



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

3 Tips For Deposing Difficult Witnesses Remotely

By **Qian Julie Wang** (April 17, 2020, 5:21 PM EDT)

Many lawyering tasks can be handled easily, and just as effectively, remotely. Taking a deposition of an uncooperative witness, though, is one task made immeasurably more difficult during the current pandemic.

Although the end product of a deposition is a written transcript that can be just as easily produced via a virtual deposition, much of the art of taking a deposition comes down to reading and deploying body language and using momentum to control adverse witnesses. As incredible as technology has become, it offers poor substitutes for nonverbal communication, which can have pivotal effects on how a deposition transcript unfolds.

While this may not be a problem where the witness is cooperative, that is rarely the case. And as more and more courts around the country order that depositions be held remotely, many attorneys will soon be in the unenviable position of deposing adverse witnesses remotely.[1]



Qian Julie Wang

Here, I offer a three strategic tips for those still learning to navigate these new dynamics. Notably, my perspective on depositions is informed by my experiences from various angles: as a trial attorney building the record; an appellate litigator making strategic decisions based on that record; and a judicial law clerk poring through the record to arrive at recommendations for judges.

1. Get to know the technology and make sure you have standby support

There are myriad services offering technological options for remote depositions. Consider scheduling demos with several services to find the best fit for your style and the particular deposition.

Once you've chosen a provider, be sure to run at least one, if not several, follow-up demos to troubleshoot and develop full comfort with the software. Understand all of the various functions of the software so that you know, for instance, to request that the private chat function between the witness and his counsel be deactivated for your deposition.

Notably, certain facets of the technology have been designed to cater to the strategic needs of depositions. For instance, services are careful to give the deposing attorney full and complete control of when the witness is privy to each exhibit.

Regardless of whether you choose to use a share screen function to present exhibits or an outside exhibit management program like eDepoze, you have full control over when the witness and opposing counsel has access to each document. With share screen, no one is able to see the exhibits until the attorney presses the button to begin screen sharing, and with exhibit management programs, no one will see the exhibits until you formally introduce them.

Regardless of which form of exhibit presentation you choose, however, make sure to practice with the program until it becomes as rote as, for instance, the process of marking an exhibit or laying foundation. Technological glitches can be an insidious barrier to getting key admissions from a difficult witness, because the strategy may often turn on projecting authority and using the element of surprise.

With that in mind, make sure you know exactly how to introduce an exhibit on the software at the exact time you need it. Presenting a smoking gun exhibit only to be hit by a technological hiccup gives the witness (and her counsel) much-needed time to regroup and formulate explanations that dodge key admissions. This is not to say that you can ever ward against all glitches, but developing agility with the software will ensure that any issues will not throw you off focus.

Attorneys are also well-advised to pay extra for a dedicated standby technician, a service many providers offer. Even without a standby person, providers can always be reached to fix glitches, and for the most part, they are resolved in approximately 10 minutes. Reserving a technician in advance just for your deposition can reduce that lag time and keep the parties' focus on the questioning.

2. Be sure to hire a videographer, and consider making more note and stipulations on the record.

Hiring a certified videographer is a must.[2] First, without a certified videographer, any footage of a deposition that may be captured by the software is not admissible at trial. Second, unless you're deposing a movie star, most people do not feel comfortable being recorded. Videography can be an added tool in your arsenal to subtly exert pressure on the witness and opposing counsel.

Third and perhaps most importantly, videography can offset many of the disadvantages of taking a remote deposition.

In an in-person deposition, you would be entitled to look at any notes that the witness has brought to the session, and you would know if opposing counsel were coaching the witness. In a remote setting, it is not possible to know for certain whether the witness is consulting notes taped to the wall across from him, or covertly reading private text messages or emails from his attorney.

It is unlikely that you will be able to lock down a witness's computer and phone, so consider having the witness sit a few feet back from the screen, such that his torso and arms are fully visible. Then, have him testify on the record at the beginning of the deposition that he has no other programs open and will not be consulting any notes, texts, emails, chats, or anything of the sort while in session.

This makes it so that if the witness later appears to be consulting another source, you can note that on the written record in a timely and clear fashion — both to alert the court and to control the witness.

Indeed, consider erring on the side of making more stipulations and notes upfront and on the record, whether it pertains to the validity of having the witness be sworn over videoconference, or whether additional time incurred by technological issues will go toward the federal rules' ceiling of seven hours.[3]

3. Consider adopting a different style that may be better suited to videoconference.

Deposition style is a very personal matter that comes down to the most effective technique for the particular attorney. Certain styles, however, may be extremely forceful in person and have limited effectiveness over videoconference. If you usually play the "bad cop," consider whether your go-to techniques may inflict less distress on a witness who is in the comfort of her own home and where your presence is limited to a small screen.

And, if you frequently deploy using long pauses to induce the witness to fill the silence, think about whether that may work less forcefully now that the parties are no longer in the same room together. Indeed, extended silence may in fact give the witness or her counsel opportunity to muck up your record — such as by inquiring whether the audio has dropped and asking whether you are still connected.

The possibility of technical issues may also counsel attorneys to prepare questioning and outlines in the form of modules that are more malleable in sequence. Technology demands flexibility. If an important line of questioning loses momentum or force due to a break in internet connection, consider falling back to safer ground, and revisiting the original topic when momentum has built up again.

Similarly, if you're having a hard time getting the witness to give you a clean admission, consider a method by which you return to an important topic throughout the deposition, intermingling those questions with more innocuous questions on other topics.

Split what would otherwise be one block of important questioning into two or three blocks, and spread them out over the course of the day. This may be more effective than asking them in close sequence, which will tip the witness off to the exact admission you're pursuing, and likely cause defense counsel to interject.

Of course, this approach works only for certain types of topics and questions, but if you are used to working off a set order of closely related questions, the technique may be more applicable than you might think.

Remember that law clerks, judges and jurors rarely read entire swaths of the transcript sequentially or in full: instead, they will read what you present to them, through quotes in your filings and exhibits. As such, getting a series of interrelated testimony culminating in one key admission can be effective even if it is meted out over the course of the day because you can still cobble the bits together after the fact. And of course, it is certainly better than no admission at all.

Finally, repurpose what travel time you save by writing tight questions that are closely hewed to the exhibits. This serves a dual purpose.

First, it is always the case that well-worded and artfully written questions give adverse witnesses less room to wriggle away from the admissions you're after. It is even more vital now that you are limited to engaging with the witness through the narrow confines of a computer screen.

Second, questions that hew closely to the language of the underlying documents give you the flexibility to get fundamental testimony before tipping your hand with the exhibits themselves. In some situations, they may even allow you to dispense with introducing certain exhibits altogether.

This can be critical if you encounter repeated issues with the exhibit management software, as you might be able to save valuable time without much sacrifice by working off your questions alone. It can also be a game-changer if you find that a lag is repeatedly giving the witness or defense counsel enough lead time with key exhibits to come up with evasive explanations and disruptive interjections that impede your ability to create a clean record.

There are many advantages to remote depositions, chief among them flexibility, reduction in expenses and travel, the increased likelihood that defense counsel will zone out or get distracted, and even ease of training access for junior associates who would otherwise not be able to attend and observe a deposition.

Most of all, though, they have become a necessity. Through diligent preparation, attorneys can ward against the disadvantages of deposing difficult witnesses remotely and still accord their clients the best advocacy possible while staying safe and healthy during these extraordinary times.

Qian Julie Wang is an associate at Robins Kaplan LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Courts across the country, ranging from the U.S. District Court for the Southern District of New York and the U.S. District Court for the Northern District of Illinois to the U.S. District Court for the Middle District of Louisiana, have ordered that depositions go forward via videoconference. At least one court, in the District of Delaware, has declined to compel depositions by videoconference, indicating instead that the depositions did not need to proceed as scheduled prior to the coronavirus outbreak.

[2] Although videography does mean additional cost, much of that cost may be defrayed by the

savings in airfare and accommodations that regular depositions would otherwise incur.

[3] Some courts have offered clear guidance on the swearing-in process. The Southern District of New York, for instance, has specifically ordered in one case:

Unless the parties stipulate otherwise, the deposition must be “conducted before an officer appointed or designated under FRCP 28” and the deponent must be placed under oath by that officer. “Before an officer” includes an officer that attends the deposition via the same remote means (e.g. telephone conference call or video conference).

The Florida Supreme Court has also explained that witnesses may be sworn “remotely by audio-video communication technology from a location within the State of Florida, provided they can positively identify the witness.” If the witness is outside of Florida, he or she “may consent to being put on oath via audio-video communication technology by a person qualified to administer an oath in the State of Florida.”

All Content © 2003-2020, Portfolio Media, Inc.