

ELEMENTS OF A STRONG REMOTE DEPOSITION PROTOCOL





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INTRODUCTION

The remote deposition is a leading litigation tool with a proven track record for obtaining pretrial discovery in an effective and cost-efficient manner.

Easy to schedule, reliable, and unsurpassed for bringing geographically distant parties together in the same virtual space, remote depositions are commonplace in litigation. Lawyers, courts and clients have all embraced remote technologies, whether they're used for virtual court hearings or remote depositions.

Today the challenge for modern lawyers is not whether, but how to incorporate remote depositions into their trial strategies. With planning and appreciation of foreseeable trouble spots, remote depositions can be conducted in a manner that maximizes client interests yet minimizes litigation risk.

A well-written remote deposition protocol will go a long way toward alleviating concerns and ensuring that a remote deposition proceeds with a minimum of glitches, misunderstandings, or objections. A remote deposition protocol safeguards the integrity of the adversarial process in the new technology-driven litigation environment. It 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:

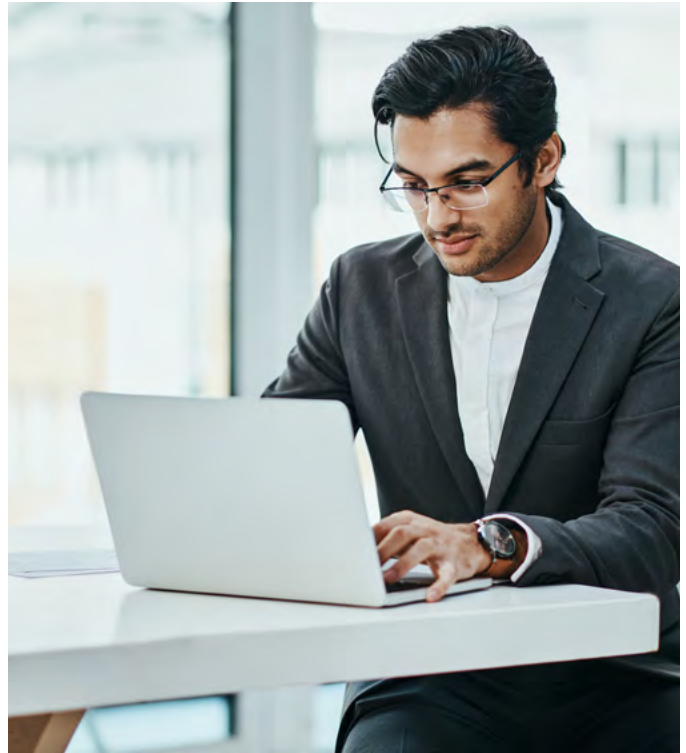
The Parties agree not to challenge the validity of any oath administered by the court reporter, even if the court reporter is not a notary public in the state where the deponent resides.

Lawyers 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.

Lawyers 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)

A remote deposition protocol should also 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 a particular deposition or all future remote depositions in the case. Declare permissible uses of testimony given during deposition. Set procedure and time limits for making objections during, and after, the deposition.
- **TECHNOLOGY.** Describe the technology to be used during the remote deposition and the identity of the deposition services vendor. Provide participants with the information necessary to access the deposition, as well as minimum technology requirements.
- **SECURITY.** Establish data security obligations for the chosen deposition technology vendor. Assign responsibility for providing secure connections, limiting unauthorized attendance, and logging the identities of all participants.
- If the deposition is video recorded, assign responsibilities to a legal videographer.
- **ON-THE-RECORD REMARKS.** Assign the court reporter the duty to state for the record, at the beginning of the deposition, as well as each segment of the deposition, his or her name and affiliation, the date and time of the deposition, and the names and locations of all participants. Prescribe required camera and microphone positioning, as well as procedures for going on and off the record.
- **ATTORNEY-CLIENT PRIVILEGE AND CONFIDENTIALITY AGREEMENTS.** Make provision for consequences of inadvertent disclosure of privileged information, whether due to technology glitches or inadvertent attendee in a breakout room. Secure agreement from court reporter, technology vendor, and legal videographer to abide by any confidentiality orders.
- **TRANSCRIPTS AND RECORDINGS.** Describe how testimony will be captured (whether stenographic or digital, including video recording). Identify which party has the responsibility to obtain the transcripts and recordings. Specify how costs will be shared.
- **“BREAK-OUT ROOMS.”** If virtual “breakout rooms” are available from the remote deposition provider, spell out any agreements on their proper use.
- **DEPOSITION INTEGRITY.** Memorialize measures designed to eliminate witness coaching.
- **DOCUMENTS AND OTHER EXHIBITS.** Describe in detail the type of platform and process for sharing exhibits in advance of the deposition, as well as counsel's post-deposition obligations for returning all exhibits.

Lawyers may find that court rules in their jurisdiction have been revised specifically to address some of the concerns listed above. These changes, along with locally adopted court orders and “best practices” guidance from bar associations, are useful starting points for drafters of remote deposition protocols in any case.

OBTAINING THE 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.

A carefully drafted remote deposition protocol and attentive counsel during the deposition are key to capturing the benefits of remote deposition technologies while at the same time addressing known risks created by the lack of physical presence in the deposition room.



ADDITIONAL READING

- [Best Practices for Remote Depositions](#), American Bar Association (Feb. 6, 2023)
- [The Ethics of Witness Preparation \(Formal Opinion 508\)](#), American Bar Association (Aug. 5, 2023)
- [Florida Bar Recommended Best Practices for Remote Court Proceedings](#) (revised July 2022)
- [Guidelines on Conducting Remote Video Depositions and Examinations for Discovery](#), American College of Trial Lawyers (February 2021)
- [Best Practices for Remote Depositions](#), The College of Labor and Employment Lawyers (July 2021)
- [Washington Civil Rule 30](#), Washington Supreme Court (revised Oct. 1, 2024)
- [Illinois Supreme Court Rule 206](#), Illinois Supreme Court (revised Sept. 29, 2021)
- [Minnesota Rule of Civil Procedure 30.02](#) (revised Dec. 30, 2024)
- [California Rules of Court 3.1010](#) (revised Jan. 1, 2022)
- [In re Gardasil Products Liability Litigation](#), MDL No. 3036, [Deposition Protocol Order](#) (W.D.N.C. Oct. 31, 2023)
- [In re SoClean, Inc., Marketing, Sales Practices, & Products Liability Litigation](#), MDL No. 302, [Amended Deposition Protocol Order](#) (W.D. Pa. July 19, 2023) (also used in CPAP MDL, No. 3024)
- [In re McKinsey & Co., Inc. National Prescription Opiate Consultant Litigation](#), MDL No. 2996, [Stipulated Deposition Protocol](#) (N.D. Cal. April 3, 2023)
- [In re Mednax Services, Inc., Customer Data Security Breach Litigation](#), MDL No. 2994, [Stipulated Deposition Protocol Order](#) (S.D. Fla. Feb. 5, 2023)
- [Sample Protocol for Remote Depositions](#), U.S. District Court for the Southern District of New York (revised Dec. 5, 2023)

