



PROGRAM MATERIALS

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Mastering the Challenges and Pitfalls of Remote Testimony

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Mastering the Challenges and Pitfalls of Remote Testimony



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Topics for Discussion

- Governing Federal Procedural Laws
- Technology, Logistics, and Equipment
- Handling Exhibits
- Witness Preparation and Credibility
- Examination Style and Etiquette

Mastering the Challenges and Pitfalls of Remote Testimony

Governing Federal Procedural Laws

Federal Rules Permit Remote Testimony

- Under Federal Rule 30(a)(1),[1] “[a] party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2).” This includes organizations, which can be deposed through designated witnesses under Rule 30(b)(6).
- The federal civil rules also permit remote depositions through use of audio-video technology. Rule 30(b)(4) provides that “[t]he parties may stipulate — or the court may on motion order — that a deposition be taken by telephone or other remote means.”

Federal Rules Permit Remote Testimony

- The same is true for video conference in-court testimony.

Rule 43(a) provides that “[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.”

- The Advisory Committee Notes[2] underscore that this provision “authorize[d] the taking of deposition not only by telephone but also by other electronic means, such as satellite television, when agreed to by the parties or authorized by the court.”

Federal Rules Permit Remote Testimony

- Other requirements of the civil rules must be satisfied for a valid virtual deposition to take place. One of these requirements, set forth in Federal Rule 30(b)(5), is the requirement that unless the parties stipulate otherwise, the deposition must be “conducted before an officer appointed or designated under Rule 28,” and that the deponent be placed under oath by that officer.
- One legal question is whether this rule is satisfied when the witness and officer are both attending virtually.

Federal Rules Permit Remote Testimony

- While older cases hold that the officer needs to be physically present with the witness, recent authority holds otherwise. For example, *Sinceno v. Riverside Church in the City of N.Y.* (SDNY March 18, 2020):[3]

“For avoidance of doubt, a deposition will be deemed to have been conducted ‘before’ an officer so long as that officer attends the deposition via the same remote means (e.g., telephone conference call or video conference) used to connect all other remote participants, and so long as all participants (including the officer) can clearly hear and be heard by all other participants.”

Other Procedural Resources

Counsel intending to conduct or defend depositions remotely should also consult:

- The district court's local rules or emergency orders
- The judge's individual rules
- Any relevant standing orders usually posted on the court's website
- Any case-specific orders and stipulations

Mastering the Challenges and Pitfalls of Remote Testimony

Technology, Logistics, and Equipment

Contents of Deposition Notice

- Reasonable written notice to witness and parties about the time (address proper time zones), location, and method of recording the testimony
- Remote deposition notices should clearly state that the deposition will be conducted and recorded by remote means
- Provide connection details to include in notice from deposition vendor

Valid Oath Administration

- Through stipulation of the parties or by court order, oath may be administered remotely as opposed to conducted in person.
 - Many jurisdictions have passed new laws/rules in this regard
- Person administering the oath should attend the deposition by the same remote means (for example, teleconference or videoconference) used to connect all other remote participants.
- Person administering the oath can verify the witness's identity.
- All participants (including the court reporter or officer) can clearly hear and be heard by all other participants.

Choosing a Court Reporter

- Court reporting agencies have different levels of experience and technical offerings, so inquire before retaining.
- Consider the following components:
 - Videoconferencing to allow participants to see/hear one another
 - Exhibit sharing for the remote introduction and exhibits
 - Streaming real-time feed of the court reporter's transcript
 - Remote video and audio recording of the witness
 - Dealing with witnesses who are difficult to understand – reporters use mouth reading to assist

Technology and Equipment

- Audio and Video – Computer with functioning, high-quality camera, speaker, and microphone
- Connectivity – Low bandwidth syndrome – Get home internet up to speed to avoid freezing or connection drops
- System Specifications – Download specific videoconferencing application beforehand and test it by conducting a dry run

Logistics and Equipment for Trial Testimony

- Have a designated tech person on your team who can assist with the setup of the virtual courtroom and troubleshoot in real time.
- Familiarize yourself (attorneys and witnesses) with all of the features of the virtual (i.e., videoconference) platform in advance.
- Have a secure filesharing service to exchange documents.
- Provide contact info for IT support for issues during the proceedings.
- Establish protocols for any Chat or Q&A functions on the platform that are allowed by the court. When the witness is not testifying, if he or she is permitted to “attend” online, then this will be important.

Logistics and Equipment for Trial Testimony

- Decide on what display setting you should use – side-by-side (so the decisionmakers can see both the questioning counsel and the witness) or presenter view (displaying only the person who is speaking).
- Have multiple large monitors to organize and display the evidence, the witness, and to view all of the court or trial participants.
- Have a reliable and high-quality webcam, and ensure that it delivers a clear, high-definition picture. You may need a 360-degree camera to display everything in the room before testifying, to assure counsel and decisionmakers that you are alone in the room.

Logistics and Equipment for Trial Testimony

- Have a backup computer preloaded with all of the documents and exhibits.
- Ensure the spoken sound quality is clear for live or recorded presentations.
- Ensure that your location is free from noise and visual distractions, such as pets, children, or other background noise.
- Backgrounds should be neutral and professional. Do not sit in front of a background that is similar in tone/shade to the color of your clothing. Do not use virtual backgrounds unless directed by the court.
- If allowed, create protocols for communication outside of the courtroom platform (Messenger, iMessage, Google Hangout, Teams Chat, etc.)

Mastering the Challenges and Pitfalls of Remote Testimony

Handling Exhibits

Handling Exhibits at a Remote Deposition

Three common ways for counsel to introduce and share exhibits in remote depositions:

- 1) Pre-mark and circulate the exhibits before the deposition. Counsel can send the exhibits by email as PDF attachments. However, this gives the witness and defending counsel the advantage of knowing ahead of time the exhibits that deposing counsel may use.

Handling Exhibits at a Remote Deposition

Three common ways for counsel to introduce and share exhibits in remote depositions:

- 2) Use the “screen share” feature common to videoconferencing software to show exhibits during the deposition and then provide the exhibits to the court reporter following the deposition to enter into the record. However, the witness and the defending counsel may require deposing counsel to page through the entire document on screen for context before responding, which can be time consuming.

Handling Exhibits at a Remote Deposition

Three common ways for counsel to introduce and share exhibits in remote depositions:

- 3) Use specialized exhibit sharing software that allows participants to upload, mark, and share exhibits during the deposition. Certain court reporting agencies provide this capability as part of their service. Counsel has flexibility to introduce exhibits on an “as needed” basis and allows all participants to review the documents independently.

Mastering the Challenges and Pitfalls of Remote Testimony

Witness Preparation and Credibility

Special Rules

- Identify all persons participating in the videoconference or in the videoconference space.
- No private communications (i.e., phone, text or email) with witness during a witness's testimony.
- Do not record the hearing. Only the court is allowed to record conferences or hearings.

Special Considerations

- Place camera at eye level or slightly above for good eye contact.
- Instruct witness to refrain from looking at cellphone or notes of any kind – creates appearance of coaching.
- No one else should be in the room with witness without notice and approval of the court.
- If multiple persons are in one room, mute microphones; consider logging separately in to maximize visibility of participants.

Special Considerations

- Run the remote video app on only one device. Other internet connections and apps should be turned off as they can interfere with the effectiveness of the remote video app.
- Avoid more than one participant in the same room with separate video apps open. This will cause an echo or other sound issues.
- Avoid using two audio streams (e.g., computer and phone) because this will result in feedback.
- Plan on regular breaks to ensure the witness does not become overly fatigued.

Special Considerations

- Ensure witness has time to appropriately review documents displayed on the screen.
- Establish ahead of time with witness an effective means of conferring during breaks, such as calling the witness's cellphone and agreeing that the witness will not speak until they leave the room in which they are testifying.
- Practice sample Q&A in which witness pauses before answering to allow time for any objections.

General Physical Set-up

- Have a stable, non-movable chair available (avoid chairs that swivel or move forward and backward).
- Your monitor may need to be lowered to create a direct line to the camera.
- Have a drink available and place it outside the camera shot; avoid putting ice in the drink; avoid too much or too little water.
- Channel a good dose of patience.

Witness Preparation – Common Pitfalls on Video

- Be mindful of surroundings, and moderate fluid intake.



General Physical Set-up

- Use appropriate lighting and background. Purchase a Ring Light (or similar light) and position it in front of you to light your face. Avoid light from behind or directly above you.
- The camera shot should be at or near eye level and frame the witness from the top of the head to the table.

General Physical Set-up: Ring Light / Eye-Level Camera

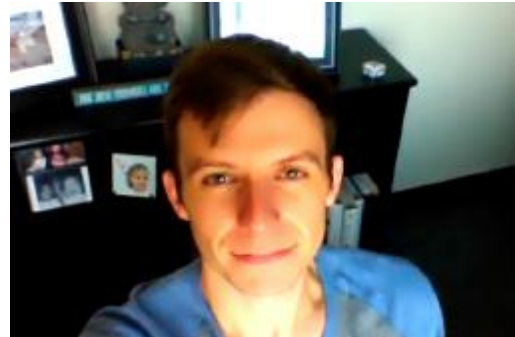


General Physical Set-up

- Examples of different angles and lighting:



Camera is angled up



Camera is angled down

General Physical Setup

- Examples of different angles and lighting:



Poor lighting - backlit

General Physical Setup

- Examples of different angles and lighting:



Poor lighting - backlit



Poor lighting – from
bottom

General Physical Setup

- Examples of different angles and lighting:



Poor lighting - backlit



Poor lighting – from
bottom



Good angle, lighting, and
framing

Eye Contact

- Making direct eye contact (with the camera) enhances witness credibility with the audience.
- Avoid shifting eyes toward the defending attorney or others in the virtual room.

Witnesses – Common Pitfalls for Remote Testimony

- Maintain eye contact with (or near) the camera: Poor eye contact.



Witnesses – Common Pitfalls for Remote Testimony

- Maintain eye contact with (or near) the camera: Good eye contact.



Body Language and Posture

- The witness should be sitting erect and leaning slightly forward while being anchored in the seat. This is the resting position.
- Avoid shifting in the seat, slouching, or leaning to one side or the other.
- Rest hands comfortably on desktop or lap unless handling a document or using hands to express or emphasize an answer.
- Every movement is emphasized when seen within a frame on an online format. Stay calm, avoid exaggerated nonverbal expressions and fidgety behaviors, such as: raised eyebrows, eyerolls, smirks, self-touching (of face, arm or chest), playing with a pen, paper clip, or other object. Do not continuously adjust glasses or clothing. Do not pick at teeth or other areas of the face or body.

Witnesses – Common Pitfalls for Remote Testimony

- Fatigue leads to poor body language – looks bored/disengaged.



Witnesses – Common Pitfalls for Remote Testimony

- Fatigue leads to poor body language – confrontational/frustrated.



Witnesses – Common Pitfalls for Remote Testimony

- Awkward/nervous self-touching (happened repeatedly).



Witnesses – Common Pitfalls for Remote Testimony

- ...*More* awkward/nervous self-touching.



Witnesses – Common Pitfalls for Remote Testimony

- ...*Even more* awkward/nervous self-touching.



Witnesses – Common Pitfalls for Remote Testimony

- Awkward/nervous self-touching – crucial moment of testimony.



Guidance to Witnesses Regarding Documents

- When handed a document (or shown a document on a screen), take time to carefully review it until you are satisfied you know it.
- If the document is lengthy, go off the record while you review it.
- After the document is read, put it down and look directly at the camera.
- Do not look down at the document and answer at the same time.
- If you need glasses for reading documents, non-glare glasses are preferable. Do not peer over the top of the glasses.

Pace

- Pause before each question (take a breath/count to five) in order to make sure you heard the question, understand it, and formulate the answer.
- Pauses also allow for objections (e.g., as to form of questions).
- Keep the pauses consistent across all questions.

Clothing

- Wear comfortable, professional clothes – e.g., dark suits, white or pale blue shirts, conservative ties, as if making a physical appearance in court.
- Avoid distracting clothing items, such as stripes or loud patterns, expensive watches, or large jewelry pieces.

Witnesses – Common Pitfalls for Remote Testimony

- Beware of awkward silences/the silent treatment.



Witness



Attorney

Witness Preparation – Responses

- Listen carefully to each question; avoid second guessing about where the questioner is going.
- Make sure you understand each part of the question and have the answer in mind before you begin to speak.
- Organize your response and give it in a concise manner.
- Address the question before explaining or providing context for an answer.
- Listen carefully for questions that contain mischaracterizations of testimony, misleading assumptions, inaccurate conclusions, or emotionally loaded terms.

Witness Preparation – Responses

- Challenge assumptions, mischaracterizations and emotionally loaded terms by breaking down the question into components; answer the question, and then rebut the misleading inferences.
- Avoid using acronyms and terms of art. If you find that an accurate answer requires the use of a technical term, define it.
- Make sure that you understand how the questioner is using a term of art; explain that a specific term has a different meaning to you and ask for a definition, but do not overuse this technique.

Witness Preparation – Responses

- Use the don't know/don't recall answers sparingly and only when necessary to avoid speculation.
- Provide context when using these terms – e.g., “That conversation took place several years ago, and I cannot recall it.”; “I cannot answer that question with accuracy because my role did not involve XYZ at the time in question.”

Mastering the Challenges and Pitfalls of Remote Testimony

Examination Style and Etiquette

Tips for Examiner in Trial

- Stand up if possible. Trial lawyers generally agree it is easier to perform well when standing up. Standing up improves concentration and gives you a wider vocal range. Movement also releases endorphins, which boost your alertness and energy. All of this holds true in an online/video format.
- If you can, set up a standing workstation and a sitting workstation, just as you would have in court. When listening to your adversary's examination, sit, take notes, and interpose your objections. When it is your turn to examine the witness, move to your standing station. While it may initially feel awkward to stand with the up-close-and-personal camera angle, you will soon get used to it.

Tips for Examiner in Trial

- Standing up will help you get from placid conversation mode to dynamic cross-examination mode.
- Many of us are used to having friendly, seated discussions with colleagues – including over Zoom – but not conducting adversarial witness exams that way. This can hamper your ability to get into the right mindset.
- Because we are used to sitting during depositions, it is easy to slip into the wrong questioning style if you situate yourself as you would in a deposition.

Tips for Examiner in Trial

- If you stand, you will feel more *in charge* of your space — and your examination.
- And while you may not be able to pace or walk away from your podium, as you may be used to, you can still use physical proximity to the camera for emphasis. Whether you have chosen to sit or stand, you can choose to lean toward the camera to make your presence more substantial — or lean back when the witness gives an answer no one should believe. But don't overdo it — if you get too close, it will look silly rather than commanding.

Tips for Examiner – Etiquette

- It is especially easy for attorneys to speak over one another when participating remotely, which can lead to a shoddy record.
- Avoid interrupting the judge or others – very easy to do remotely.
- Be sure not to proceed without your court reporter and that the court reporter does not lose their connection.
- Speak up; make sure to mute your microphone when not using it.
- Do not use more than one microphone at once – causes an echo.

Mastering the Challenges and Pitfalls of Remote Testimony



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Thank you for Attending!