



Zooming into the future with Remote Depositions

How the pandemic has affected the courtroom

BY MICHAEL F. YOSHIBA, ESQ.

History

Imagine yourself sitting between five guests at a house party. They're having a spirited conversation about a movie they just watched. Back and forth and back and forth with questions, observations, comments, highlights and opinions. You can't get a word in, so the best you can do is try and listen to what's being said. Everyone seems to be talking at the same time. Someone stops to ask your thoughts on the last comment, but you don't recall who made the comment now or what question prompted the reply. Awkward. You remember only bits and pieces of the comments and conversation and certainly didn't take notes. Welcome to the world of court reporting.

BC: Before COVID-19

For the uninitiated, a deposition is a question-and-answer session whereby a court reporter records a group conversation. The session is placed into a booklet or transcript for later use by the parties involved in a case or lawsuit. These written transcripts are the product of court reporters most commonly Certified Shorthand Reporters ("CSR"). CSRs must be able to record and remember at least 225 words per minute, for five minutes between two persons, at a 95% accuracy rate. A typical deposition will have 3-5 persons in attendance. Every statement made, question asked, answer given, utterance and exclamation must be accurately taken down and transferred to a writing and then booklet that memorializes the entirety of the conversation. This task was invariably performed in person by the





CSR recording the conversation of everyone seated around a large table. In the courtroom, the CSR sits in the “well” between the judge, jury and witness, typing a shorthand record of anything stated in the courtroom. Technology and a pandemic changed this forever.

Pivoting to a New Reality

In March 2020, everyone in the legal field was working remotely from home offices, cell phones and laptop computers. The need for meetings and conferences did not wane however. The legal process was slowed but did not stop. Depositions for court cases were still needed in those matters being actively litigated. The existing safety measures precluded people from gathering in conference rooms for depositions. Attorneys looking for options to continue prosecuting their cases, by necessity, began holding remote depositions using online applications such as Zoom.

Zoom allowed CSRs to conference together up to 25 attendees in an online conference room. In April 2020, Zoom’s popularity exploded and had more than 300 million daily meeting participants. Although there was initial resistance to conducting online depositions, it turned out to be a very efficient and convenient way to gather the necessary participants for a deposition. With convenience also came problems.

Technology Gap – Equipment and Support

Deposition witnesses were not guaranteed to have computer technology current enough to stream the live feed within the Zoom conference application, nor could the attorney taking the deposition insist that the witness install the Zoom application onto their computers. Home computers were not equipped with the requisite cameras, resolution and microphone required for remote depositions. With disparate equipment among the participants and lack of technological support, many of the early attempts to conduct remote depositions failed miserably. Most attorneys learned how to navigate the complexities of taking remote depositions often with assistance from office information technology (“IT”) staff or consultants.

Some tried to take advantage of smartphones that had cameras and microphones for the remote depositions. The convenient pocket-sized cell phones were not conducive with remote deposition appearances. The small screen could not show all participants, nor could the witness see documents being shared in the remote conference room document screen sharing feature.

Everyone in their own window

When depositions are being remotely attended by the parties, not all persons attending the deposition are in separate locations. On occasion, a witness and their attorney will be in the same office or room. This is problematic because a witness being questioned should not be in the same screen shot with their attorney, for relevancy and prejudicial concerns. And likewise, if an attorney is in the same room as a witness, but the attorney cannot be seen because the focus is only on the witness, any inappropriate interactions between the attorney and witness will be missed.

Unanticipated issues arose where participants were visually or hearing impaired. Assistive equipment had to be provided to that witness, else the testimony is unusable. For example, using the small speakers on a typical home computer is inadequate for helping hearing-impaired persons communicate in depositions.

Document Handling

Witnesses can also be asked about documents in depositions. For in-person depositions, deponents are handed actual documents and asked questions therefrom. Documents can range from a single page to one hundred pages or more. Witnesses can quickly scan a document by flipping through pages at their own ability and pace. Questioning witnesses about documents during remote depositions, however, is highly challenging. The attorney taking the deposition can only show a witness the document one page at a time. Viewing each page requires scrolling up and down at a pace dictated by the witness. The witness’s ability to clearly view a document is limited by the screen on the witness’s computer, laptop or smart phone. To complicate matters further, the CSR must certify and attest to the specific exhibits being identified and testified to by the witness. The CSR must have either preloaded exhibits being referenced or trust that the document being delivered after the deposition will be the same.

CSR vs taped deposition

Following the pandemic, there are fewer CSRs to handle depositions and to certify the accuracy of deposition transcripts. Most, if not all, depositions are now taken remotely. Many courts have stopped including CSRs as part of the regular courtroom staffing. The shortage of CSRs has birthed a new industry service — taped depositions. Taped depositions are audio or video recordings of the deposition but without any follow-up transcript preparation or certification. Using deposition testimony in any court setting requires a certification of the transcript accuracy, a transcript certified by a CSR if in California and many states. Beware of “taped depositions” and ask ahead.

Adapt

The pandemic only accelerated the need for the legal community to use and embrace new technology in remote depositions and courtrooms. The future is here and now. 🌟



Michael F. Yoshida is a shareholder in the Eminent Domain and Litigation Departments of the Los Angeles law firm, Richards, Watson & Gershon.