealed by the Judicial Council."⁴

The provisions set forth above in Rule 11 were initially extended by the amended appendix of the emergency rules, which were adopted and effective as of August 13, 2020. Furthermore, on September 18, 2020, Governor Gavin Newsom signed Senate Bill 1146, which went into immediate effect and essentially made the emergency measures of Rule 11 discussed above permanent.⁵

While Rule 11 and SB 1146 provide for parties to take virtual depositions absent stipulation or agreement, the process is still best conducted with coordination and agreement from both the deposing and defending counsel. In the

COVID-19 environment, it is as important as ever to attempt to litigate civilly and cooperatively and to meet and confer whenever possible disagreements may occur.

In instances in which cooperation is simply not possible, court intervention may be needed. Whether that is in the form of a motion to compel a virtual deposition, if a party is refusing to allow one, or a motion for protective order, if a party is insisting that the deposition must be in person, seeking court intervention should not be undertaken lightly.

In light of the current COVID-19 pandemic, court backlogs, and the language of Rule 11 permitting virtual depositions and the widespread utilization of them, a lawyer may disadvantage its client by arguing to a judge that a deposition should not proceed virtually and instead must proceed in person. With the current state of the law and the COVID-19 court-adopted procedures, a litigant taking that position will have significant hurdles to overcome and could further delay a case.

Noticing Virtual Depositions

In addition to setting virtual depositions by agreement, other important factors

when setting virtual depositions are to keep in mind the witness to be deposed and to facilitate the deponent's appearance and participation. It is most important to address ahead of time when an attorney will be deposing unrepresented individuals such as third-party witnesses, first responders, police officers, and other such witnesses. When scheduling these types of depositions, it is best to find out what type of technology the witnesses have available and from what location they will be connecting for the deposition. Also, it is important to ask what device they will use to connect to the deposition. Is the deponent logging in from a secure and quiet location with good Internet? Will the deponent have potential bandwidth/Internet issues that might make viewing of exhibits difficult?

When the deponent is a not a party, party representative, or expert witness, the deposing party should take the lead in finding out this information and addressing the issues ahead of time. If the witness is to be represented by a party, it is necessary to go through the same process with opposing counsel to make sure everyone has the appropriate technology to allow a good connection for effective participation in the deposition.



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Deposing counsel also should coordinate with defending counsel on the type of technology available so as to prevent foreseeable technical difficulties and allow both sides to participate effectively. Many firms providing virtual deposition services can assist in providing technology such as an iPad or laptop with broadband and Zoom preloaded to witnesses ahead of time so the witness can easily attend the deposition. However, these preparations take extra time and planning, which is why it is so important to identify these issues early on during the deposition notice stage.

Finally, when parties have agreed on a date and time for a virtual deposition and determined if any technology hurdles need to be overcome, parties should then ensure that the deposition notice contains appropriate language identifying that the deposition is being conducted virtually. Often, retained court reporter firms can provide the language to include in a notice that has the necessary details for the virtual deposition platform being utilized.

Preparing for Virtual Depositions

Deposition preparation has never been more important than in the COVID-19 legal practice landscape. At the forefront of this preparedness is understanding, acquiring, and becoming familiar with the different types of technology available. Indeed, technology has never been more important in the legal field. Being effective with only a legal pad and a Redweld folder is simply an impossibility in the virtual deposition world. Counsel now must become familiar with, and competent in using, the available technologies—a litigant unfamiliar with available technologies or incompetent in their use cannot take an effective virtual deposition.

Good audio-visual equipment. Unlike online chats or MCLE presentations, virtual depositions are legal proceedings with legal consequences. When taking virtual depositions, it is important to utilize good audiovisual equipment. Most laptops, tablets, and phones come equipped with cameras and microphones that could be used to conduct a virtual deposition; however, much better options are available. The appropriate apparatuses can easily be acquired online for reasonable prices from online retailers. Purchasing a good external camera, lighting device, and microphone will make it easier to be seen and heard thereby making the virtual deposition experience more effective.

An external camera greatly improves

video quality, and an external light helps eliminate issues with poor lighting, back-lighting, or glare. Both can be clipped to the top of a computer and will make it much easier for others to view the deponent in a virtual deposition setting.

An external microphone/headset makes the sound quality significantly better than a standard built-in computer mic. Microphones come in many options, including lapel mics (the kind clipped to a shirt), stand-alone mics (resembling old school radio microphones on a desk), and headset microphones that fit over the wearer's ears and resemble a headset used by an airline pilot or sports broadcaster. All are effective in improving the quality of the audio, so deposition questioning is clearer and easier to understand for all participants. One advantage to a headset mic with headphones is that it makes it easier for the deposing party to hear others in the deposition, which is particularly useful if the deposing party has to conduct the virtual deposition in a location with background noise or with a soft-spoken witness.

Connectivity. A good Internet connection is of paramount importance when conducting virtual depositions. Whenever possible, connection to a deposition should be made through a hard-wired Internet connection rather than wireless connection for a more stable Internet source. If connecting by wireless, it is important to limit the number of users on the connection as much as possible to decrease lag, which can slow down the connection. In situations with poor Internet connectivity, parties may opt to connect audio to the virtual deposition via phone rather than the Internet.⁶

If setup or technical difficulties become daunting, most companies offering virtual depositions services can provide an attendant to assist with any type of technology or connectivity issues and may, by request, be available at the start of a deposition for troubleshooting.

Multiple screens. Another step to making virtual depositions easier is to invest in a second screen for the computer used for the deposition. Many lawyers may already have multiple monitors at work, but, if working from home on a laptop, obtaining and connecting a second screen can be beneficial in the virtual deposition setting. Whether it is an additional monitor, tablet, or an extra television connected by High-Definition Multimedia Interface—usually known as HDMI—a second screen makes virtual depositions much easier. With two screens, the depo-

ment can keep the virtual deposition platform on one dedicated screen while working files, documents, and exhibits are displayed on the other monitor.

Virtual backgrounds and green screens. Hollywood has been using the green screen for years. It now can be deployed during virtual depositions. A collapsible green screen is an inexpensive screen obtained online that will create a uniform backdrop and display a virtual background easily. Trying to use a virtual background without a green screen can work on some newer higher-powered computers, but with a slightly older computer, faces may become absorbed into the background thus creating an interesting yet distorted visual image unless a green screen is deployed.

Virtual backgrounds are simply superimposed images that project on to the green screen and replace with a stock image what is actually in the background, such as books, posters, or other cluttered messes. These allow litigants to present a more professional presence during virtual depositions as well as to keep the witness focused on questions and not what could be happening behind in the background, such as embarrassing interruptions suddenly appearing in the form of an unexpected entrance by a spouse or child. Without a dedicated room for virtual depositions, it is important to carve out space at the kitchen table or in a living room. Using a green screen for a virtual deposition can help create the appearance of a private professional space.

Livenote and picture-in-picture. Livenote is often used in trial or at in-person depositions when the transcript of the testimony is provided and displayed in real time. It is a feature that can be helpful in certain depositions, particularly more complex ones, and can also be used in virtual depositions. When using Livenote, dual monitors come in handy that allow counsel to keep the running transcript displayed on one screen and the witness on another screen.

Picture-in-picture is useful in document-intensive depositions. It allows showing the deposition video side by side or superimposed over an exhibit being discussed. Like Livenote, this feature was available in pre-COVID depositions and is still available to use in virtual depositions. Livenote and picture-in-picture are options that many virtual deposition platforms offer as a service. For the right situations, they can make the virtual deposition process more effective with better quality video product.

Exhibits in virtual depositions. When preparing exhibits for a virtual deposition, especially if the deposition involves a lot of documents, it is best to pre-mark and Bates stamp documents in enough time prior to the deposition that the documents can be provided electronically to the court reporter and opposing counsel. This practice facilitates referencing exhibits in the deposition and directing witnesses. This is especially helpful in the virtual setting when the deposing party cannot reach across the table, flip to the page, and point the witness to a certain statement. It may also make sense to send hard copies to the witness in advance of

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the deposition so that having the exhibits pre-marked and Bates stamped facilitate directing the witness to the correct data. Providing hard copy exhibits ahead of a virtual deposition is advisable when the witness may not have the best connection or will be attending the deposition on a device like an iPad or a mobile phone on which documents may be hard to see.

In addition to providing the exhibits ahead of time, it is advisable to prepare for the deposition by creating an electronic folder on the computer specifically for the deposition with all of the pre-marked exhibits saved. This functions as a “virtual Redweld” and will make it significantly easier to share documents during the deposition.

Effective Virtual Depositions

The Zoom platform has become prevalent and essential during COVID-19, but there are lesser-known tools that may assist counsel in conducting virtual depositions. While the first step to taking an effective virtual deposition is acquiring the technology and preparing for the deposition and the next step is to become familiar with using tools like green screens and dual monitors, the only way to become truly familiar with the process is to practice, practice, prac-

tice. One way to practice using Zoom is to set up a call with oneself or ask a friend, family member, or significant other to join on a Zoom call and test out various techniques.

There is no substitute for practicing how to use a deposition platform such as Zoom to become proficient with the technology necessary to conduct an effective virtual deposition. There are a variety of Zoom features that are useful in virtual depositions.

Screen sharing. This is perhaps the most useful function in conducting virtual depositions. The screen sharing button is found at the bottom of the Zoom window and has a green “up” arrow that opens a menu of sharing options. The share-screen function allows interaction with the witness and allows the presenter (usually the deposing attorney) to show documents, photos, videos, and other exhibits virtually to the witness and opposing counsel. After selecting the screen share button, Zoom displays which windows are available to be shared and allows a preview of each window before it is displayed. Prior to selecting the share tab, it is advisable to pay attention to which window is selected so as to avoid accidentally sharing the entire desktop or windows, which should not be made public.

Using two monitors facilitates screen sharing. One technique in using two screens is to have one screen dedicated to the Zoom deposition and the other screen dedicated to a virtual Redweld folder with all exhibits open. This allows the deposing attorney to easily find the document to share while opening it on a second screen to select and share the desired portion with everyone, all without obscuring the virtual deposition on the other screen. The dual monitors allow the deposing party to keep sight of the witness while finding and sharing relevant exhibits. After virtually sharing the selected document, the party can click the red “Stop Share” button, which will dismiss the document. Another practical, real-world benefit to this type of organization is the ability to avoid accidental sharing of personal or private information by displaying the wrong screen inadvertently.⁷

Annotate and Whiteboard. “Annotate” is a useful function when displaying documents via the share screen mode. This feature is available when a document is displayed via the “Share” button and is located in a toolbar at the top of the screen share as a pencil icon. This fea-

ture allows for marking up the document being shared with the witness and can also be used by the witness to mark up the document. Similar to handing a pen to a witness across the table, this feature allows the witness to virtually mark documents, for example, indicating where the witness was standing in a certain photograph during a car crash. It is a way to hand the witness a "virtual pen."

Counsel can then take a screen shot of the witness's annotation and mark it as a new exhibit to attach to the deposition. This function also works to show the witness a video, to stop on a certain frame, and to ask the witness to make annotations. The annotations also can be marked as an exhibit to the deposition. By request, many companies providing virtual depositions will assign an attendant to the deposition to coordinate document sharing and virtual exhibit creation.

The "Whiteboard" option on Zoom is another useful tool in virtual depositions that is an option selected from the Share Screen tab. The Whiteboard function acts as a virtual whiteboard allowing users to draw or write on a virtual surface. Like the Annotate function, the witness can write on the Whiteboard or create a dia-

gram, which can then be captured with a screenshot and saved as an exhibit.⁸

These are just a few of the features that can make a virtual deposition proceed with some of the benefits of face-to-face depositions.⁹ Although the virtual deposition cannot recreate exactly the in-person experience, when utilized proficiently it can be highly effective. Virtual depositions also have benefits that in-person depositions lack, for example, eliminating hours of travel time to a deposition. They also may be more convenient and less stressful for some witnesses, thereby making them feel more comfortable. Also, when a witness does not have to drive long distances to sit in an unfamiliar conference room and can instead log in from home, it can facilitate a witness's cooperation in appearing for depositions.

While virtual depositions likely will not replace in-person depositions forever, they are a necessary tool going forward for the duration of the COVID-19 pandemic. Moreover, even when things begin to return to normal, given the utility of virtual depositions and the recent signing of SB 1146, virtual depositions will continue to play a significant role in the future of legal practices. Becoming proficient in them is a skill that will only

enhance counsel's ability to represent clients and litigate cases, both now and into the future. ■

¹ The author has participated in over 50 virtual depositions since the beginning of the COVID-19 pandemic in March 2020.

² Appendix I, Emergency Rules Related to COVID-19, available at <https://www.courts.ca.gov/documents/appendix-i.pdf> (current as of Aug. 19, 2020).

³ *Id.* at Cal. R. Appendix I, Emergency R. 11. Depositions through remote electronic means.

⁴ *Id.*

⁵ Amending CODE CIV. PROC. §§1010.6, 2025.310 and adding and repealing CODE CIV. PROC. §599 (approved Sept. 21, 2020); see California Legislative Information, SB-1146 Civil procedure: electronic filing, trial delays, and remote depositions, available at https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB1146.

⁶ A tutorial on how to do this on the Zoom platform can be found here: <https://support.zoom.us/hc/en-us/articles/201362663-Joining-a-meeting-by-phone> (last accessed at Nov. 24, 2020).

⁷ Zoom screen sharing tutorial, available at <https://support.zoom.us/hc/en-us/articles/201362153-Sharing-your-screen-content-or-second-camera> (last accessed Nov. 24, 2020).

⁸ See Zoom walkthrough of the features, available at <https://support.zoom.us/hc/en-us/articles/115005706806-Using-annotation-tools-on-a-shared-screen-or-whiteboard> (last accessed Nov. 25, 2020).

⁹ See Zoom tutorials regarding all features on their platform, available at <https://support.zoom.us/hc/en-us/articles/206618765-Zoom-video-tutorials> (last accessed Nov. 25, 2020).

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