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Risk Management Tools for the Design Professional

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Discovery: Depositions and Document Production in the Age of COVID (and Beyond)

By Michelle R. Berger, Esq. with contribution from David B. Kosakoff, Esq.

As it relates to the pandemic-generated behavior we've collectively adopted over the past 14 months, it appears our mask-wearing/social-distancing/eating-outside ways may be coming to an end. Other Covid-era changes, however, just might be here to stay, especially those related to depositions. It is important to be aware of the processes clients and insureds will undergo related to depositions in 2021, and this article will discuss them.

First, Some Background

On March 20, 2020, the California Chief Justice issued the first (of what would be many) advisories recommending steps Superior Courts could take to mitigate the effect of reduced staffing and court operations and to protect the health of judicial officers, court staff, and court users, while recognizing that courts are considered an "essential service". Those actions included suspension of all civil trials, hearings, and proceedings and when possible, conducting non-urgent matters telephonically.

On April 6, 2020, the Judicial Council of California adopted rules to allow electronic depositions in civil cases. While appearing telephonically for certain hearings wasn't new to most litigators, conducting a deposition over Zoom was something else. While California is in various stages of re-opening (along with the rest of the country), and in-person depositions may slowly return, remote depositions are likely here to stay. For an industry built upon face-to-face interactions; from client meetings and court hearings to especially depositions, these changes required rapid adaptation by litigators (and their clients) nationwide.

Similar measures were adopted on the East Coast by Executive Orders by Governor Cuomo and a myriad of protocol updates by the Chief Administrative Judge to address the impacts of the pandemic. Indeed, country wide the courts enacted measures to navigate the unprecedented health concerns.

What is a Remote Deposition?

A remote or virtual deposition uses the ubiquitous Zoom format with neither the witness, the court reporter, the noticing attorney, the defending attorney nor anyone else that attends typically in the same room together.

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This can have certain advantages and disadvantages:

- **Pros:**

- The remote deposition can be less expensive since it eliminates travel time. Previously, depending upon location, traditional deposition attendees may have had to leave an hour or more before the start time for a deposition to account for traffic. It is not unusual to allow for 2 hours or more when attending a morning deposition in an urban area which necessarily results in costs for attorney travel time. The elimination of travel time resulted in substantial savings for clients and their insurers;
- The remote deposition can be less threatening for witnesses that may feel intimidated by the discovery process. First time or anxious deponents are not appearing at an unfamiliar office for their deposition but instead, are in the comfort of their own home or their attorney's office. This can make a process that some witnesses approach with trepidation easier for a nervous client;
- The remote deposition is relatively easy to set up (again, most utilize the Zoom format which just about everyone is familiar with at this point);
- Finally, in terms of clothing choices, only the waist up really matters (meaning, pajama bottoms for remote depositions work out fine!)

- In the right case, the remote deposition can be an effective alternative to the traditional in-person format. If the basic facts are straightforward or not in dispute and the exhibits are not voluminous, the result can be a quick and cost-effective way of undertaking fact investigation.

- **Cons:**

- The remote deposition can be a very difficult way of taking evidence. Often times, the sound quality is poor, as there is no way to regulate or improve the various devices used by the participants. Frequently, the court reporter interrupts the deposition to ask for repeat of questions or answers, and at times, the overall sound wavers in and out. Objections to questions can prove problematic, as either the witness or court reporter experience difficulties to hear or acknowledge them and/or the response by the deponent comes simultaneously with the objection raised. Many times, the remote deposition process can be laborious and subpar when compared with in-person depositions;
- The remote deposition is rife with potential for interference. Because the parties are not in the same room, it is difficult to verify that the witness is not receiving improper email or text message "assistance" from counsel (or others) in answering the questions posed or relying on documents out of site to counsel. While certain admonitions can be given in this regard, there is no way to assure that improper influence by the defending attorney is not taking place;
- The remote deposition can create problems with the presentation of documents to witnesses to inquire as to their contents. While Zoom has a share screen feature, it is slow and awkward to manipulate multiple page exhibits or when large amounts of text are at issue. Moreover, as with all exhibits marked during a remote deposition, they are typically



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Mr. Kosakoff is well known to design professionals in the New York Metropolitan area. He is a frequent lecturer and author of articles on various topics of interest to the design community and serves as General Counsel to the Westchester/Hudson Valley Chapter of the American Institute of Architects.

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As we continue to navigate the most extensive shift in the economic landscape that many of us will ever experience, the industries we work in and interact with on a regular basis will continue to change. Architecture and engineering firms have been particularly impacted with designers, contractors and owners having to adapt and create new approaches and protocols to manage communication, safety obligations and even "virtual site visits." [Read More](#)



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emailed to the court reporter by the noticing attorney, sometimes subsequent to the deposition. Accordingly, there is no way to ensure that the document presented to the witness via the share screen feature during the deposition is the same document emailed to the court reporter as an exhibit at its conclusion. This break in the normal chain of custody related to deposition exhibits may call their authenticity into question at the time of trial. Of course, a solution to this is to provide copies of the expected deposition exhibits to all parties in advance, however this obviously reveals the noticing lawyer's deposition strategy and allows the deponent and his or her counsel time to prepare;

- As to documents requested under an in-person deposition notice, the deponent is required to produce the responsive documents at the time of his or her deposition. For obvious reasons, this does not translate to the remote deposition, making the production of documents challenging. The burden is placed on the noticing counsel to either request documents via written discovery before the deposition or rely on reaching an agreement with opposing counsel to produce the requested documents in advance of the deposition. Either way, extra thought is required for document production in a remote deposition;

To most litigators, there is no substitute for sitting across the table, face-to-face with the witness and observing their body language and temperament as a gauge to potential performance at trial. This cannot effectively occur when depositions are conducted via a computer screen. As noted, in person depositions are slowly returning, but it is likely that remote depositions will continue to be utilized in some capacity and as such, extra care and preparation of clients and insureds will be required.

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