



PROGRAM MATERIALS

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**Bressler's Raising the Bar Series:
Protect the Exec! - Virtual Hearings &
Changing Perceptions of Executive
Testimony**

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Protect the Exec! – Virtual Hearings & Changing Perceptions of Executive Testimony

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Overview

Has the increased accessibility and use of virtual platforms brought on by the COVID-19 pandemic affected the legal standard for providing testimony?

How does the testimony of senior level “C-suite” executives illustrate this issue?

What can practitioners take away from this example and apply to their post -pandemic practice?

Takeaway

C-suite executive testimony provides a compelling study on how virtual mediums—though commonplace—cannot supplant substantive legal standards of relevance and undue burden.

Takeaway

Relevance remains the paramount issue and the perceived ease and accessibility of their testimony, does not change the standard when determining if these witnesses should testify .

The COVID - 19 Pandemic

The ease of virtual testimony has been predominantly practical in nature and dictated by the necessity of the COVID-19 pandemic .

Pros of Virtual Appearances

- Appears easier to schedule
- Lack of travel time
- Familiar surroundings
- Control over medium/preparation

Cons of Virtual Appearances

- Expectation of availability
- Perceived convenience
- Potential discomfort with medium
- Inability to read in - person demeanor

General Considerations

For Witness Testimony in Litigation

The Federal Rules of Civil Procedure distinguish objections to the *medium of testimony* from objections to the actual *testimony itself*.

FRCP Legal Standards

Rule 30(b)(4)

FRCP 30(b)(4) permits depositions taken by “remote means” either by stipulation of the parties or by order of the court.

The test first requires evaluation of whether there is a legitimate reason for the remote deposition by the party seeking it; and then there is a burden shift to the opposing party to make a “particularized showing” that the remote deposition is prejudicial. *Swenson v. GEICO Cas. Co.*, 336 F.R.D. 206, 209 (D.N.V. 2020).

FRCP Legal Standards

Rule 30(b)(4)

Such a “particularized showing” typically involves a compelling reason why a party would suffer prejudice from the remote method, such as a party who is asked to appear telephonically when their physical identification is critical to their testimony. *See United States v. \$160,066.98 from Bank of Am.*, 202 F.R.D. 624, 629-30 (S.D. Cal. 2001).

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FRCP Legal Standards

Rule 30(b)(4)

Though courts possess wide discretion in ordering the manner for taking depositions, generally speaking, leave to take remote depositions tends to be freely granted. *See Brown v. Carr*, 253 F.R.D. 410, 412 (S.D. Tex. 2008).

FRCP Legal Standards

Rules 45 & 26(b)(1)

Subpoenas issued to non-parties pursuant to FRCP 45 import the “overriding relevance requirement” pursuant to FRCP 26(b)(1), allowing discovery regarding “any non-privileged matter that is relevant to any party’s claim or defense.” *See also Warnke v. CVS Corp.*, 265 F.R.D. 64, 66 (E.D.N.Y. 2010).

FRCP Legal Standards

Rules 45 & 26(b)(1)

When considering undue burden, "courts generally employ a balancing test, weighing the burdensomeness to the moving party against the deponent's need for, and the relevance of, the information being sought." *Flanagan v. Wyndham Int'l*, 231 F.R.D. 98, 102-03 (D.D.C. 2005).

Post-Pandemic Considerations

- Frequency of virtual appearances?
- Virtual appearances as the new normal?
- Stricter limitations on virtual appearances?
- Stipulations to appear virtually more common?

Post-Pandemic Considerations

As for FRCP 45 and the import of relevance and undue burden standards —those objections are firmly rooted in the testimony sought, as opposed to the medium upon which testimony is given.

C-Suite Testimony

Efforts to compel C -suite officials to appear and provide testimony in cases where they have no reasonable, personal nexus to the case highlight the importance of keeping objections to the testimony medium separate and apart from issues touching upon the relevance and undue burden.

C-Suite Testimony

Courts have consistently prohibited parties from using requests to make available senior management officials with little or no connection to the facts of a case as a means of leverage or harassment. *See, e.g., Celerity Inc. v. Ultra Clean Holding Inc.*, No. C 05-4374, 2007 WL205067, at *3 (N.D. Cal. Jan 25, 2007).

C-Suite Testimony

Reasons:

- No personal knowledge
- No nexus to facts
- Information could be procured elsewhere
- Avoid harassment

Apex Deposition Rule

Recognizing that the highest positions within a juridical entity rarely have specialized and specific first-hand knowledge of matters at every level of the complex organization, courts have adopted the apex-deposition rule in the corporate context to

- (1) promote efficiency in the discovery process by requiring that before an apex officer is deposed it must be demonstrated that the officer has superior or unique personal knowledge of facts relevant to the litigation, and
- (2) prevent the use of depositions to annoy, harass, or unduly burden the parties.

Alberto v. Toyota Motor Corp., 796 N.W.2d 490, 492 (Mich. Ct. App. 2010).

*Not adopted by all courts

Apex Deposition Rule

While the rule is by no means a bar against C -suite executive testimony, courts are likely to use their broad discretion to shield such executives from undue burden, harassment and embarrassment in connection with depositions in instances where no unique personal knowledge of the case exists. *See Apple Inc. v. Samsung Elecs. Co.*, 282 F.R.D. 259 (N.D. Cal. 2012).

Accessibility \neq Relevance

- Superficial appeal of virtual hearings
- Relevance is the bottom line

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