



GUIDELINES ON CONDUCTING REMOTE VIDEO DEPOSITIONS AND EXAMINATIONS FOR DISCOVERY

Advocacy in the 21st Century Committee

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GUIDELINES ON REMOTE VIDEO DEPOSITIONS AND EXAMINATIONS FOR DISCOVERY¹

The American College of Trial Lawyers recognizes the impact COVID-19 is having on the ability of judges and lawyers to do the important tasks of the discovery process that aid in the resolution of civil disputes. Many jurisdictions are using or considering the use of remote video to conduct motions hearings and nonjury trials. The use of remote video to take depositions and conduct examinations for discovery² is also underway.

In cases pending in federal courts of the United States, remote depositions utilizing remote video may well be permitted:

FRCP 30(b) (4) ...“By Remote Means. The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule..., the deposition takes place where the deponent answers the questions.”

State and province rules vary, and thus stipulations or agreements by counsel or court orders may be necessary to conduct a deposition or examination using remote video technology while assuring compliance with applicable rules, e.g. administering the oath remotely. To the extent that existing rules do not permit remote video depositions, the College expects that the COVID-19 experience will cause states and provinces to review their rules of procedure and consider amendments to address when depositions by remote video are permitted.

For purposes of this document, the term “remote video deposition/examination” assumes that the witness, examining lawyer(s), witness’ lawyer (if any), and court reporter are each in separate locations. There may be others (associates, paralegals, technicians, experts, etc.) in the same location as an examining lawyer or court reporter but it is assumed that the witness will be in a room alone.

The ACTL Task Force on Advocacy in the 21st Century has gathered policies, procedures, orders, and other input from lawyers in the United States and Canada in an effort to assemble the wisdom and experience of others on the use of taking depositions and examinations via remote video. These Guidelines endeavor to focus the attention of the Bench and Bar on issues that must be considered when conducting depositions and examinations by remote video. Not all of these issues are applicable to every deposition or examination in which remote video is used, but it is suggested that each of them bears consideration in an effort to reduce the chance of confusion, intra-deposition/examination disputes and the need for court intervention during a deposition/examination, and to increase the likelihood that the deposition/examination will be fair to all parties and their counsel.

1 Readers are (a) encouraged to provide feedback about their experiences with these and other ideas for addressing the issues identified in the Interim Guideline; and (b) continue to visit the College website to see the latest version of the document. Please email comments, orders, rules, etc. on this topic to advocacy@actl.com.

2 To enhance readability, the word “depositions” will be used to refer both to “examinations under oath” (used in the Canadian judicial system) and “depositions” (as used in the United States judicial system).

Deposition/examination rules and traditions vary among jurisdictions, but most lawyers and all judges agree that the orderly, efficient progression of discovery in general and deposition/examination-taking in particular works best when counsel work together in good faith to develop a discovery plan appropriate for the case. Nothing in this document suggests that any other course of action is preferable, much less desirable. Instead, this document sets forth issues for the lawyers to discuss and agree among themselves on how to conduct depositions/examinations by remote video and, if they cannot, to guide the court on how to address the issues raised by use of remote video.

A Written Plan should be agreed upon or Court Order obtained to address how remote video depositions/examinations will be conducted.

Some jurisdictions will develop, via administrative court order or local rule, a standing plan for depositions/examinations using remote video. Some lawyers will not have the benefit of such a plan and will have to develop an understanding with other counsel on the matter on a case-by-case basis, preferably confirmed in a writing.

1. Planning for a remote video deposition/examination should include discussion of (a) the video platform that will be used, (b) who will be responsible for managing the video platform during the deposition/examination and his or her duties, (c) whether the video recording at the deposition shall be deemed the equivalent of a video deposition by a videographer, available for use at trial pursuant to applicable rules of procedure and evidence, and (d) confirm that the applicable rules of civil procedure shall determine what constitutes the official record of the deposition.

There are a multitude of video platforms available, some of which are used in circumstances other than depositions/examinations (*e.g.*, Zoom) and others designed for depositions/examinations which are used primarily by court reporters.

Typically, the court reporting vendor will have a technician (the “Video Manager”) control the platform during the deposition/examination. The Video Manager will (a) open the platform for an equipment check at least fifteen minutes before the deposition/examination is scheduled to begin; (b) work with the parties and counsel to identify and correct any video or audio issues before the deposition/examination; (c) monitor the deposition/examination in real-time for video or audio issues; (d) monitor the recording of the video and audio, going on and off the record as appropriate; (e) promptly bring to the attention of the participants any connectivity issues between the platform and any participant; (f) assist any party or the witness with video, audio, and screen sharing issues that arise during the deposition/examination; and (g) coordinate the distribution of the video of the deposition/examination with the court reporting vendor.

2. Planning should include a discussion of whether (a) all lawyers participating in the deposition/examination should be “on camera” for the entire deposition/examination (excluding breaks); (b) the deponent should be “on camera” for the entire deposition/examination (excluding breaks); (c) any other person (party, observer, or non-examining lawyer) should be on camera; and (d) everyone other than the witness, examining party, court reporter and Video Manager should have his or her microphone muted unless it becomes necessary to object or otherwise raise an issue during the deposition/examination. No person

other than the parties, their respective counsel, and counsel for the deponent can attend the deposition without consent of all counsel or as permitted by rules of court.

3. Planning should include a discussion of who should monitor the platform for loss of connectivity with one or more participants and whether the deposition/examination should be stopped if that occurs. The Plan should provide that the deposition should not proceed if technology fails or a deponent or counsel cannot hear questions or answers in the deposition.

4. Planning should include a discussion of how the participants can immediately contact one another in the event of one or more participants loses connection with the platform.

5. An understanding should be reached, if not provided by a court order or rules, that the deponent can give an oath or affirmation remotely on camera, administered by the court reporter regardless of the reporter's location, and that the parties and participants will not challenge the validity of the oath or affirmation for any reason.

6. An understanding should be reached on whether one or all of the following will apply to the remote video deposition/examination:

a. Whether the deponent may send or receive any text, email or other messages that in any way concern the subject matters of his or her testimony or that relate in any way to his or her role as a witness in the proceeding during the deposition.

b. Whether the deponent may consult any social media site (Facebook, Twitter, Instagram, Linked In, etc.) for any purpose from the beginning of his or her testimony until it is complete.

c. The application of any law, local rules or customs about whether the deponent may discuss the subject matter of his or her testimony with any person from the beginning of his or her testimony until it is complete, except with the witness' counsel as appropriate for purposes of discussions over whether a privilege should be invoked and as otherwise appropriate by law and local custom).

d. The application of any law, local rules or customs about what materials (other than those presented by examining counsel), if any, the deponent may review during the deposition or examination.

e. Whether the deponent will be permitted to do any Internet or other research during the deposition or examination.

f. Whether a witness who uses documents or notes during the deposition will be required to share those items with all counsel upon request.

g. An agreement that the deponent will not take any action to turn off the camera or disrupt the internet connection between the camera/ computer and the platform unless instructed by counsel on camera to do so.

h. An agreement that the deponent and all counsel will keep a phone readily available to receive a telephone call in the event of a technological interruption during his or her testimony, or any time during the proceeding, including but not limited to colloque between counsel.

7. An understanding should be reached on the responsibilities of the lawyer for the party deponent.

For example, the lawyer for the deponent may be charged with the responsibility to have a computer, camera, and appropriate Internet connection to allow the deponent to be deposed using remote video on the selected platform. The lawyer may also be charged with the responsibility to familiarize the deponent on how the camera operates and how to otherwise interact with the platform, including the screenshare function.

As in a traditional deposition, the deponent's lawyer should not communicate with the deponent during the deposition about the subject matter of the deposition, except if necessary, to invoke privilege or address technology issues. Whether the deponent's lawyer can discuss the subject matter of the deposition with the deponent during off-camera breaks should remain subject to local rules and customs.

8. An understanding should be reached on the responsibilities of the lawyer who is deposing a witness, who will not be represented by a lawyer at the deposition/examination.

For example, the lawyer who is deposing a person who is not represented by counsel may be given the responsibility to have a computer, camera, and appropriate Internet connection to allow the deponent to be deposed using remote video on the selected platform. The lawyer may also be given the responsibility to reasonably attempt to familiarize the deponent on how the camera operates and how to otherwise interact with the platform, including the screenshare function. The lawyer may also be given the responsibility to instruct the witness on the agreed-upon rules for the deposition concerning handling documents, communicating with others during the deposition, etc.

9. An understanding should be reached on the responsibilities of lawyer participants generally.

It is anticipated that most lawyers would agree that the following responsibilities should apply to lawyers participating in remote video depositions/examinations.

a. Reasonably cooperate with one another and with self-represented parties in the creation of a Plan.

b. Become familiar with the technology that will be used for the deposition/examination, understand how it works, and, where possible, have the necessary hardware and software to participate meaningfully. Hardware and software should be tested before the hearing so that any glitches can be identified and resolved.

c. Cooperate with other counsel, self-represented parties, the court reporter, and the Video Manager during the deposition/examination.

d. Obey the law, local rules, and customs about when it is appropriate to communicate with the witness.

e. Work with other counsel and self-represented parties to ease any burden technology places on other counsel or another party and not use technological challenges or glitches to take advantage of another lawyer or party.

f. Determine whether any party, lawyer or deponent has a disability that prevents or impairs his or her ability to participate in a deposition that includes the use of remote video and include provisions that will permit the person to fully participate in the deposition.

10. An understanding should be reached on a protocol for handling exhibits during the remote video deposition/examination.

The parties may agree to handle documents expected to be referenced during the deposition/examination in multiple ways and should set forth any agreement reached on the issue in writing. In the absence of an agreement, the Court may be required to select a manner for handling exhibits.

The discovery rules in Canada are very different from those in the United States (and indeed they may vary from province to province). Nothing in these Guidelines should be interpreted to suggest that counsel or parties should not disclose those documents that they are required by law or rule to disclose at the time when they are required to disclose them.

That said, unless a law or rule requires something different, in a traditional deposition in the United States there is not a mandatory pre-deposition exchange of documents to be used by one examiner or another in the deposition. To be sure, there is a universe (however large or small) of documents that well-prepared lawyers and witnesses understand may be used during the deposition/examination, but examining counsel are not required to tell a witness or her counsel what documents will be referenced in what order during the deposition/examination. The fact the deposition/examination is being taken utilizing remote video should not change that practice.

To the extent that there are documents to be submitted to the deponent during the deposition/examination, the document can be screen-shared during the deposition/examination and, as appropriate, be marked as an exhibit or an exhibit for identification only (as appropriate). A document which is screen-shared should be described on the record with sufficient particularity that any person familiar with the case can readily identify it. (*E.g.* “This is page one from a two-page letter from Smith to Jones dated Jan. 2, 2020 bearing identification numbers P00122 and P00123.”) Then, absent an agreement to the contrary, the entire document should be uploaded using the in-meeting file transfer feature of the video platform to all counsel, the court reporter, the Video Manager, and the witness. Counsel and self-represented parties should confirm on the record that each received a copy of the uploaded document. The witness and the witness’ lawyer have the right to review the images of the entire document (not just the page offered by the examining lawyer via screen share) before being asked questions about the page or the document. Whether the entire document or just the page or pages which are screen-shared are marked as an exhibit will depend on the rules and customs of the

jurisdiction and any agreement among counsel. The court reporter has the responsibility to manage the referenced documents and to mark them as exhibits as requested.

There are other acceptable alternatives that may be considered. For example, the parties may agree to confidentially share the proposed exhibits with the court reporter before the deposition. The parties may agree to email any proposed exhibit to the participants before questioning the deponent about it. The parties may agree to upload the proposed exhibits into a password protected digital lockbox, sharing the password at the beginning of the deposition/examination.

If a document is created during the testimony (e.g. a diagram of the scene of an incident), or if markings are placed on an exhibit during testimony and a party wants to offer the created or marked document as an exhibit, the party shall do so in the traditional fashion and then, through the use of the “in-meeting file transfer” feature of the platform or other agreed method, send a copy of the document to each party, the Court (if required by local rules), the Video Manager, and the court reporter. Counsel and self-represented parties shall confirm on the record that each received a copy of the uploaded document. The court reporter will mark any such exhibit as requested.

To the extent that oversized (plans, construction drawings, spreadsheets, etc.) documents or physical objects will be used or will be sought to be made exhibits the parties should include in the Plan a method for using them during the deposition/examination and delivering them to the court reporter for inclusion in the official record of the deposition/examination.

If a true “original” needs to be made an exhibit to the deposition/examination, the parties should agree on the record who will maintain the “original” document after the deposition/examination. The parties may agree that a copy of the “original” may be substituted for the “original” as an exhibit to the deposition/examination with the “original” maintained by a designated person.

Finally, it should be noted that some court reporters have specialized video platforms that permit enhanced document markup, x-ray and MRI markup, importation of maps, various recording capabilities, touch display, etc. A discussion about which video platform will be used by the parties may include a discussion of this type of enhanced platform.

11. If raised by a participant, an understanding should be reached on whether any person can be in the same room as the deponent.

A deponent may want his or her counsel physically present at the time of the deposition/examination. Likewise, the examining lawyer may want to “look the deponent in the eye” and insist on being physically present, as might one or more of the other lawyers participating in the deposition/examination. The deponent’s lawyer, who otherwise sees no need to be physically present in the room with the deponent, may then insist on being present to prevent any chance of harassment by the examining lawyer. A multitude of other scenarios exist, the effect of which is that what was intended by the person seeking a remote video deposition is converted into a hybrid deposition, with some participants physically present in one location with the deponent and others in other locations.

These issues present the classic situation where the parties should work together in good faith to reach an agreement that meets the legitimate concerns of all of those that will be

involved in the deposition/examination. If they cannot agree, a court will be required to resolve the dispute, considering not only the interests of the parties but also that of the public in securing a just, speedy, and inexpensive resolution of the case.

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