

Trial Tips

Tips for Conducting Virtual Depositions

By Eric T. Boron



The COVID-19 pandemic is going to end someday. And everything we civil litigators do will go back to normal, right? Hardly. For example, virtual depositions are here to stay. Here are a few tips and tricks for making the next virtual deposition you conduct the best one you have ever conducted in a civil action.

Be Prepared

Determine the deposition exhibits you plan to utilize during the virtual deposition, and if possible email the court reporter pdfs of those deposition exhibits ahead of time. Decide before the deposition whether you will have the court reporter screen share the deposition exhibits with the witness or whether you or your legal assistant will do the screen sharing.

If you have not interacted by email with your court reporter prior to the virtual deposition, ask the court reporter to give you their email address and phone number before you go on the record.

Take precautions to eliminate potential distractions. Silence your cell phone and put it out of sight. Have your calls held. Place a sign on the outside of your office or conference room door advising those you work with that you are conducting a virtual deposition and are not to be disturbed.

Take Control from the Start

As soon as the witness is sworn in, the floor is yours. Take control immediately. Do not allow opposing counsel to begin speaking, no matter what they think “important to put on the record.” You may elect to afford them that courtesy after you have finished asking your questions—but not at the start.

Preliminary Issues and Ground Rules

Your deposition notice states that the deposition is being taken remotely by videoconferencing. Notwithstanding this, after introducing yourself, say you want to confirm that you are taking the deposition testimony today remotely by agreement.

Ask, “Are you agreeable to testifying today through this remote process?”

Tell the witness you are going to go over some important ground rules. The purpose of doing this is threefold.

First, covering a series of important ground rules right off the bat makes clear to the witness that you are prepared, experienced, and in charge.

Second, a number of the important ground rules covered by this trial tip are designed to limit the potential for the witness and/or their attorney later in the case, such as in opposition to your motion for summary judgment or while on the stand at trial, to have any viable basis for asserting that the witness didn’t understand how the virtual deposition process works or didn’t understand that there were ground rules for testifying virtually.

Third, covering the important ground rules up front with the witness puts the witness and counsel for the witness on notice that you will not tolerate “coaching” of the witness during the virtual deposition through cell phone texts or other attempts by counsel to covertly communicate with the witness while you are on the record.

Recommended ground rules to cover include the following:

- Have the witness confirm that they understand that the job of the court reporter is to take down every word spoken during the deposition. Ask, “Do you understand this?”
- Instruct the witness not to speak until it is their turn. Specifically, the witness must not begin speaking their answer to any question until the entire question has been asked. Ask, “Do you understand and agree to this ground rule?”
- Tell the witness you will wait until the witness has finished their answer before you ask your next question. Ask, “Do you understand this?”
- Tell the witness that if they experience any technical difficulty of any kind during the virtual deposition—for example, with the computer equipment or with the internet connection—the witness must do their best to immediately bring that to everyone’s attention. Ask, “Do you understand and agree to this ground rule?”
- Tell the witness you need their complete and undivided attention throughout the virtual deposition. Ask, “Is there anything distracting you right now?”

- Tell the witness they need to turn off all electronic devices other than the computer they are looking at. They must turn off their cell phone and place it somewhere that is out of reach. They are not to check their email or any other computer programs while on the record during the virtual deposition. They are expected to keep their eyes up and focused on the screen throughout the deposition. Ask, “Do you understand and agree to these ground rules?”

Covering the important ground rules up front with the witness puts the witness and their counsel on notice that you will not tolerate “coaching.”

- Tell the witness you will be probing their personal knowledge of facts today. They should not be receiving any help from a spouse, relative, business associate, friend, or attorney in answering the questions. Ask, “Do you understand and agree to this ground rule?”
- Have the witness tell you where in the house or building they are sitting to give their virtual testimony. Be sure to ask, “Is there anyone else in the room with you?” Then tell them they must immediately let you know if anyone enters the room in which they are testifying.
- Ask the witness if they have any notes or documents with them that they were planning to use for reference. If so, ask them to describe each note or document, and if by description they appear to have documents not yet produced in the case, ask the witness to hold such documents up to the screen for you to see. Go off the record at this time to discuss undisclosed documents with opposing counsel only if absolutely necessary. It is usually better to simply make a note for yourself at this point of the incomplete document production issue, and then circle back to the issue at the end of the deposition.
- Tell the witness you will be screen sharing documents throughout the virtual deposition, and those are the documents you want them to be focusing on. Screen share a pdf of your business card as an example, and confirm



TIP: Establishing ground rules at the outset makes clear to the witness that you are prepared, experienced, and in charge.

that they can see it on their screen. If you think the witness may be unable to read and understand English, have the witness read aloud the name of your firm and its location information, ostensibly to confirm that the screen sharing process is working well. Doing this memorializes at least to an initial extent their reading comprehension ability.

- Have the witness confirm that they understand that from start to finish during the virtual deposition they will be under oath, meaning they must truthfully answer each and every question. Ask, “*Do you understand and agree to this ground rule?*”
- Your final ground rule is memorialized by asking the witness, “*If you do not understand one of my questions, will you let us know that?*”

If the witness will not agree to these very reasonable ground rules, consider going off the record and telling counsel for witness you need to reschedule the deposition to an in-person deposition.

The Virtual Medium Has Its Advantages

If the defending attorney is not located in the same physical room as the witness, the virtual deposition may well afford you as questioner a better opportunity than an in-person deposition to have the undivided attention of the witness. The likelihood of the witness being distracted (or coached) by the defending counsel’s physical mannerisms, throat clearing, coughs, or finger/toe taps is lessened when the witness and their attorney are not in the same room. Consider intentionally leaving a screen shared exhibit up on the screen right up until the time when your next exhibit is screen shared. When the exhibit is taking up the whole screen, the witness cannot see or interpret covert, visual coaching signals made by their counsel.

Again, if you’re not in the same place as the witness or counsel for the witness, you can have extensively highlighted and notated documents openly spread out in front of you throughout the deposition. You don’t have to worry that opposing counsel might see your notes and ask for a break to prepare the

witness for responding to a topic or issue it appears from your notes you are going to probe.

Make judicious use of pregnant pauses during a virtual deposition. They are best used after the witness gives an answer you know or suspect is incomplete or evasive. Your silence gives the witness time to reflect on their answer, and hopefully add to it—without your having to ask a follow-up question. Opposing counsel can object to the form of your questions but cannot object to their own client’s additional, voluntary testimony. If you made it clear at the beginning of the deposition that because of the virtual format you will wait until the witness has finished giving their answer before you ask your next question, defending counsel will have no cause to complain about your pregnant pauses. If they do complain, say that you thought the witness had not finished answering your question yet, and that is why you were waiting. Remember that the transcript produced by the court reporter will not indicate how much time passed between the prior answer and your next question.

Consider moving up closer and closer to the camera on the top of your screen when you begin to ask the most meaningful questions of the deposition. Look directly into the camera when asking the key questions and when listening to the responses.

More on the Coaching Issue

If opposing counsel is in the same room as the witness during the virtual deposition, there is significantly heightened cause for concern that the witness is going to be coached during the virtual deposition. Tell the witness and counsel they need to position the camera on the computer being used for the virtual deposition at their location in such a way that enables the court reporter and you to see both the witness and counsel simultaneously on your computer screens.

Respectfully ask the witness and counsel to place their cell phones at a spot that is out of their reach. Consider saying something like, “*I have no reason to believe there will be any coaching by your counsel of your answers today, but in my experience, virtual depositions run much smoother when everybody involved has turned off their cell phones and placed them out of reach during the virtual deposition.*” Then, be alert to indications that the witness is reading aloud answers from a script or is reviewing documents other than ones you put up on the screen as exhibits during the virtual deposition. If you believe such indications may be reflective of counsel actively coaching the witness as to the answers being given, call for a break, and then respectfully speak to counsel for the witness off the record during the break about your concerns that “someone” (remember it could be someone else besides counsel putting form objections on the record) seems to be coaching the witness’s answers.

Dealing with blatant coaching of the witness during a deposition or other beyond-the-pale behavior of counsel for the witness is beyond the scope of these tips and tricks for conducting virtual depositions and will require application and enforcement of the practice laws and rules of the venue of your litigation. ◀

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