

tech corner

Virtual Deposition Testimony: Practical Tips for Lawyers and Testifying Expert Witnesses

by Hollie M. Mason

As the world passes a year of restrictions and lockdowns due to the pandemic, nearly all of us have participated in some type of virtual meeting or social event. While COVID-19 vaccinations are well underway in the U.S., a number of courts, regulatory authorities, and financial institutions have projected a continuation of virtual business environments for most of 2021.

This article explores practical tips for attorneys and expert witnesses in preparing for and participating in virtual depositions, including technological, procedural, and practical considerations.

Get to know the technology

Those of us that have participated virtually in any aspect of litigation know that one of the most important steps in preparing is to familiarize ourselves with the supporting technology. Not all virtual platforms are the same, so it is important to acquaint yourself with the platform you will be using (e.g., Zoom, Skype). Most virtual platforms have training videos on their websites to help users become more familiar with various features and functionality, such as Zoom's video tutorials.

Hollie M. Mason



Hollie Mason is a Senior Consultant with The Brattle Group¹ in Washington DC. With more than 14 years of financial industry experience, she provides expert testimony and analysis as well as consulting services concerning securities trading and markets, customary practice, regulatory compliance, and risk management.

Attorneys should talk with their court reporter to find out which platforms are available, and choose the one with the functionality needed for your deposition. Attorneys and testifying witnesses should allocate time in advance to go over the relevant platform to ensure that they are comfortable with, for example, how best to review documents or create breakout rooms for team consultations. Also, remember to have a backup plan if the platform or technology fails. To prepare for the possibility of a platform outage, parties to the litigation can agree in advance whether they will move forward via phone or if they will resume proceedings at another time. Discussing and agreeing to those plans ahead of time preserves the flow of the deposition and the record.

Other platform-related tips include:

- Always use mute whenever you are not speaking.
- No virtual backgrounds or filters, please. Using a virtual background limits transparency as to who may be attending the deposition.
- Always ensure that any filters are turned off before virtually joining a deposition to preserve professionalism. As you may recall, a lawyer in Texas had an awkward few minutes during a virtual hearing when he virtually joined a hearing without realizing that a filter was causing him to appear like a cat, the video of which was posted on the internet and has been viewed more than 10 million times.
- Take note of what is in the background in the location where you will be sitting (e.g., book titles, pictures). Is it distracting, or does it inadvertently reveal something about you?



TECH CORNER

- Close all other applications on your computer, especially communication platforms like Teams or Jabber, as they can be an unnecessary distraction (more on that, next).

In addition, in the absence of traditional organizational and documentation tools, consider ways technology can further assist. For example, consider arranging for colleagues or team members to follow the deposition via a live transcript platform. These programs allow invitees to view a live feed of the “unofficial” transcript of the deposition (as the court reporter creates it in real-time), allowing them to identify items for follow-up. Typically, those viewing a live virtual transcript do not need to be announced on the record as attending the deposition.

Be prepared for procedural and tactical differences

Using a virtual platform to facilitate deposition testimony can often mean more time is spent shuffling between exhibits and directing witnesses to passages within documents being reviewed on a screen, resulting in extended silences. It is important to expect and prepare for these administrative silences.

For example, attorneys can prepare witnesses to:

- Allow more time for objections before answering questions.

- Avoid unnecessary conversation; it could be misconstrued as coaching, resulting in an objection or the need for clarification on the record—both of which can be problematic.

- Focus on the person asking the questions on their screen and avoid using any type of chat program—whether it is part of the video platform or an external application—to communicate with others when testifying. If concerns about such conduct are raised, be sure to put issues on the record and respond to accusations of improper behavior.

In a virtual setting, examination styles or tactics can also be different. Though the pressures that exist as part of attending an in-person deposition may be absent, attorneys can use short, continuous questioning to try and mimic the pressures associated with in-person examinations in order to unmask deceptions or get a reactionary response.

Attorneys may start the deposition with their most important questions, as opposed to later on, as virtual testimony can result in witnesses being more easily distracted and become tired, complacent, or dramatic as the day goes on.

Whether you are a testifying expert or attorney, be sure you have a plan in place to combat “virtual” fatigue, such as taking more scheduled breaks to keep focused.



Special Topics in Elder Law: Taking Away the Car Keys and Hoarding Disorders

August 11, 2021

2:00 p.m. - 4:00 p.m.

Hruska Law Center, Lincoln

Also available via webcast

2 CLE hours

Register at www.nebar.com

Set expectations and get organized ahead of time

Stipulations can also help to ensure that virtual depositions are administratively successful. For example, in most instances, parties must consent to a court reporter swearing in a witness virtually and to the deposition being recorded. Other potentially helpful stipulations include:

- No documents or notes will be allowed to be taken during the deposition.
- No other parties will be allowed to be in the room with the person testifying.
- No off-screen communications while the deposition is in progress.

The parties can also stipulate as to when and how far in advance documents are to be exchanged.

Other exhibit-related tips include:

- Create specific digital folders that describe each document along with pre-marked exhibit numbers to send to the court reporter in advance.
- Be sure you know how to share and review documents during deposition.
- Avoid asking opposing parties or testifying experts to bring documents to a virtual deposition. Instead, set your document production deadline for a few days before the deposition date.


If you did not receive all requested documents, or if a testifying witness mentions documents during their testimony that you have not yet received, consider leaving the record open and/or requesting on the record the documents to be provided.

Verify logistical details in advance

Finally, a few days before the scheduled deposition, attorneys should talk with the court reporter to double-check platform functionality and pricing, exchange/mark exhibits, and go over the agreed-upon ground rules for the deposition, including whether or not the deposition will be recorded. If you plan to record a virtual deposition, attorneys should check their local rules, as some states require all parties to stipulate and/or consent to the recording in order for it to be admissible.


Attorneys and testifying experts should also consider coming up with a list of names or technical terms in advance to provide to the court reporter on the record, since the spelling and pronunciation of terms, names, and acronyms can be more difficult to understand in a virtual environment. This can assist in reducing the need for errata corrections.

Preparation is the key to success

It is clear that virtual testimony will be a common reality in litigation for the foreseeable future. Attorneys and expert witnesses should expect to increase their planning and preparation to help ensure virtual depositions go smoothly. Set yourself up for success by familiarizing yourself with the technology in advance, staying virtually organized, setting clear expectations, and verifying and/or stipulating to the final details with all participants. 

Endnote

- ¹ The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm or its clients. This article is for general information purposes and is not intended to be and should not be taken as legal advice.



If you are aware of anyone within the Nebraska legal community (lawyers, law office personnel, judges, courthouse employees or law students) who suffers a sudden, catastrophic loss due to an unexpected event, illness or injury, the NSBA's SOLACE Program can likely assist that person in some meaningful way.

Contact Mike Kinney at mkinney@ctagd.com and/or Liz Neeley at lneeley@nebar.com for more information.

We have a statewide-and-beyond network of generous Nebraska attorneys willing to get involved. We do not solicit cash, but can assist with contributions of clothing, housing, transportation, medical community contacts, and a myriad of other possible solutions through the thousands of contacts available to us through the NSBA and its membership.