



**“THE NEW PERRY MASON:  
MASTERING THE (TECHNICAL) ART OF VIRTUAL DEPOSITIONS”**

**FDCC 85<sup>th</sup> Annual Meeting, August 1-7, 2021**

**SUBPART: THE PROCEDURAL RULES**

**By Shelly Masters, Cokinos | Young**

**I. Introduction.**

While virtual depositions were not invented in response to the COVID-19 pandemic, their use was the exception and not the rule. Those “old school” virtual depositions were taken usually to offset the costs of travel to question witnesses in faraway places or accommodate those who were unable or simply wouldn’t agree to travel. To conduct the depositions, the parties relied on basic technology and informal agreements which consisted mostly of decisions on where the court reporter would be, who would be in the room with the deponent and whether the documents to be used in the examination would be exchanged by email or fax. For many lawyers inexperienced in taking virtual depositions, the depositions were a means to an end but rarely resulted in any Perry Mason “gotcha” moments.

In fact, deposing witnesses remotely has never been the first choice of litigators who have long prided themselves on their ability to elicit key admissions from unsuspecting deponents by wielding “smoking gun” documents during in-person depositions. However, by a surprise turn of fate, attorneys from coast to coast were thrown kicking and screaming into an alternate reality where the exceptionally rare remote deposition became the sole method for conducting depositions. These lawyers were forced to utilize this remote option to keep client matters tracking toward mediation and/or trial.

Unfortunately, the procedural rules of each state provide little guidance for many of the issues commonly encountered by parties seeking to conduct a remote deposition. This piece provides a summary of existing rules and a specific reference tool via hyperlinks for accessing those rules governing remote depositions either codified by state statute or pursuant to temporary executive or court orders issued in response to the pandemic.

**II. Rules Governing Remote Depositions.**

Despite the existence of virtual depositions for years and the increased reliance on them during the pandemic, most states have an extremely underdeveloped set of rules of procedure for these types of depositions. Although most jurisdictions allow remote depositions, the rules are generally limited to the following: (1) whether or not remote depositions are allowed; (2) preliminary agreements, stipulations or court orders required as a prerequisite to taking a remote deposition; (3) whether or not remote oath administration is allowed; and, (4) if allowed, how remote authorization is to be achieved. However, no state has codified a comprehensive set of procedural and technological requirements to prescribe the manner and method for conducting such depositions.

A state-by-state compendium of the procedural rules governing remote depositions entitled **PROCEDURAL RULES FOR REMOTE DEPOSITIONS BY STATE** immediately follows this summary. The chart identifies whether or not remote depositions are allowed, how an oath is to be administered in remote proceedings, a citation to the governing statute or executive or court order and highlights some other relevant rules or court holdings. Below is a short rendition of the nature and scope of those procedural rules.

**A. Whether or not remote depositions are allowed.**

In the majority of the states, remote depositions have long been allowed by codified rules of civil procedure since well before the pandemic. A few states like New Hampshire do not have rules which expressly provide for remote depositions. However, taking depositions by remote means have been embraced by local attorneys as part of their standard practice.

Following the pandemic, states quickly expanded the use of, or gave preference to, remote depositions by executive or court order. For example, Maine issued an emergency order requiring *all* depositions to be conducted remotely. In South Dakota, the state's Supreme Court issued an Emergency Order stating that parties not agreeing to stipulate to remote depositions bear the burden of demonstrating that their failure to stipulate was made in good faith. Further, the South Dakota high court mandated the imposition of costs and fees be assessed against any party who acted in bad faith in not agreeing to stipulate to remote depositions. Like other states, remote depositions were permitted by order of the Supreme Court of New Jersey but judges were given discretion to make a determination of whether or not in-person depositions are warranted in complex matters.

**B. If allowed, on what basis.**

In some states, the rules of procedure allow depositions to be conducted by telephone and/or by video recording and/or by other remote means and/or expressly video conferencing technology. A number of states only allow for telephonic depositions, while standard practice has informally extended the limited means of remote deposition to video depositions, even though the rules do not expressly allow for it. While many states' rules call for stipulations or court orders as a prerequisite to conduct depositions remotely, the rules on what must be included regarding the specific protocol and parameters for how the deposition is to proceed vary.

**C. Whether or not remote oath administration is allowed.**

The paramount consideration for conducting remote depositions has overwhelming been whether or not remote oath administrations will be allowed and, if so, to what extent. Some states moved quickly to codify the practice while others just issued temporary orders. While a few standards like those found in Idaho are very flexible, most states have incorporated safeguards and rules to ensure the deponent is properly identified. Some states have disallowed the administration of an oath by telephone. Many states like Illinois have provided for remote oath administration but only temporarily during the national health emergency. In Nevada, state law permits the parties to

stipulate a non-court appointed officer to administer the oath. Other states leave the question of how the oath is to be administered to the parties who can agree or stipulate to the method.

**D. If allowed, how remote authorization is to be achieved.**

State laws and temporary orders vary widely on the method for the administration of oaths in remote depositions. Most states require a combination of simultaneous audio and video confirmation. However, there are a few states with their own unique rules as follows:

- Deponent must show driver's license on the camera as a means of identification (CT)
- Notary and deponent must be located in same state (AL)
- Must utilize "real-time, two-way video and audio communication technology" (MT)
- Dynamic knowledge-based assessment where the individual must answer four of five questions correctly within two minutes (AZ).

A number of states have indicated an intent to roll back temporary concessions to in person oath administration either by expiration of executive order or at the end of the emergency.

**III. Conclusion.**

Depositions by remote electronic means remain the dominant method of capturing witness testimony still today – a year and half since the pandemic's inception. Even though social distancing and mask protocols are easing and may one day disappear, the practice of conducting depositions virtually will extend well beyond the last vestiges of the pandemic-related emergency for a few key reasons. Lawyers and, more importantly, clients have had a front row seat to witness the benefits afforded by this remote practice – especially the time and cost savings. Lawyers have expanded their skills at taking remote depositions. Videoconferencing capabilities, deposition software and document management platforms are continually expanding and improving. Thus, between the cost savings and advancing skills and tools for taking such depositions, remote depositions are here to stay and at an increased frequency over pre-pandemic numbers.

Because of the dearth in procedural rules in this area, lawyers must create comprehensive checklists full of procedural protocols on which to confer with opposing counsel in advance of depositions. For example, consideration must be given to many procedural-type issues including, but not limited to, the following:

- 1) what videoconferencing software will be used (e.g., Zoom, Google Hangouts, Skype, GoToMeetings, Microsoft Teams, WebEx, etc.);
- 2) how will documents be managed, exchanged and marked as exhibits;
- 3) will the parties each use their own document management software or will they agree to a uniform platform;
- 4) if document software is to be used, who can upload and access the documents and when;
- 5) if document software is to be used, what are the capabilities for highlighting and editing documents during the deposition;
- 6) if document software is to be used, what are the capabilities for controlling the document view of the witness;

- 7) if document software is to be used, will the attorney or the witness be allowed to control the document during the examination;
- 8) if document software is to be used, how will the parties navigate between the videoconferencing software and the document management software;
- 9) will any of the parties be allowed to be in the same room as counsel or other parties or will they be required to disclose the identity of those at each location;
- 10) will documents be provided in native electronic or PDF format;
- 11) how and when will documents be provided to counsel for the purpose of lodging objections prior to examination of the witness;
- 12) are there any procedures necessary for compliance with protective orders;
- 13) who will be allowed to record the audio and video of the deposition;
- 14) will the parties agree to prohibit witnesses from accessing cell phones, iPads, computers and other methods of communication during the deposition;
- 15) if the witness and their counsel are to be in the same room, will there be a requirement that both individuals be monitored by the audio/video technology; and,
- 16) will the parties be able to have privacy during breaks and discussions with clients.

Lawyers must then draft clear and specific stipulations, deposition notices and written agreements to cover the myriad of issues that may or will occur. In complex multi-party cases, the parties may want to include deadlines in docket control orders to require the parties to confer and reach agreement on the protocols for conducting remote (or partially remote) depositions. It may be necessary to secure court approval for certain remote deposition arrangements. Addressing these issues early and in detail will likely ensure a smooth and, as much as possible, dispute free deposition.

For those who have not done so already, the New Perry Masons must adapt to the practice of taking remote depositions by developing, modifying and honing their practical and strategic approach to the realities of the virtual realm.