

**CONDUCTING  
DEPOSITIONS ONLINE**  
WHAT YOU NEED TO  
KNOW TO EXECUTE THE  
PROCESS SUCCESSFULLY  
AND LEGALLY

July 2020

## **An Esquire Deposition Solutions Webinar for the Florida Bar**

*Approved by the Florida Bar for 1.0 hours General and 1.0 hours  
Technology CLE Course Credits*





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# AGENDA

- Litigating Remotely
- Understanding the Rules Governing Remote Depositions
- Remote Services for Online Proceedings and Record Capture
- Preparing for the Deposition: Before, During & After
- Keeping Your Information Secure
- Next Steps



# UNPRECEDENTED TIMES

## THE NEW ABNORMAL IS HERE TO STAY



- Exacerbating Court Backlogs
- Protecting Your Clients' Cases
- Firm and Attorney Business Continuity
- Essential Cases that Must Be Heard (Due Process and Emergency Issues)
- Health and Safety of All Members of the Court System

A photograph of a green football field with white yard lines and a wooden bench on a red track. The bench is in the foreground, and the field extends into the background. The text is overlaid on the left side of the image.

# FOR A LITIGATOR, SITTING ON THE SIDELINE IS NOT AN OPTION

Litigators, whose practices frequently require in-person contact at depositions, mediations, and court proceedings, are scrambling to find a way to keep their cases on track.

# NEW LITIGATION TRENDS

## Corona - related

- Business Interruption
- Insurance Claims
- Voters Rights
- Cures & Preventions
- Price Gouging/Failure to Refund
- Governmental Action or Emergency Matters

## Client Company Needs

- Bankruptcy/Restructuring
- Employment
- Cyber-Security
- Healthcare
- Crisis Management
- Supply Chain

# KEEP YOUR CASES MOVING IN THE NEW ABNORMAL\*

- Balance reasonable accommodations with moving your clients' cases forward
- Agree to reasonable adjournments, but keep deadlines on a short leash
- Propose doing depositions and court conferences by video
- Push back on litigants who seek delay for strategic gain
- Don't let the perfect be the enemy of good: in-person would be perfect; videoconference is good

*\*Source: New York Law Journal, 3-20-2020, Joshua Wurtzel (attorney at Schlam Stone & Dolan)*



# UNDERSTANDING THE RULES GOVERNING REMOTE PROCEEDINGS



# STATE RULES MOVE TO REMOTE

Nearly every state has issued an order encouraging the use of videoconferencing as a means of conducting legal business to help stop the spread of coronavirus.



# FEDERAL RULES OF CIVIL PROCEDURE

## Rule 29. Stipulations About Discovery Procedure

Unless the court orders otherwise, the parties may stipulate that:  
(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition

## Rule 30(b)(4)-(5)

The parties may stipulate ... that a deposition be taken by ... remote means.

Committee notes clarify that section (b)(4) expressly “eliminate[es] the necessity of the presence of one whose only function it is to administer the oath.”



As of April 1, 2020

# REMOTE OATHS

- Remote Oaths
  - Remote swearing in of the witness
  - Remote testimony
- Permit remote oaths by special order due to COVID-19
  - Alabama
  - California
  - Connecticut
  - Florida
  - Massachusetts
  - Mississippi
  - Missouri
  - Nevada (Clark County)
  - New Hampshire
  - New York
  - Pennsylvania
  - Texas
  - Wisconsin
- By stipulation of counsel is always allowable

**AS A RESULT OF COVID-19 RELATED TEMPORARY ORDERS, REMOTE OATHS / REMOTE COURT REPORTING IS PERMITTED IN ALL 50 STATES**

# FLORIDA RULES OF CIVIL PROCEDURES



**1.300(c) Selection by Stipulation.** If the parties so stipulate in writing, depositions may be taken before any person at any time or place upon any notice and in any manner and when so taken may be used like other depositions.

**1.310 (c) Examination and Cross-Examination; Record of Examination; Oath; Objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial. The officer before whom the deposition is to be taken **must put the witness on oath** ...except that when a deposition is being taken by telephone, the **witness must be sworn by a person present with the witness who is qualified to administer an oath in that location.**

# FLORIDA ATTORNEY GENERAL OPINION 92-95



“A notary public may not administer an oath to a person over the telephone even though the attorneys for all interested parties stipulate as to the person's identity.”

While the Attorney General's opinion suggests that a videoconference could satisfy the in-person requirement, the AG didn't go that far. Instead, the AG wrote:

**“It may be advisable to seek legislative or judicial clarification through the crafting of legislation or rules to accomplish this.”**

# MARCH 16, 2020

## REQUEST FOR EMERGENCY ORDER PERMITTING REMOTE OATHS

**From:** [REDACTED]  
**Date:** Monday, March 16, 2020 at 13:52  
**To:** John Tomasino <[tomasino@flcourts.org](mailto:tomasino@flcourts.org)>  
**Cc:** [REDACTED]  
**Subject:** Need for an additional emergency order on taking of oaths remotely in light of COVID-19

Dear Mr. Tomasino:

In light of the state of emergency created by COVID-19, and the adopted general practice of social distancing, we ask that the Florida Supreme Court consider issuing an emergency order permitting oaths to be administered remotely via audio-video communications equipment for depositions and other legal or remote testimony.

As you may be aware, there has been some doubt in the past about whether the term “in the presence of” means that a notary (usually a court reporter taking a deposition remotely) must be physically present with a witness to administer an oath, even when the witness can be seen and heard by the notary via video such that the notary can verify the witness’s identity. The various Rules Committees (RJA, Civil, Juvenile, and Family) have been attempting for several years to amend the rules to allow administering remote oaths via audio-video technology, but have not yet succeeded in producing a unified rule for this Court’s consideration. However, the committees have agreed that best practices include allowing oaths to be administered remotely for legal testimony, so long as the person administering the oath can positively identify the witness—they have just not yet agreed on a unified rule.

Attached is a suggested Order that would temporarily suspend any actual or implied requirement that notaries, and other persons qualified to administer an oath in the State of Florida be present with the witness to administer an oath for swearing in witnesses before taking legal testimony in a deposition or other legal proceeding so long as the person administering the oath can positively identify the witness via audio-video communications equipment. Thank you for your consideration.

# FLORIDA EMERGENCY MEASURES

## Recently extended indefinitely

April 6, 2020

Supreme Court of Florida

No. AOSC20-23

IN RE: COMPREHENSIVE COVID-19 EMERGENCY  
MEASURES FOR THE FLORIDA STATE COURTS

ADMINISTRATIVE ORDER

- To maintain judicial workflow to the maximum extent feasible, chief judges are directed to take all necessary steps to facilitate conducting proceedings with the use of technology.
- Notaries and other persons qualified to administer an oath in the State of Florida may **swear a witness remotely by audio-video communication technology** from a location within the State of Florida, provided they can positively identify the witness.
- If a witness is not located within the State of Florida, a witness 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 rules of procedure, court orders, and opinions applicable to remote testimony, depositions, and other legal testimony ... that can be read to limit or prohibit the use of audio-video communications equipment to administer oaths remotely ... shall remain suspended.

# FLORIDA LOOKS AHEAD: Continuity Workgroup

- On April 21<sup>st</sup>, Justice Canady established a Continuity Workgroup to assess the current Covid-19 situation and recommend next steps.
- Canady's order directs the group to:
  - “Examine the current status of all court proceedings . . . where warranted, propose methods for resolving them with remote technology;
  - Identify and propose solutions for legal issues . . . [and] challenges, and costs associated with the use of remote technology;
  - Propose guidance . . . to allow the safe return of judges, personnel, parties, counsel, jurors, and the public to court facilities;
  - Recommend the priority in which proceedings that require in-person hearings and trials should resume . . .
  - Identify which proceedings may continue to be held remotely even after the public health emergency has passed . . . .”



# FLORIDA LOOKS AHEAD: Continuity Workgroup Recommendations

- On May 4<sup>th</sup>, Justice Canady issued a new emergency order increasing the list of proceedings state courts will accomplish by remote technology during the coronavirus pandemic. This includes:
  - **Non-jury trials**, except that all parties must agree to remote non-jury proceedings in criminal, juvenile delinquency, and termination of parental rights cases;
  - Alternate dispute resolution cases;
  - **Status, case management, and pretrial conferences in all case types;**
  - **Non-evidentiary and evidentiary motion hearings in all case types;**
  - Arraignments and pleas in absentia in county court misdemeanor cases;
  - Hearings in juvenile delinquency cases ...
  - Problem-solving court staffings, hearings, and wellness checks.

As of July 13, 2020

# FLORIDA LOOKS AHEAD... CAUTIOUSLY

- Requirements in Florida Courts per Florida Supreme Court
  - Facemasks
  - Health Screenings
  - Temperature Checks
- Current landscape across Florida
  - Jury Trials
  - Court appearances



# FLORIDA LOOKS AHEAD... CAUTIOUSLY

## What has gone right?

- Continuity Workgroup
- Court Ability to Modify Requirements (e.g, Florida Supreme Court)
- Ability to move cases along faster

## Where are improvements needed?

- Court Backlog
- Zoom “Bombing”
- Courts chosen to pilot jury programs set aside remote juries due to spike

# PER TEMPORARY ORDER: SAMPLE NOTICE & STIPULATION\*

- FLORIDA EMERGENCY ORDER

- Pursuant to the No.AOSC20-23 issued by the Florida Supreme Court on April 6, 2020, ...

- SAMPLE NOTICE LANGUAGE

- Suggested language for remote deposition notice: “The witness may be sworn in using remote videoconferencing technology.”

- SAMPLE STIPULATION

- It is hereby stipulated that this deposition will be taken by remote videoconferencing equipment and that the oath will be administered remotely by videoconference. The parties stipulate that the reporter and witness will be in remote locations. Pursuant to [NAME OF ORDER] issued by the [STATE] Supreme Court on March \_\_\_\_, 2020, all parties stipulate and agree that the witness is identified as \_\_\_\_\_ and the witness was placed under oath remotely. This deposition shall be used for all purposes like other depositions.

*\*Not legal advice*



# REMOTE DEPOSITIONS AREN'T NEW

- Technology makes remote depositions easy and convenient
- Multi-state & cross-border
- Reduce travel
- Remote participation by client or legal support team
- Electronic exhibits save money on copying and shipping



A black and white photograph of a dog, possibly a pit bull mix, sitting at a desk in an office. The dog is looking towards the camera. In the background, there are blurred office elements like a computer monitor and papers. The overall tone is professional and calm.

**It takes more than a webcam  
and an internet connection to  
safely and securely conduct a  
deposition & capture the record.**

# REMOTE SERVICES

FOR ONLINE PROCEEDINGS & RECORD CAPTURE

# REMOTE (VIRTUAL) SERVICES TO CONSIDER



- Remote Deposition Services
- Remote Court Reporter
  - Optional Real-time
- Transcript & Exhibits
- Remote Videographer
- Remote Interpreter



# WHAT'S DIFFERENT WITH REMOTE COURT REPORTER SERVICES



## Requirement:

- Court reporter and witness are not in the same room

## Optional:

- All other parties are remote

## Fully digital process

- On-line proceeding (videoconferencing)
- Exhibit submission
- Transcript/exhibit deliverables

# REMOTE REPORTER ROLE & RESPONSIBILITY

- Viewed on the screen as a participant
- Swears in the deponent
- Takes the record
- Performs read-backs as requested
- Controls the proceeding as they normally would
- Manages the exhibit process in producing the record



# A REMOTE REPORTER SHOULD NOT

**Do anything that risks capturing a verbatim record**

- Should not share exhibits during remote proceeding
- Should not pause videoconferencing proceeding recordings
- Should not provide technical support to the parties in the proceeding



# CONFIRM EXPERIENCE, TECHNOLOGY, TRAINING & SUPPORT



- Agency remote service experience (did the agency just react to COVID-19?)
- Does the agency provide the enterprise-level software technology, processes, procedure, and security?
- What training has the remote court reporter received?
  - Managing the proceeding on videoconferencing
  - Specific roles & responsibilities
  - Before, during, and after processes and procedures
- Who is supporting the remote court reporter before and during the proceeding?

# BEFORE THE DEPOSITION

PREPARE ... PREPARE ... PREPARE

# TECHNOLOGY NEEDED

*Assume use at trial.  
Get the best audio & video possible.*

- Device capabilities
- Internet connection - broadband wired or wireless
- Quality audio speakers
  - Wireless Bluetooth not recommended for proceedings
- Quality web camera
  - Wireless Bluetooth not recommended for proceedings





# ATTORNEY & TEAM PREPARATION

- **Confirm and test everyone's technology** in advance of the proceeding\*
- **Prepare Notice of Deposition** to disclose proceeding methodology
  - Videoconference
  - Remote swearing in of the witness
  - Stipulation (if necessary)
- **Exhibits**
  - Prepare your exhibits on your **computer hard drive**
  - Determine **who will screen share the exhibit** during the proceeding – attorney or staff

*\* Do not switch devices day of the proceeding, all bets are off*

# YOUR WITNESS PREPARATION



- **Confirm and test witness technology** in advance of the proceeding\*
- **Explain environment and dress**
- **Rehearse speaking cadence** (unique in a videoconference)
  - Attorney: Question – **Pause**
  - Witness: Listen – Understand – **Pause** – Answer
- **Set expectations** -- a videoconference deposition will take longer

\* Do not switch devices day of the proceeding, all bets are off



# WITNESS RULES (AGREED TO ON THE RECORD)

- Witness positions self approximately mid-body and up
  - Body language
  - Hands (is the witness texting during the proceeding?)
- Communication during breaks
  - Agree to and test a **separate audio method** than is being used to record the proceeding
- Witness confirms no one else is in the room
  - Confirm on the record
- If another person(s) in the room with the witness:
  - Identify the person (name, relationship) on the record
  - Get on camera
- Witness agrees to not communicate with anyone during the deposition
  - No emailing, chatting, texting during the deposition
- Witness identifies any technology that's in the room with them
  - Can subpoena the technology if known (*i.e.*, texts on a smart device during the deposition)

# EXHIBITS PREPARATION: EXHIBIT STRATEGY DECISION

- **Email the exhibits** to all parties (include witness & opposing counsel) if there's no strategic advantage to keeping them from being seen in advance of the proceeding
- If the element of **surprise is important**, such as to impeach the credibility of a witness or to cause unbalance, introduce the exhibit from your computer via share screen for the first time **during the proceeding**



# EXHIBITS PREPARATION

## Marking the Exhibits

- Agree on numbering with opposing counsel to simplify marking of exhibits
- Pre-mark the exhibits if emailing in advance
- Exhibit number in file name
- Confirm the exhibit marking support the agency provides

## Self-Stamping Solutions

### Adobe Acrobat Reader DC

- For PC users
- For Mac users

### ExhibitStickers.com

- Add digital exhibit stickers directly to your Adobe PDF exhibits



# AGENCY PROCEEDING PREPARATION WITH PARTIES

## Testing / Validation

- Testing / validation with all parties
  - Equipment working
  - Sound check
  - Bandwidth ok?
  - Video displaying?
- Verify services you require
  - Real-time
  - Remote videography
  - Interpretation

## Technology / Process

- Exhibits
  - Sharing during the proceeding
  - Submission to the record
  - Marking post proceeding
- Educates all parties on agency videoconferencing platform
  - How to access
  - How to use

# DAY OF THE PROCEEDING

# TECHNOLOGY CHECK



- Audio test – test your speakers
- Web camera test – test your web camera
- Bandwidth test – test your bandwidth ([www.speedtest.net](http://www.speedtest.net))
  - 5 Mbps minimum upload/download, 10 Mbps is preferred
- Close all other tabs and applications on your computer

# ENVIRONMENT CHECK

- Minimize use of internet bandwidth (including family)
  - Close down Roku, Netflix, gaming devices to maximize your bandwidth
  - Alerts, chats and texts blocked on all devices
  - Turn off or mute Alexa and other “smart” speakers
- Positioning for on camera and sound
  - Clutter free, plain background in your video frame
  - Proper lighting – well-lit and not back-lit face
  - Face Camera – position yourself to be seen
  - Microphone Placement – microphone close to you
  - Professional attire
- Avoid disruptions / background noise during proceeding
  - Cell phone on Do Not Disturb/no Call Waiting

# PREPARE AND CONFIRM

## Attorney & Team Prepared

- Exhibits uploaded in advance (if possible)
- Exhibits which will be viewed during the deposition are open on the computer of the person tasked with sharing the exhibit for viewing
  - All other files are closed
- Technology check completed
  - Do not change technology at the last minute
- Environment check completed

## Witness prepared

- Technology check completed
  - Ensure witness has technology to actually view the exhibit during the proceeding (a cell phone won't work, the exhibit image may be too small)
- Environment check completed
- Has videoconference log-on information (link and password)
  - Able to connect via both video and audio

• All parties should be on video during the deposition.  
This makes it easier for the court reporter to identify the parties, which ensures an accurate transcript



# AGENCY ROLE & RESPONSIBILITY AT THE DEPOSITION

## • PREPARATION

- Check with each attendee and test bandwidth
- Ensures proceeding is locked and password protected
- Ensure court reporter is ready
- Confirms all video and audio and answers any questions of the parties
- Begins videoconference 30 minutes in advance of proceeding start

## • ON-GOING SUPPORT

- Provides contact information to attendees
- Remains available as technical support at the request of the court reporter

The image shows a screenshot of a 'Remote Reporter Job Sheet' form from Esquire Deposition Solutions. The form is divided into several sections:

- Header:** ESQUIRE DEPOSITION SOLUTIONS logo and 'Remote Reporter Job Sheet' title.
- Job Information Table:**

Job Number:		Reporter Name:	
Job Date:		Type of Proceeding:	
Zoom# and ID:		SDC Name/Number:	
Scheduled Time:		Actual Start/End Time:	
Venue:		Case Caption:	
- Witness and Exhibits Section:**
  - Witness Name: \_\_\_\_\_ **Special?**  30(b)6  PMK/PMQ  Med/Tech/Expert
  - Remote witness location: \_\_\_\_\_
  - If No Show:  Witness No Show **+Requested:**  Certificate of Nonappearance  Statement on the Record
  - Appearance:  Wait Time (Minutes \_\_\_\_\_)  Holiday  Weekend  After Hours (before 8 am/ 5)
  - Page Count: \_\_\_\_\_ *Estimated* \_\_\_\_\_ **Final**
  - Surcharges:  Video  Interpreter  Videoconference  Telephonic  Worker's Comp  California Stip Away
  - Read & Sign Info:  Read & Sign?  Waived  Not applicable  Not discussed  Reserved w/Letter to:

# DURING THE PROCEEDING

# AUDIO-VIDEO BEST PRACTICES

- Mute your sound if not speaking
- Turn video on and keep on throughout the proceeding
- If you have trouble being heard or hearing, test your microphone and/or speakers, respectively.
- Switch to phone audio if you still have trouble hearing or being heard



# REMOTE COURT REPORTER ROLE DURING THE PROCEEDING

- Initiates the proceeding: on the record
- Identifies attendees for the record
- Swears in the witness
- During the proceeding
  - Stops the proceeding if taking attorney, defending counsel, or deponent lose their connection, until they return
  - **Focuses on the record capture**
  - Does not handle exhibits DURING the proceeding
  - Records the entrance or exit of parties during the proceeding (unrelated to lost connection, above)

# WORKING WITH EXHIBITS DURING THE PROCEEDING

- The court reporter does not present exhibits during the proceeding
- Counsel introduces new exhibits at the proceeding
- Counsel introduces previously submitted exhibits
- Counsel's computer should allow for the display of any exhibit file format during the proceeding
  - Native files such as X-rays, spreadsheets, images, and PDFs
  - PDF is preferred for markup and exhibit production
- Counsel may give control to the witness (i.e. page turn)
- Witness should have ability to annotate

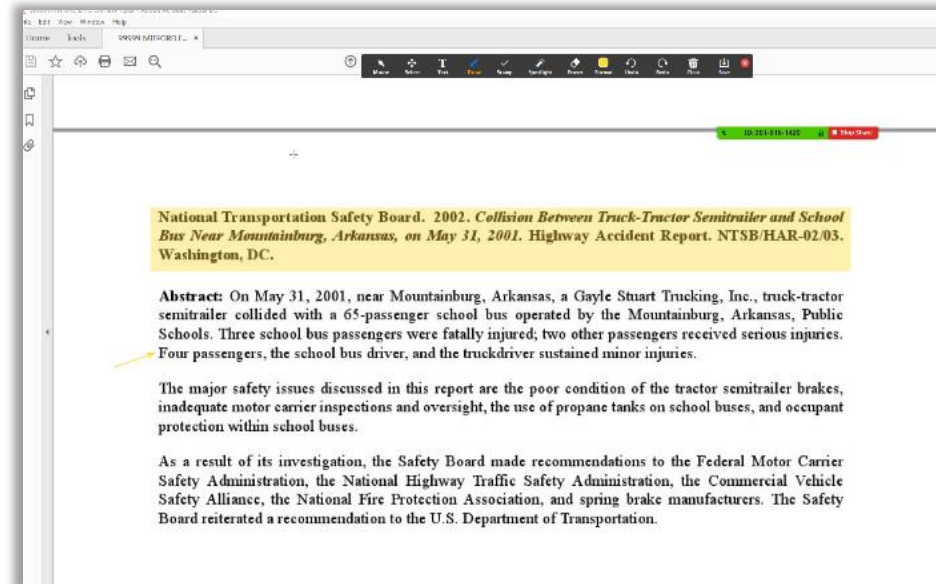
# EXHIBITS AT THE PROCEEDING: YOUR RESPONSIBILITIES

- Regardless if previously submitted or first introduced during the proceeding, maintain folder of your exhibits on your computer
- Exhibits introduced during the proceeding
  - Distribute exhibits to all parties via email or file-sharing platform
  - Share exhibits via videoconference “share document” function
- These shared documents are not considered submitted to the court reporter yet
- Post-deposition, counsel provides the shared exhibits to the court reporter for the record

# ANNOTATING EXHIBITS DURING THE DEPOSITION

## Annotation Methods

- Use Acrobat tools to annotate PDFs
  - Will mark up document – annotation becomes part of the document
  - Preferred method for PDF files
- Use videoconference platform annotation feature to mark up any file format document



# AFTER THE PROCEEDING



# ITEMS TO CONFIRM BEFORE THE VIDEOCONFERENCE ENDS

- Court Reporter
  - Confirms the order
  - Collects witness(es) email address(es) for Digital Read & Sign
- Videographer
  - Confirm sync or unsynced video order



# SUBMITTING EXHIBITS AFTER THE DEPOSITION: COUNSEL ROLE

- Renames exhibit files to include exhibit number
  - e.g. AccidentMap\_Exhibit-1.pdf
- Securely emails or uploads the exhibit files per agency instructions
- Confirms exhibit security
  - Transfer
  - Access
  - Storage
  - Distribution

# EXHIBITS AFTER THE DEPOSITION: COURT REPORTER ROLE



- Downloads the exhibits
- Communicates directly with the client
- Completes the record: final transcript and exhibits

# KEEPING YOUR INFORMATION SECURE

BEFORE, DURING, AND AFTER THE PROCEEDING

IT'S NOT ONLY WHAT YOU HAVE (TECHNOLOGY),  
IT'S HOW YOU USE IT (POLICIES, PROCESSES).



ESQUIRE REMOTE REPORTING SERVICES  
**GETTING DEPOSITIONS RIGHT**  
BY ADVANCING THE EVOLUTION OF FLEXIBLE COURT REPORTING

# THANK YOU



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