

# AN OVERVIEW OF REMOTE DEPOSITIONS AND THEIR EVOLUTION

By

Michael K. Kiernan, Esq.

Susan L. Deng

Jordan S. Fink

## INTRODUCTION:

The pandemic has had far-reaching effects on countless aspects of the legal profession. The manner in which we interact and function in our offices, communicate with clients and attend judicial proceedings are but a few examples of these changes. For litigators, the effect on our ability to take live testimony in a deposition has perhaps seen the biggest cascade of changes. While the ability to take a videotape (remember those?) deposition, take a deposition telephonically or via videoconference have been around for many years, the pandemic has forced us to explore new technologies and learn new skills in taking a deposition remotely.

Let's admit it - how many of us had either heard of or actually used Skype, Zoom, WebEx, Microsoft Teams, (insert your favorite here) before the pandemic!? What started out as to many of us, as "cutting-edge technology" is now "old hat" to all of us. We have learned how to share documents and make the Zoom deposition experience as close to "in person" as possible. This means of taking depositions has proven to be cost-efficient in many ways, with the elimination of the inevitable local or out-of-state travel. Many practitioners are finding that they can accomplish a greater number of depositions in a given day as opposed to having to travel from place to place, office to office to accomplish those same depositions. Correspondingly, with the elimination of travel, the scheduling of depositions from a practical standpoint, is much easier.

Unsurprisingly, The Covid-19 pandemic has brought a windfall of business and personal users to videoconferencing services. Zoom is currently the most used video conferencing service in the world, with its user base growing 45% between March and October of 2020.<sup>1</sup> However, Microsoft Teams is catching up, and has increased its user base 26% percent since last October,

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<sup>1</sup> *Okta Reports That Zoom is Top Video Conferencing App*, Zoom Blog (Feb. 1, 2021), <https://blog.zoom.us/zoom-top-video-conferencing-app-okta-businesses-at-work-2021/#:~:text=Zoom%20was%20by%20far%20the,and%20October%20of%20last%20year.>

with 145 million daily active users across the world.<sup>2</sup> Other services like Cisco’s Webex have also seen their numbers of users skyrocket, with Webex’s Senior Vice President reporting they grew 2.5 times in 2020.<sup>3</sup> Further, as businesses realize the benefits of video conferencing, the trend is unlikely to stop, with reports indicating the global video conferencing market could grow from 9.2 billion in 2021 to 22.5 billion by 2026.<sup>4</sup> What effect this might have on the travel and hospitality industry is outside the scope of this paper.

While it is certainly debatable as to whether conducting a deposition via Zoom is preferable over the “in person” experience, especially depending upon the type of witness involved, there is no doubt the convenience and cost-savings of a Zoom deposition will make it a part of our future. Certainly, clients do not miss having to pay for travel time and related travel expenses.

As such, with Zoom depositions here to stay, we thought it would be interesting to look back at how we got here. In other words, what is the basic historical perspective of remote depositions, and how have they evolved over time. In addition, how have those historic measures been adapted to the pandemic.

#### HISTORICAL PERSPECTIVE:

Depositions have historically been conducted in person due to the advantage of being physically present with the deponent. Physical nearness allows the attorney taking the deposition to share exhibits with the deponent and deponent’s counsel and also allows deponent’s counsel more control over the situation to object and better protect his or her client. However, the advent of technology has provided for the modernization of the legal profession, particularly with the use of audiovisual recording devices in depositions. One method in particular that has been used

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<sup>2</sup> *Riding the COVID-19 Wave, Microsoft Teams Now Has 145 Million Daily Active Users*, MSN (Apr. 28, 2021), <https://www.msn.com/en-in/money/technology/riding-the-covid-19-wave-microsoft-teams-now-has-145-million-daily-active-users/ar-BB1g8Y76?ocid=BingNewsSearch>

<sup>3</sup> *Cisco's Webex draws record 324 million users in March*, Reuters (Apr. 3, 2020), <https://www.reuters.com/article/us-cisco-systems-webex-idUSKBN21L2SY>

<sup>4</sup> *Video Conferencing Market worth \$22.5 billion by 2026 - Exclusive Report by MarketsandMarkets™*, PR Newswire (May 10, 2021, 11:00 AM), <https://www.prnewswire.com/news-releases/video-conferencing-market-worth-22-5-billion-by-2026--exclusive-report-by-marketsandmarkets-301287398.html>

frequently is the video deposition, which creates a visual record of the witness's deposition testimony for presentation at a trial in lieu of live testimony.<sup>5</sup>

In 1970, Congress amended the Federal Rules of Civil Procedure to allow the use of non-stenographic means for recording depositions.<sup>6</sup> State courts subsequently began allowing the use of non-stenographic means for recording depositions.<sup>7</sup> The first case addressing the use of non-stenographic means under Rule 30 was the 1971 case of *Carson v. Burlington N. Inc.*,<sup>8</sup> where the Nebraska Federal District Court addressed a motion for a video deposition.<sup>9</sup> For this case in particular, the court found that the videotape deposition would be a preferable because it would present a visual illustration of how the machine was operated by the plaintiff at the time of the accident and avoid endangering the jury.<sup>10</sup> The *Carson* court noted that photographic means are advantageous because the jury could gain greater insight from the manner in which answers were delivered and recorded by audio visual devices and that the recording would avoid the usual reading of a lengthy deposition into evidence at trial.<sup>11</sup>

The court in *Perry v. Mohawk Rubber Co.*<sup>12</sup> reiterated the need for the use of a video deposition to have an additional benefit for the presentation of evidence in order for the court, in its discretion, to grant use of the medium.<sup>13</sup> The judge denied the plaintiff's motion for a videotape deposition for failure to show that the medium would reduce the costs of taking the depositions or that any evidence involved in the proceedings required visual observation.<sup>14</sup> In order for a court to grant use of a non-stenographic recording, there must be genuine economic considerations for use of the medium and the added benefit of insuring adequate discovery in the search for justice.<sup>15</sup> Personal preference of a single party was an inadequate reason for the use of a videotape deposition in the absence of those grounds.<sup>16</sup>

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<sup>5</sup> Thomas J. Murray, *Videotape Deposition: Putting Absent Witnesses in Court*, 68 A.B.A. J. 1402, 1402 (1982); see also Tom C. Clark, *Symposium: The Use of Videotape in the Courtroom*, 1975 BYU L.J. 327, 329 (1975) (discussing the fact that since federal and state courts have begun allowing non-stenographic means for depositions over 4,000 depositions have been taken on videotape and several hundred trials have used videotape testimony).

<sup>6</sup> Fed. R. Civ. P. 30.

<sup>7</sup> See e.g., Fla. R. Civ. P. 1.310(a)(4); Ga. Code Ann., § 9-11-30; Cal. C.C.P. § 2025.340; N.Y. C.P.L.R. 3113.

<sup>8</sup> 52 F.R.D. 492 (D. Neb. 1971).

<sup>9</sup> *Id.* at 492.

<sup>10</sup> *Id.* at 493.

<sup>11</sup> *Id.*

<sup>12</sup> 63 F.R.D. 603 (D.S.C. 1974).

<sup>13</sup> *Id.* at 607.

<sup>14</sup> *Id.* at 606.

<sup>15</sup> *Id.* at 607.

<sup>16</sup> *Id.*

However, courts have cautioned against the use of video depositions to illicit an emotional response from a factfinder, limiting a party's ability to use graphic visuals or set dressing as a prerequisite to the allowance of a video recording.<sup>17</sup> Video depositions can be highly dramatic and stylized to affect the greatest sympathy from a jury, so abuse of the medium must be curtailed by court order or stipulation to prevent improper emotional impact.<sup>18</sup>

Despite the potential for misuse of the recorded medium the majority of courts view video depositions favorably.<sup>19</sup> Reasons for this complimentary view include the fact that video depositions can provide "greater accuracy and trustworthiness" as compared to a stenographic deposition<sup>20</sup> and can potentially eliminate jury boredom from a lengthy reading of a deposition transcript.<sup>21</sup> The convenience of a video deposition also cannot be overstated, especially concerning the gathering of evidence.<sup>22</sup> Beyond cost-saving measures and better illustration of evidence for the benefit of the factfinder, courts have found the unavailability of a witness critical for the allowance of video depositions.<sup>23</sup> Video depositions have been taken in situations where the witness was crucial but uncooperative,<sup>24</sup> planned to leave the jurisdiction,<sup>25</sup> or was too ill to attend trial.<sup>26</sup> In the event a witness is unavailable, the video deposition presents testimony as if he or she is actually there.<sup>27</sup> Moreover, a video deposition can supply evidence unavailable in other forms, can show evidence more clearly, and be useful for appellate review.<sup>28</sup>

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<sup>17</sup> *U.S. v. LaFatch*, 382 F. Supp. 630, 631 (N.D. Ohio 1974).

<sup>18</sup> James L. Underwood, A GUIDE TO FEDERAL DISCOVERY RULES § 3.02, at 135-38 (2d ed. 1985); § 3.03(b), at 150.

<sup>19</sup> Hugh B. Lewis, *The Video Deposition as a Civil Litigation Tool*, 13 CAMPBELL L. REV. 374, 380 (1991).

<sup>20</sup> *Id.* See also *Burlington City Bd. of Educ. v. U.S. Mineral Prods. Co., Inc.*, 115 F.R.D. 188, 189 (M.D. N.C. 1987) ("video depositions provide greater accuracy and trustworthiness than a stenographic deposition because the viewer can employ more of his senses in interpreting the information from the deposition."); Susan B. Drucker & Janice Platt Hunold, *Videotaped Depositions: The Media Perspective*, 60-NOV N.Y. ST. B.J. 38, 40 ("In addition to providing the words of witness, the videotaped presentation provides the jury the opportunity to hear the inflections, intonations and pauses in the witness's speech and to observe general demeanor. A transcript of testimony cannot communicate that a witness appears to be nervous or upset.").

<sup>21</sup> Murray, *supra* note 1, at 1402; see also Bradley Parker et al., *The Paperless Deposition*, 20-FEB UTAH B.J. 36, 39 (2007) (Jurors are often receptive to a more visual presentation.).

<sup>22</sup> Underwood, *supra* note 14, § 3.03(b), at 149.

<sup>23</sup> James L. Underwood, *The Videotape Deposition: Using Modern Technology for Effective Discovery (Part 1)*, 31 PRAC. LAW. 61, 64 (1985).

<sup>24</sup> *In re Daniels*, 69 F.R.D. 579 (N.D. Ga. 1975).

<sup>25</sup> *Pope v. State*, 441 So. 2d 1073 (Fla. 1983).

<sup>26</sup> *State v. Wells*, 538 So. 2d 1292 (Fla. 2d DCA 1989).

<sup>27</sup> Thomas A. Heffernan, *Effective Use of Demonstrative Evidence: Seeing is Believing*, 5 AM. J. TRIAL ADVOC. 427, 430 (1982).

<sup>28</sup> Lewis, *supra* note 15, at 386.

In addition to the allowance of non-stenographic means of recording depositions, Rule 30 was amended in 1993 to allow parties to stipulate that a deposition be taken by remote means.<sup>29</sup> This particular subsection of Rule 30, and state civil procedure rules authorizing the same, have gained increased utilization over the last year due to the COVID-19 pandemic.<sup>30</sup>

#### PANDEMIC MEASURES:

In March 2020, a national emergency was declared by the President of the United States due to the spread of COVID-19 and the Centers for Disease Control (CDC) noted that “[l]imiting face-to-face contact with others is the best way to reduce the spread” of the virus.<sup>31</sup> In order to balance the advice of the CDC and the demands of litigation, state supreme courts began issuing emergency administrative orders that allowed court business to be conducted remotely<sup>32</sup> and some state legislatures began passing laws which facilitated remote depositions.<sup>33</sup> Throughout 2020 and into 2021, as the pandemic pressed on, attorneys and litigants across the country have adapted to this new way of practicing law, including conducting depositions and deposition preparation remotely.<sup>34</sup>

Obvious issues and questions arose as soon as emergency administrative orders directing remote depositions became the new normal, such as how to provide exhibits,<sup>35</sup> ensuring the witness has sufficient opportunity to confer with counsel,<sup>36</sup> or working with unfamiliar technology.<sup>37</sup>

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<sup>29</sup> Fed. R. Civ. P. 30(b)(4).

<sup>30</sup> See e.g., Ohio R. Civ. P. 30(b)(6); Mass R. Civ. P. 29; Tex. R. Civ. P. 199.1.

<sup>31</sup> National Center for Immunization and Respiratory Diseases (NCIRD), Division of Viral Diseases, *Social Distancing*, CENTERS FOR DISEASE CONTROL AND PREVENTION (updated Nov. 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>.

<sup>32</sup> See e.g. Florida Supreme Court Order No. AOSC20-13 (“Mitigating measures include but are not limited to...use of technology, electronic documents, electronic communications, and other electronic means of conducting court business to mitigate the spread of COVID-19, to the extent consistent with law.”); Texas Supreme Court Order No. 20-9042 (“Consider as evidence sworn statements made out of court or sworn testimony given remotely, out of court, such as by teleconferencing, videoconferencing, or other means”); Alabama Supreme Court COVID-19 Administrative Order Approving Remote Administration of Oaths to Witnesses in Court Proceedings and Depositions.

<sup>33</sup> See e.g., S.B. 1146, 2019-2020 Reg. Sess. (Cal. 2020).

<sup>34</sup> Nikku D. Khalifian et al, *Trial and Error: The Future of Remote Litigation*, JDSUPRA (Feb. 24, 2021), <https://www.jdsupra.com/legalnews/trial-and-error-the-future-of-remote-9686001/>.

<sup>35</sup> Lindsey Mann et al., *Remote Depositions Bring Ethics Considerations For Lawyers*, LAW360 (May 5, 2020, 4:49 PM), <https://www.law360.com/articles/1269933/remote-depositions-bring-ethics-considerations-for-lawyers>.

<sup>36</sup> Edward Duffy, *Remote Depositions: Coming To A Home Office Near You*, LAW360 (Apr. 2, 2020, 4:23 PM), <https://www.law360.com/articles/1259699/remote-depositions-coming-to-a-home-office-near-you>.

<sup>37</sup> Mann et al., *supra* note 31.

Courts themselves have addressed some of these concerns by issuing sample protocols for remote depositions<sup>38</sup> or providing guidance in their rulings,<sup>39</sup> and have also reiterated that remote video depositions provide a “sufficient opportunity to evaluate a deponent’s nonverbal responses, demeanor, and overall credibility.”<sup>40</sup> In fact, these administrative orders have become so useful and integral to the continued practice of law during the pandemic that courts have seen fit to renew them multiple times since their inception. For example, the Florida Supreme Court (like many courts around the country) issued an administrative order regarding remote depositions on March 18, 2020,<sup>41</sup> and subsequently reaffirmed it in multiple administrative orders with the latest issued on March 26, 2021.<sup>42</sup>

The concerns of practitioners have been somewhat alleviated because remote depositions have worked better than many expected and have resulted in unanticipated benefits.<sup>43</sup> Screen-sharing technology allows an attorney to use exhibits as if the deponent was in the same room, giving all parties the ability to see the document on screen, and the court reporter can mark a document as an exhibit.<sup>44</sup> In addition to screen-sharing, physical documents can be sent in advance in a sealed envelope with specific instructions that the exhibits not be opened until instructed to do so during the deposition by the deposing attorney.<sup>45</sup> With regards to conferring with counsel,

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<sup>38</sup> Magistrate Judge Robert Lehrburger, *Sample Protocol for Remote Depositions*, S.D.N.Y. (May 11, 2020), [https://nysd.uscourts.gov/sites/default/files/practice\\_documents/RWL%20Lehrburger%20Sample%20Remote%20Deposition%20Protocol.pdf](https://nysd.uscourts.gov/sites/default/files/practice_documents/RWL%20Lehrburger%20Sample%20Remote%20Deposition%20Protocol.pdf).

<sup>39</sup> See e.g., *Rouviere v. DePuy Orthopaedics, Inc.*, 471 F. Supp. 3d 571, 575 (S.D.N.Y. 2020) (granting plaintiff an extra hour for a deposition via videoconference to ameliorate any prejudice caused by delays in the handling of exhibits by the witness and counsel); *Dennis v. JP Morgan Chase*, 2020 WL 5658624, at \*2 (S.D.N.Y. Sept. 23, 2020) (To avoid the potential of coaching, “no individual may be physically present in the same room as the witness, except for the witness’s attorneys, while the witness is giving deposition testimony on the record”; “[i]f the witness’s attorneys are physically present with the witness, the witness and the witness’s attorneys shall [at all times] be visible on screen.”).

<sup>40</sup> See *Pursley v. City of Rockford*, No. 18 CV 50040, 2020 WL 6149578, at \*2 (N.D. Ill. Oct. 20, 2020) (quoting *Learning Res., Inc. v. Playgo Toys Enters. Ltd.*, 335 F.R.D. 536, 539 (N.D. Ill. 2020)); see also *Mosiman v. C & E Excavating, Inc.*, No. 3:19-CV-00451-DRL-MGG, 2021 WL 1100597, at \*3 (N.D. Ind. Mar. 23, 2021); *Sec. & Exch. Comm’n v. Aly*, 320 F.R.D. 116, 119 (S.D.N.Y. 2017); *Gee v. Suntrust Mortg., Inc.*, No. 10-cv-01509 RS (NC), 2011 WL 5597124, at \*3 (N.D. Cal. Nov. 15, 2011).

<sup>41</sup> Florida Supreme Court Order No. AOSC20-16.

<sup>42</sup> Florida Supreme Court Order No. AOSC20-23, Amendment 11.

<sup>43</sup> Darren Goldman, *Why Remote Depositions Are Likely Here To Stay*, LAW 360 (August 21, 2020, 3:38 PM), <https://www.law360.com/articles/1303302/why-remote-depositions-are-likely-here-to-stay>.

<sup>44</sup> Goldman, *supra* note 39. See also Parker et al., *supra* note 17 at 36-38 (In fact, paperless video depositions have been conducted prior to the COVID-19 pandemic where attorneys have used cameras to enhance paper document presentation or occasionally shown digital exhibits. This is in line with the trend towards electronic record making due to available technology and the idea that “a picture really is worth a thousand words” and a deponent’s answer in a deposition “cannot be accurately reflected in black and white printed words.”).

<sup>45</sup> Edward M. Shapiro & Christopher B. Harwood, *Remote Depositions: The New Normal*, LAW (Oct. 19, 2020, 1:26 PM), <https://www.law.com/newyorklawjournal/2020/10/19/remote-depositions-the-new-normal/>.

the deposition host, usually the court reporting service, can create sub-meetings within the deposition which allow parties to speak candidly in a room nobody else can enter or observe.<sup>46</sup> As for concerns about technology, there have not been many reported problems<sup>47</sup> and court reporting services offer technical assistance in the event a remote proceeding goes awry.<sup>48</sup> This is of course does not include those occasional mishaps were counsel may appear as a cat or worse.

The Florida Bar has published an article with helpful practices titled “Taking Effective Remote Depositions”.<sup>49</sup> While many of these suggestions are common sense, they nonetheless have proven to be helpful. Some of the suggestions included the following. In advance of the deposition day, attorneys should ask the court reporter to provide the necessary credentials and login information to all parties, counsel, and witnesses.<sup>50</sup> Attorneys should also ensure that the deponent has a suitable background, especially if it will be played at trial.<sup>51</sup> Counsel should state for the record that the deposition is being conducted under the Florida Supreme Court Order No. AOSC20-23, Amendment 11, and the person administering the oath must be able to identify the witness, by asking that they present identification.<sup>52</sup> Other helpful tips include making sure the mute function is used during breaks to ensure no privileged information is shared, and asking the witness to identify anyone else in the room, to prevent coaching.<sup>53</sup> There are other recommendations you may wish to consider including among others, making certain of the camera angle your witness is using. Like video depositions, you do not want the camera focusing on ¼ of your witness’s face, looking up from below perhaps into a nostril, or down from above on a growing bald spot. Each angle conveys a message and you want your witness to appear natural.

Unsurprisingly, and as reviewed above, the ease and efficiency of remote depositions have resulted in cost saving for clients and geographic flexibility for attorneys. Although attorney rates and court reporting services remain regardless of the forum, clients have been able to save on travel

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<sup>46</sup> Goldman, *supra* note 39.

<sup>47</sup> *Id.*

<sup>48</sup> *See Grano v. Sodexo Mgmt., Inc.*, 335 F.R.D. 411, 415 (S.D. Cal. 2020) (“There are numerous resources and training opportunities available throughout the legal community to assist Sodexo’s counsel in the operation and utilization of the new technology.”).

<sup>49</sup> Aron U. Raskas, *Taking Effective Remote Depositions*, Florida Bar News (June 12, 2020), <https://www.floridabar.org/the-florida-bar-news/taking-effective-remote-depositions/>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Florida Supreme Court Order No. AOSC20-23, Amendment 11.

<sup>53</sup> Aron U. Raskas, *Taking Effective Remote Depositions*, Florida Bar News (June 12, 2020), <https://www.floridabar.org/the-florida-bar-news/taking-effective-remote-depositions/>.

expenses because attorneys have not been required to attend depositions in-person.<sup>54</sup> Attorneys have been able to increase their accessibility without the need for physical appearances, allowing them to attend depositions while physically in a different city, perhaps hundreds of miles away from the location of a deponent and deponent's counsel.<sup>55</sup>

However, remote court proceedings are clearly not without their risks. Newsworthy incidents like a woman appearing naked on an eviction hearing, a famous news anchor appearing shirtless during his wife's zoom meeting, or a client remotely attending a mediation hearing drinking a beer have occurred.<sup>56</sup> Most have heard by now of the infamous cat filter incident, where an attorney appeared before a judge in a virtual hearing, unable to remove the virtual software's filter that made him appear as a cat.<sup>57</sup>

After more than a year of conducting remote depositions the legal profession is confronted with a new reality, though one that has been on the horizon for decades. Circumstances such as the COVID-19 pandemic have merely accelerated the integration of the legal field with technological advancements that have progressed since the 1960s and reinforced the ever present notion that technology is a vital part of the continued practice of law. With the increase in vaccinations in the United States a post-pandemic world is in sight, but it is unlikely that the legal profession will return to what it was just two short years ago as many courts nationwide continue to require remote proceedings. Moreover, both attorneys and clients have discovered the efficiency and cost-effectiveness of remote depositions. Because of this receptiveness by courts, attorneys, and clients, more than likely a system that incorporates a hybrid of in-person and remote proceedings is the future of litigation. As a result, visual technology is increasingly necessary for effective advocacy and remote depositions will continue to be utilized and may eventually become the norm within the legal community.

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<sup>54</sup> Goldman, *supra* note 39.

<sup>55</sup> Khalifian et al., *supra* note 30.

<sup>56</sup> Andrew Wolfson, *Think a court cat filter is weird? Try virtual court with beer, bikinis and clients in bed*, Louisville Courier Journal (Dec.18, 2020, 7:36AM) <https://www.courier-journal.com/story/news/2020/12/18/amid-covid-19-pandemic-remote-court-hearings-bare-naked-truth/3932436001/>.

<sup>57</sup> Christina Zdanowicz, *Lawyer tells judge 'I'm not a cat' after a Zoom filter mishap in virtual court hearing*, CNN (Feb. 10, 2021), <https://www.cnn.com/2021/02/09/us/cat-filter-lawyer-zoom-court-trnd/index.html>.

*Authors:*

*Michael K. Kiernan is the Managing Partner of the St. Petersburg, Florida office of Traub, Lieberman, Straus & Shrewsberry LLP*

*Susan L. Deng is an associate in t the St. Petersburg, Florida office of Traub, Lieberman, Straus & Shrewsberry LLP*

*Jordan S. Fink is a Law Clerk in the St. Petersburg, Florida office of Traub, Lieberman, Straus & Shrewsberry LLP*