



ELEMENTS OF A STRONG REMOTE DEPOSITION PROTOCOL



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The remote deposition has become a leading litigation tool for moving cases forward during the current coronavirus pandemic.

Remote depositions are an efficient means of obtaining discovery at a time when few are able or willing to travel or gather in groups. More importantly, the reality for litigators today is that it is very difficult to obtain a continuance until some future date when the public health crisis will abate sufficiently to allow in-person depositions to resume. Courts have embraced remote technology, and they want attorneys to use it. In a recent representative case, magistrate Judge Jeffrey T. Gilbert [summarily rejects nearly a dozen familiar arguments against remote depositions \(PDF\)](#). In Re Chicken Broiler Antitrust Litigation, No. 1:16-cv-08637 (N.D. Ill.).

The question now for litigators is whether remote depositions will be conducted well or poorly.

A well-written remote deposition protocol will go a long way toward alleviating concerns and ensuring that a remote deposition will proceed with a minimum of glitches, misunderstandings, or objections. A remote deposition protocol puts all parties on the same page, and it creates a record that can be consulted in the event of future challenges to the deposition.



Address Leading Concerns

The legality of remote depositions and the remote administration of the deponent's oath are well-established in all jurisdictions. To the extent that any party has a concern about the validity of evidence obtained during a remote deposition, the matter should be explicitly addressed in the remote deposition protocol. Sample language might be:

The Parties agree not to challenge the validity of any oath administered by the court reporter, even if the court reporter is not a notary public in the state where the deponent resides.



Attorneys considering remote depositions sometimes worry that technology or connectivity breakdowns will trap them in a deposition where they are not able to effectively protect their interests. Sample remote deposition protocol language addressing this concern might be:

This provision shall not be interpreted to compel any Party to proceed with a deposition where the deponent cannot hear or understand the other participants or where the participants cannot hear or understand the deponent.

Another frequently expressed concern is the possibility that the deponent is surreptitiously communicating with unknown individuals during the deposition. A deposition protocol should address this concern and place responsibility on counsel to eliminate it:

No counsel shall initiate a private conference, including through text message, electronic mail, or the chat feature in the videoconferencing system, with any deponent while a question is pending, except for the purpose of determining whether a privilege should be asserted.

The remote deposition protocol should also require that each person attending the deposition be able to hear and see every other participant. Each participant should ensure that their recording environment is free from noise and distractions.

Attorneys in some cases have required remote deposition witnesses to sign a post-deposition statement attesting that they had not received coaching or assistance during the deposition. The following language was used in a recent case:

From the beginning of the deposition until the end of the deposition, including during breaks, I did not communicate—whether in person, by telephone, videoconference, or any electronic or other means of communication—with any person about the case other than what is reflected in the court reporter's transcript of the deposition.

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Address Leading Concerns (Continued)

In addition to the foregoing issues, a remote deposition protocol should include language addressing the following topics:

- **Purpose and Scope.** Spell out the purpose of the deposition and whether or not the protocol will apply to this deposition or all future remote depositions in the case.
- **Technology.** Describe the technology to be used during the remote deposition and, if known at the time, the identity of the deposition services provider.
- **On-the-Record Remarks.** At the beginning of each deposition, as well as each segment of the deposition, the court reporter will state for the record his or her name and affiliation, the date and time of the deposition, the names and locations of all participants.

- **Transcripts and Recordings.** Establish the identity of the deposition services provider and how testimony will be captured (stenographic transcript, video recording, or both). Who has the obligation to obtain the transcripts and recordings, and how will costs be shared?
- **“Break-out Rooms.”** If virtual “breakout rooms” are available from the remote deposition provider, the parties should memorialize any agreement on their proper use in the protocol.
- **Documents and Other Exhibits.** Spell out in detail the process for sharing exhibits in advance of the deposition, as well as counsel’s post-deposition obligations for returning all exhibits.

Additional topics for inclusion in a remote deposition protocol can be found in a [sample remote deposition protocol](#) (PDF) that U.S. Magistrate Judge Robert W. Lehrburger has posted on the U.S. District Court for the Southern District of New York’s website.



Obtaining a Remote Deposition Protocol



Regardless of jurisdiction, there are two main ways to obtain a remote deposition protocol. First, and most common route, is to negotiate the terms of the protocol with opposing counsel and present it for signature by the judicial officer supervising discovery in the case.

If negotiations break down, or the opposing side will not consent to a remote deposition, the protocol can be obtained as part of the relief requested in a motion for an order in aid of discovery.

Conclusion

A well-written remote deposition protocol provides a strong measure of protection against the most common concerns associated with remote depositions: technology hurdles and undetectable coaching or other back-channel communications with the witness.

Remote deposition protocols are not a cure-all. However, counsel may wish to have the witness positioned in a manner that makes reading from a digital device difficult. It may also be advisable to note in the record suspicious, overlong pauses before the witness ventures an answer to a question. Finally, any violations of the protocol can be brought to the court's attention for sanctions or other relief.

Until in-person depositions become a reasonable alternative to remote depositions, a carefully drafted remote deposition protocol and attentive counsel during the deposition may very well be the best that can be done to protect the client's interests during these challenging times.

