



Viewpoint: High Bar For Litigators Who Want to Compel In-Person Depositions



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Due to concerns regarding coronavirus over the past 18 months, in-person depositions have dramatically decreased in number. Remote technology has allowed litigators to conduct depositions entirely from the comfort of their home or office, and avoid any related travel time and expense. Recently, variants of the coronavirus appear to result in increased infections and faster spread, resulting in many attorneys and deponents outright refusing to agree to any in-person depositions. Many courts have agreed with this position and have refused to compel deponents to submit to an in-person deposition when there are existing health concerns, and remote deposition testimony seemingly appears to be just as convincing and widely accepted as the norm.

This trend is contrary to the instincts of most attorneys. Lawyering has been and still is an “art” that is best suited to be performed in-person. This would include depositions, arbitrations, and mediations, and most certainly jury trials. The ability of a lawyer to observe and comprehend non-verbal communication from a witness during a deposition is vital to the successful performance of the craft, and this ability is undoubtedly impaired when conducted over a computer screen.

Advantages and disadvantages of in-person depositions versus remote depositions

Initially, and prior to the availability of COVID-19 vaccines, most litigators considered remote depositions a “safer” way to conduct depositions, and a way to avoid unnecessary exposures amongst multiple persons who are often speaking (or yelling) for long durations of time in a closed environment. Depositions generally take place indoors, often in the tight quarters of a conference room for an entire day or longer. As it relates to remote depositions, clients were often appreciative of reduced travel time and expense from their attorneys.

However, there are disadvantages to remote depositions that are generally overlooked. First, it is common to experience audio and technical difficulties during remote depositions. Deponents and counsel are often unfamiliar with remote technology, and are at times, unable to connect to the

proceeding in a timely manner. Court reporters are frequently unable to audibly hear the deponent during a remote deposition; this has resulted in unclear and incomplete deposition transcripts. Deponents, including expert witnesses, are required to review their deposition transcripts following their depositions for accuracy. This has led to an increase in the number of revisions and changes to deposition transcripts, which then must be analyzed and reviewed by all counsel, resulting in additional legal expense to the client. At trial, the incorrect deposition transcript as well as all subsequent changes are used – which leads to further confusion from the judge, jury, attorneys and parties as to what the deponent said during his or her deposition.

Secondly, depositions are generally used to assess the deponent’s credibility. Physically being in the same room as the deponent allows the deposing attorney to better assess the deponent’s body language, attire, personality during breaks in the deposition, whether they are being coached by counsel during the deposition, etc. Remote depositions do not provide the same access to the deponent as an in-person deposition.

Third, with COVID-19 vaccines and booster shots widely available, many individuals have become fully vaccinated against the coronavirus. However, variants of COVID-19 appear to be more transmissible and there has been an increase of breakthrough infections in individuals who are fully vaccinated.

Litigators intending to conduct depositions are left in a quandary: whether to try to compel a deponent to an in-person deposition, or whether to proceed with a remote deposition. If the litigator tries to compel an in-person deposition, what will happen if the deponent refuses to submit to an in-person deposition due to health safety concerns? Is court relief available to compel an in-person deposition? And how would a court likely rule on a motion to compel an in-person deposition?

Many courts are unlikely to compel in-person depositions

In California, deponents who do not want to submit to an in-person deposition due to health concerns can object and file a motion for a protective order. Before, during or after a deposition, any party, deponent, or other affected person or organization may move for a protected order. [*California Code of Civil Procedure* § 2025.420(a)]

California courts have relied on persuasive authority in *United States v. Greenlight Organic, Inc.*, 503 F.Supp.3d 1269 at 1272-1273 (March 30, 2021 Ct. Intl. Trade). In *Greenlight*, the defendants objected to having the witness appear in person due to health risks associated with travel and staying indoors for extended periods of time with others during the depositions in light of the pandemic. The Court took judicial notice of the fact that travel and remaining indoors for extended periods of time with other people during the pandemic poses personal health risks. *Id.*, at 1273. The Court held that there was good cause for the issuance of a protective order, noting that “prioritizing in-person depositions over potential health risks would pose an undue burden on the witnesses during the COVID-19 pandemic.” *Id.* The Court commented that “It would be highly

burdensome to require the witnesses to appear in person due to their concerns over the potential health risks involved, while it would be much less burdensome and far safer for the witnesses to testify remotely via video-conference.” Id. Lastly, the court noted that it would not compel witnesses to travel and undertake health risks against their will to appear in person for depositions, particularly when videoconference court proceedings have become second nature during the pandemic.

In contrast, in a recent patent dispute in the Southern District in California, Apple sought a protective order requiring that 11 depositions of Apple employees, noticed by plaintiffs to take place in May and June 2021 and to proceed in-person in San Francisco, instead take place remotely by videoconference under Rule 30(b)(4) of the Federal Rules of Civil Procedure due to the continuing COVID-19 pandemic.

Interestingly, the district court required Apple’s counsel to submit a declaration that identified by name each of the 11 Apple employee-deponents, and, for each deponent, attest that counsel has either spoken with or received an electronic communication directly from each such deponent as to (a) whether the deponent states the deponent feels uncomfortable proceeding with an in-person deposition due to COVID-19; (b) whether the deponent has, for the preceding 30 days, worked for Apple remotely-only; (c) whether the deponent has attended any in-person work-related meeting during the preceding 30 days; and (d) whether the deponent has been advised that Apple requires the deponent to work remotely for the next 60 days. *Masimo Corp. v. Apple Inc.*, Case No. 8:20-cv-00048-JVS (S.D. Cal. May 11, 2021)

It appears California courts are hesitant to compel in-person depositions. However, some California courts are now probing litigators as to whether the deponent has legitimate health concerns, including whether the deponent has attended recent in-person, work-related meetings.

What about compelling in-person depositions in other states?

Texas: During the early months of the coronavirus pandemic, Rodney Gilstrap, Chief Judge for the U.S. District Court for the Eastern District of Texas, prohibited all in-person depositions, and ordered that “There will be no in-person depositions conducted during the pandemic.” Only recently was that order vacated on July 6, 2021, as vaccinations increased and revised COVID-related guidance from the Centers for Disease Control and Prevention was received.

Florida: A Florida judge ordered depositions to proceed but only if adhering to all social distancing guidelines. The court admonished the parties for unprofessional conduct in the scheduling of a routine corporate representative deposition. The judge commented that “if all the issues we are currently facing were to be organized on a ladder of importance, this deposition-scheduling dispute would not even reach the bottom rung of a 10-rung ladder.” *CW v. NCL (Bahamas) Ltd*, No. 19-cv-24441 (S.D. Fla. Mar. 21, 2020).

Georgia: In Georgia, a judge denied a party’s request to compel an in-person deposition in Atlanta because videoconference means were available. The Court ordered that the deposition would be held via videoconference or teleconference, at the discretion of the moving party. See *Order Sanho Corp. v. Kaijet Tech. In’l Ltd., Inc.*, No. 1:18-cv-05385 (N.D. Ga. Mar. 30, 2020).

Illinois: An Illinois District Court denied the Defendant’s motion to compel an in-person deposition of the Plaintiff because of the availability of remote means. The Court noted that technological problems can arise during in-person as well as remote depositions, but that is not a reason to prevent remote depositions from occurring. The Court noted that the moving party Defendant failed to show any prejudice or other evidence of a need to proceed with Plaintiff’s in-person deposition that outweigh the health risks created by the ongoing COVID-19 pandemic. See *Order Valdivia v. Menard, Inc.*, No. 3:19-cv-50336 (N.D. Ill. July 28, 2020).

Louisiana: A Louisiana District Court judge denied a motion for a protective order requesting remote depositions and instead required the parties to cooperate and to apply a COVID protocol that would satisfy the requirements for the deposition to occur in-person. See *Order Swivel Rental & Supply, LLC v. Petro Pull LLC, et al.*, No. 6:18-cv-01141 (W.D. La. Aug. 19, 2020).

Conclusion

Due to health and safety concerns, most Courts are not inclined to grant a motion to compel an in-person deposition, unless specific prejudice can be shown. This is a rather high standard, and is not easily satisfied. For the time being, most litigators should plan on continuing to schedule and conduct remote depositions, despite the various pitfalls related to audio and technical difficulties, incomplete or inaccurate deposition transcripts, and more.

Although we suspect the technical issues (i.e., sound, video, etc.) will improve over time, in-person depositions remain preferable to and should be sought whenever circumstances dictate the need to be physically present with the witness.

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