



Shift to depo-by-video slowly gaining steam

Court reporters: tech keeps cases moving

By: Kris Olson April 2, 2020

For a maiden voyage, the sailing was fairly smooth, Jean-Phillip A. Brignol reports.

The Holland & Knight associate took his first all-remote video deposition on March 24, four days after the Supreme Judicial Court removed an impediment to moving cases forward in that manner.

Issued in response to the COVID-19 pandemic, the court's March 20 order authorized court reporters to use their notary public powers to administer oaths and attorneys to take testimony by someone not in their presence, "so long as the officer or other person before whom the deposition is to be taken can both see and hear the deponent via audio-video communication equipment or technology for purposes of positively identifying the deponent."

Freelance court reporter Dawn Mack said she had hoped that once the court's order was issued, her phone would start ringing with calls from attorneys anxious to build back some momentum behind their litigation, in anticipation of the courts reopening. But thus far, the pace has been surprisingly slow.

"I'm not sure why it hasn't caught on," she said.

Mack figured that once lawyers began to get situated in their home offices, the requests for her assistance with video depositions would stream in. Instead, it has been a trickle. She had her first video deposition on March 30, and her second was scheduled a few days later.

If reluctance to learn how to use the technology is part of the problem, Brignol and Mack have a message for the hesitant: Get over it. Video depositions are not difficult to execute well, though there are some tricks of the trade to keep in mind.

Brignol conducted his deposition with the online video conferencing platform Zoom, which has seen a sharp spike in usage in these days of shuttered offices and social distancing.

But Zoom is just one option for conducting a video deposition, said Kenny Zais, owner of O'Brien & Levine Court Reporting Solutions, which worked with Brignol on his deposition.

"There are different platforms, and it's not that one is better than the other," Zais said. "It depends on what types of services the parties want to bring together."

In Brignol's case, the participants used Zoom in conjunction with eDepoze, software that allows exhibits for deposition to be prepared electronically and then introduced securely using an iPad or laptop.

That was particularly helpful, Brignol said, because he was deposing an expert witness, which involved going over his curriculum vitae, along with reports and other documents.

While Zoom allows users to share audio either through the computer or via a dial-in number, Brignol said they chose the latter, as it provided a safety net in case the video failed for whatever reason. But at least in this instance, Plan B was not needed, the Boston lawyer reported happily.

As with Brignol, Mack said her first experience with an all-remote video deposition was overwhelmingly positive. To perform her court reporter duties, Mack deployed two laptops, one for the Zoom video and the other to do her real-time transcription. She said she had no problem seeing or hearing the other participants.

All of the participants quickly adapted to the necessary etiquette, speaking one at a time instead of trying to talk over one another, aided by the Zoom feature that brings the person who "has the floor" to the foreground on the screen. She acknowledged there could be greater challenges if there are more than four participants.



"It's a new world. We have to figure out how to meet our clients' needs, move cases forward, and keep it safe."

— Jean-Phillip A. Brignol, Boston



Even the newly authorized method of swearing in the witness, a doctor, went smoothly, with the doctor holding his license up to the camera to verify his identity.

Indeed, in one sense, the video deposition made her job easier, Mack said. Experts like the doctor tend to read quickly from medical reports that include terminology unfamiliar to laypeople. But when the doctor shared his



screen, all the participants could see the record, helping her keep pace, Mack said.

Incentive is there

If too many attorneys kick depositions down the road until in-person meetings can resume, Mack said she envisions a scenario in which the resulting crush will lead to a shortage of available court reporters.

Mack said she and her fellow court reporters hope instead that requests for video depositions will gather steam.

“You don’t need a whole lot,” Zais said. “You need to have a computer with a camera and a reliable internet connection.”

Zais said that it was perhaps to be expected that video depositions would take a while to gain traction, given how much upheaval everyone’s working conditions have been thrown into.

“But at some point, you have got to keep learning about different ways to keep cases moving,” he said.

If attorneys do increasingly warm up to video depositions, Mack said she and her colleagues are ready. They have been using — what else? — Zoom to give one another tutorials and swap best practices. Zoom itself also has a number of online resources, through which Mack said she has been constantly learning about useful new features.

What to do, not to do

So, what lessons have participants gleaned from their initial experiences with video depositions?

Brignol highly recommends setting up a mock call, even if for only 10 minutes, with opposing counsel to make sure everyone’s technology is functioning properly and that the acoustics are satisfactory.

“Especially if your time is limited for the deposition, you don’t want to waste time on that stuff,” he said.

Brignol also is a big believer in having backup plans. That means not just having a separate conference call dial-in number available but also printed-out copies of documents, even if they are going to be introduced using software like eDepoze.

Mack agrees that a “dry run,” even the day before, is helpful. She also advises learning how to mute the computer’s microphone and turn off its camera. The muted microphone will help cut down on background noise during the questioning, and each will help prevent the inadvertent creation of a “bloop reel” during breaks.

Mack said she was initially concerned that if the introduction of exhibits were left in her hands, it would disrupt the flow of the proceedings. But she said she and her attorney clients have been able to work out a system in which the lawyers scan electronic copies of the exhibits and handle the sharing of them via their screens.

Brignol also noted that he had the benefit of the participation of one of his firm’s partners, Stephen P. Hall, which helped minimize the amount of multi-tasking he needed to do. While Brignol was posing questions, Hall could take notes or receive documents or questions over email from opposing counsel.

No going back?

Zais suspects that, even if they become more comfortable with video depositions, a lot of attorneys will revert back to their previous practices once the restrictions on travel and in-person meetings are lifted.

However, he added, “I think COVID-19 will change a lot of folks’ thinking about this technology and how to deploy it.”

Brignol tends to agree, calling video depositions the “second best option, next to actually being there in person,” and superior to doing a deposition by teleconference.

“I think it is a good substitute,” he said.

One thing that is sacrificed is the full opportunity to take the measure of a witness’s credibility, Brignol noted. The attorney conducting the video deposition may be juggling other tasks, and the quality of the video may not allow as much scrutiny of facial expressions and body movements.

The quality of the audio could also have an impact on the rhythm of the questioning, he said, especially if a witness needs to pause to have something clarified.

That is not to say, however, that video depositions are anything less than a godsend under current circumstances.

“It’s a new world,” Brignol said. “We have to figure out how to meet our clients’ needs, move cases forward, and keep it safe.”

Issue: APRIL 6 2020 ISSUE

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