

# The Dawn of the Zoom Deposition: What Lessons Are We Learning So Far?

The COVID-19 pandemic has caused depositions to be held in a much different way than ever before, and it looks to be working well.

BY MATT KEENAN AND JON STRONGMAN

When history books are written about the COVID-19 era, they will certainly contain a chapter about how the virus changed the way we communicate—and the way we litigate. Civil discovery and depositions have, by necessity, moved online, and according to one prominent court reporting service, the number of remote depositions grew 400% since March 2020.

Zoom is more than the name of the brand. It's a metaphor for how quickly this discovery reality has hit us. In the past three weeks, we have completed several remote expert depositions. The lessons learned, we believe, are worth sharing.

## Upsides, Downsides and the Big Picture

Obviously, this mode of discovery is in its infancy. The current platforms feel more like a useful adaptation of available technology to get the job done than a refined tool built and programmed for this specific purpose. There's no question there will be acquired shortcuts and targeted technological improvements that will facilitate the process. That said, the basic concept seems unlikely to change—separate parties in separate locations speaking on a common subject with the benefit of technology. Our experiences appeared to advance the most important goal—learning opinions and the basis for the same. Questions asked, answers given, the ball moved.



Matt Keenan



Jon Strongman

And, we believe, the setting minimized the potential for opposing counsel to employ tactics that come easily when seated across the table—cajoling, pressuring and cutting off witnesses, things we see all too frequently these days. The witness had the liberty to answer without interruption. In other words, these depositions were more a search for truth and less a firing line.

Other benefits include cost and video recording. This technology obviously eliminates the expenses, time and related headaches that come with traveling to the witness. And anyone who has requested court permission to get a video camera on the questioner knows how hard these orders can be. This technology grants your motion. So as a defense attorney, what is not to like?

The downsides include a loss of control—for everyone involved. Nothing can replace sitting across from a witness you are deposing or next to

a witness you are defending. The room has a feel. You can sense when a witness is uncomfortable or tired. A witness' response to pressure is palpable—for better or worse. Having a fine sense of these reactions is a vital part of control in a deposition—for both sides. And in a virtual environment, these senses are muted.

Additionally, not being present with the witness in the hour before the deposition can also be unsettling. For us, that is the moment to inspect their file and eliminate surprises.

### **Advice from Court Reporters and Other Best Practices**

Court reporters have lived through more virtual depositions than anyone else, and they freely offered five tips to make sure the process is smooth.

- Stipulate not to communicate with the witness while on the record—e.g., no texting or emailing to the witness.
- Get exhibits organized in advance. Many platforms will have a file-sharing feature that makes this easy and accessible for the parties, witness and reporter.
- Connect to the deposition audio by phone. This helps reduce the drag on the Wi-Fi—particularly at home—and helps avoid jumpy, garbled audio.
- One speaker at a time. The technology only amplifies the difficulties when lawyers and witnesses talk at the same time.
- Have email access during the deposition as a backup just in case.

Additionally, “[a]ttorneys considering this technology need to know the term [‘low latency’]—it means that there is very little lag time between the moment a question is finished and the moment that the witness receives the finished question,” said Corey Smith, senior trial consultant at Golkow Technologies. “Low latency makes the experience much more like natural conversation. Zoom, for instance, has a low latency. Other platforms vary.”

Physicians who moonlight as experts in litigation may be tech-challenged and need guidance, even as telemedicine becomes more common. It can be helpful with doctors to enlist a staff member to assist. They can be a real asset for such things as exhibits that are emailed, new notes to be scanned, time sheets with last-minute additions, and matters that ensure the deposition is wrapped up.

### **How Remote Depositions May Change Our Practices**

With a little imagination it is possible to see how this technology offers options that conventional depositions do not. Here are just two quick examples.

In Zoom depositions, you are no longer limited to the exhibits you have printed or shipped. Both sides can use anything a computer can access. All you have to do is place the exhibit in a file-share folder or share your screen. In a Zoom world, the days of large boxes of paper and FedEx shipments are over.



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Additionally, adversarial depositions could be navigated in real time. Imagine a scenario where a magistrate judge may simply join the Zoom deposition and observe the questioning to resolve the dispute rather than waiting for after-the-fact briefing and arguments.

### **The Way Forward**

COVID-19 has forced tech-phobic courts to embrace new practices as they have attempted to move forward with litigation despite shelter-in-place and other movement-limiting orders. As efforts to reduce the spread of the virus begin to wane and life returns to normal, some of COVID-19's effects are surely here to stay. Remote depositions—whether by Zoom, Skype, Webex, or any other videoconference vendor—will offer us a number of benefits, but they require adjustments to preparation that attorneys should not ignore.

***Matt Keenan and Jon Strongman** are partners at Shook, Hardy & Bacon and members of the Trial Techniques and Tactics Committee of the International Association of Defense Counsel. Keenan specializes in multi-district litigation witness preparation and defense. Strongman is a product liability trial attorney.*