

Using Zoom Video Conferencing for Depositions

By Craig J. Hubert, Esq., of Szaferman Lakind, and Mark Renzi of Renzi Legal Resources

While you may have certain cases and witnesses requiring in-person testimony, COVID-19 challenges need not disturb the majority of fact depositions and the taking of de bene esse trial testimony. So long as attorneys and witnesses have internet access and a device (smart phone, tablet, laptop or PC) with a camera, a deposition can proceed in a virtual video teleconference room while each of us is in a different location. This same technology is being utilized for arbitrations, mediations and other meetings and proceedings. Below please find a practice guide to proceeding with video teleconference depositions.

Setup In Advance

Looking first at the communication in advance with the court reporter, it is essential staff provide the caption, the names and contact information for those who will be appearing as well as any documents/exhibits intended to be marked and utilized. These should be marked in advance. Should the attorney strategically choose to mark and present a document to a deponent in real time, it will work, whether done by the attorney or with the assistance of the assigned technician. The “Share Content” Zoom Conference feature supports the process and will allow an attorney to pull up a document on his or her computer while all involved in the deposition are viewing the attorney’s visual screen. Again, there may be strategy to this method, but be mindful of a few things. One, make sure all other windows and programs are closed and that the background on your device is neutral and appropriate. Second, you will be responsible for navigating the document that you are now pulling up and presenting to the witness, so be sure you have the ability and comfort level in doing so. Finally, if an adversary objects, seeking to review the full document before the witness is questioned about it, make sure you have the ability to send the document by email to your adversary at that time.

Witness Preparation. Screen Display

When entering your name (attorney’s name) in the Zoom Account after you either click the link to enter the deposition or when you make your free online Zoom Account, be sure to use your formal name, followed by Esquire or Esq. Make sure staff reminds the client/Plaintiff’s witnesses (including experts) not to use nick names or screen names displayed. Some are disturbing or inappropriate. We must recognize this is being broadcast. Be professional.

Renzi Legal Resources will send out the link that each participant must click in order to join the deposition or other type of meeting. Generally speaking, this is all that is necessary in order to join. However, in the event an iPhone or iPad is being utilized, it may require that the Zoom Application be downloaded. It is best to advise likely affected clients to download the free Zoom Application in advance of the deposition to avoid unnecessary delays at the start of a proceeding.

Environment

Along the same lines of professionalism and propriety, the attorney and staff should remind the deponent to make sure no other persons can be heard or seen. No other persons should ever be in the video field. Have the witness examine the area where the video deposition will capture a video image. Be certain there is nothing offensive, unprofessional, political, identifying or personal in the video field or potential video field, including upon the deponent’s clothing (i.e., Trump t-shirt). Also, make sure the image of the deponent is sufficiently distanced from windows. The natural light creates a distorted image and is distracting. Remove pictures of family and the deponent (i.e., pictures of Plaintiff on vacation recreating with family can become evidential, and troublesome in a personal injury case).

Inform the deponent of precautions to take if they need to leave the location they chose to conduct the video deposition, i.e. to get something or to take a break. The goal is to avoid creating video of the home/location that was not sanitized in preparation for the video deposition and may place other individuals in the video. If a witness must get up or take a break, the video device should remain in the location depicting the prepared/sanitized area. In addition, it is best to enable the “Stop Video” setting any time the deponent leaves his or her seat, as well as the “Mute” button to ensure ancillary conversations and noises are not heard. Finally, make sure in advance that the deponent has internet access, a working device and that the device is either plugged into an outlet or can be plugged in at any time during the proceeding (plugging in for the duration is the best method). Interrupted or weak internet signals, old devices and dwindling power in a device can all lead to pixilation of video images and disrupted sound conveyance. As Zoom allows for free meeting of up to 40 minutes, it may be best for a paralegal or assistant to perform a practice with the deponent to be sure the connection is satisfactory and to further have a view of the deponent’s environment to make sure it is sufficiently neutral and void of potential problems discussed above.

Video Presentation

At the beginning of the deposition, the court reporter will seek to identify the witness. The witness should have at hand his or her license that can be shown on the video, or any other official form of identification. The attorneys will typically be asked whether they can verify the identity of the deponent, and to confirm there is no issue as to the court reporter’s identification of the deponent. Again, the deponent should have the identification at hand so they need not search once on the video. I cannot stress enough the importance of avoiding the situation where the deponent walks around his or her house with the device being used, thus depicting the home and other people in the home.

Once the witness is sworn, I recommend you put on the record that counsel agrees this is a discovery deposition not a de bene esse, and as such, all attorneys agree that the video or any image within will not be memorialized or retained by anyone. You may want to have the deponent confirm this as well. In the event you wish to have the deposition video and audio-recorded, to you must inform the court reporter and adversaries in advance of this intention. Additionally, you should ask the deponent if anyone else is in the room with them or within earshot.

Functions and Settings

Prior to joining a Zoom meeting, I recommend you give instructions to the court reporter to disable the “chat” option in the Zoom Application for all attorneys and deponents during deposition. If not disabled, have attorneys and deponents (on the record) represent they will not use the “chat” function during the entire deposition. Further do not forget to instruct a party deponent that they are prohibited from communicating about the substance of the deposition by phone, email, text or any other means with their attorney during the deposition or breaks.

There is a meetings settings feature in Zoom giving options, i.e. showing your video image in Gallery View, displaying names of participants etc. It is fairly user friendly. There is also a virtual background setting. In the event you are asked by Zoom, I recommend that you disallow Zoom access to the images on your phone or device.

As referenced earlier, you have the mute/unmute option. Like any phone conference, encourage everyone (except the questioning attorney and deponent) to use the mute function. This permits easier understanding by the court reporter and blocks incidental sounds and noises that may be picked up and amplified by your microphone. Remain vigilant and remember, however, that you are muted as you must disable this function in order to lodge an objection.

The stop video option takes you off video. Should you need to get up for any reason, enable the stop video function.

Share Content Feature

This option is utilized for documents (pre-marked or not) as discussed earlier. By “pinching” your screen you are able to zoom in on a document or image. The image quality degrades as you attempt to zoom in. Depending upon how closely you zoom in, the image becomes completely distorted. This is less of an issue for typed documents.

As an aside, you alternatively have the option to utilize an iPad/trial pad for demonstrative evidence. If you do not possess this technology but perceive a need, let your court reporting technician know in advance as he can supply the hardware and software you require for your deposition.

Other Takeaways

If any participants have connected by both phone and laptop, a most unpleasant feedback noise occurs. Avoid dual devices.

Finally, at the end of the deposition, do not immediately press the “Leave” icon. Rather, make sure the reporter has what he or she requires, i.e., does not need spellings. As is the case at any deposition, you must inform the reporter whether exhibits are to be attached to the transcripts.

Craig J. Hubert, a Certified Civil and Criminal Attorney, is a partner at Szaferman, Lakind in Lawrenceville, NJ. He can be reached at chubert@szaferman.com.

Mark Renzi is a Certified Court Reporter. He can be reached at 1-800-368-7652, or through his website at <https://rlresources.com>.