

GUIDANCE ON VIDEO AND OTHER ELECTRONIC DEPOSITIONS DURING THE COVID-19 CRISIS

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The Supreme Court by its April 2, 2020 Order Number 25700-B-610 suspended “any local or state court rule that requires administering any oath or affirmation in person where such oath or affirmation can be administered remotely by available technologies...” The intention of that order was to facilitate depositions by technologies such as Zoom, Teams, Go To Meeting, and other platforms.

Questions have arisen from attorneys and court reporters regarding deposition procedures to comply with the civil rules while utilizing the court’s April 2, 2020 order. This memo provides guidance on how to accomplish remote, video depositions while complying with the existing rules.

It is critical to note the WSBA does not give legal advice. Further, the Supreme Court has made it clear that following guidance from the WSBA is not safe harbor; only the Supreme Court may determine what the law is. However, given the extraordinary circumstances and the fact WSBA over time has provided advisory opinions we have collected a variety of questions regarding video depositions and are providing suggestions below as to how such issues might be resolved. It may be possible for the Supreme Court to amend the Civil Rules to better facilitate remote, video depositions. That is outside the scope of this memo.

This guidance will be provided in a question-and-answer format with a short declarative answer to facilitate understanding followed by an explanation for the answer.

1. **Q: Who should host the proceeding, e.g., establish the video or remote connection?**

A: Any person.

Reason: The Civil Rules do not impose limitations on where a deposition may take place. A video deposition or other electronic means is merely providing an electronic room where the proceeding takes place. CR

30(b)(8)(F) identifies requirements that the location of a video deposition must comply with (suitable in size, quiet, adequate lighting, etc.) but not where the room itself must be.

2. **Q: Should everyone listening to the deposition identify themselves whether or not on camera?**

A: Yes.

Reason: It is established custom and practice at every in-person deposition to identify for the purpose of the record those in attendance. Although there is no specific civil rule or statute compelling that, taking a deposition by remote video does not change the practice of standard depositions. Further, RCW 9.73.030(1)(a) provides it is unlawful for any “private communication transmitted by phone... or other device between two or more individuals between two points within or without the state” to be “record(ed)...without first obtaining the consent of all the participants in the communication.” Arguably, no witness or attorney can give knowing consent without knowing who is present.

3. **Q: Must the witness provide identification to prove their identity?**

A: No.

Reason: The current rules do not require identification be presented. See CR 30(c). The rule only requires the reporter to put the witness under oath. RCW 9A.72.010(2) defines “oath,” identifying what is required to be put under oath. Presenting identification is not a requirement. However, an aspect of taking an oath is an affirmation the declarant is who they purport to be. See RCW 9A.72.010(2)(b). The risk of a substitute witness falsely appearing is no greater in the video context than in person. If a party has a concern whether the witness presenting is not the witness noted, the civil rules already provide a mechanism for addressing that.

4. **Q: Must “chatrooms” accompanying a video platform be turned off?**

A: No, provided there are not private chats with a witness while being asked questions during deposition.

Reason: CR 30(h)(5) prohibits “private consultation” with a witness while a question is pending. Electronic chat cannot be used with a witness as a means of consultation while a question is pending. That includes both chat via the video platform and private cell phone or other means. Additionally, CR 30(h)(6) requires that all attorneys and parties conduct themselves in during deposition under a “courtroom standard” and to the

extent a chat becomes a distraction, or used to inappropriately influence a witness, that conduct likely violates that civil rule.

However, it is custom and practice for attorneys to pass notes to each other to aid in the examination of a witness provided it is not disruptive. Passing notes by way of an electronic chat is no different provided it is not seen by the witness in which case it would likely violate CR 30(h)(5) and should not be done. The “chat” function is often the only way for a person to identify a technological problem when video or audio fails.

5. **Q: Must “chatrooms” be turned off to block other viewers from witnessing the deposition?**

A: No, subject to conditions.

Reason: The Supreme Court has held discovery proceedings are *not* public proceedings per se. See Tacoma News, Inc v. Cayce, 172 Wn.2d 58, 71-72 (2011). Unrelated persons have no right to attend a physical deposition; electronic, remote depositions are not different. However, provided all those present are identified for the purpose of the record, as explained in response to question two above, and there is no case specific reason why a person’s attendance would be prohibited if held in person, i.e., non-party witnesses are generally excluded, a protective order may be in place, or sensitive issues may be discussed, that a deposition is by a video platform does not change the existing rule on attendance of other attorneys, parties, etc., at a deposition.

6. **Q: Does HIPAA impose requirements that must be uniquely met for a remote video deposition?**

A: No. However, safeguards are available.

Reason: As noted above, the court’s April 2, 2020 order does not change any aspect of depositions other than remote attestation. There was no aspect of the civil rules that imposed restrictions or safeguards regarding HIPAA. Taking a deposition with remote attestation does not change that.

This question raises more of a technology issue and the need for all in attendance to identify themselves, than a civil procedure issue as described above in response to questions two and five. Everyone in the proceeding should identify themselves and if they do, there should be no HIPAA complication. In that regard, security as to an electronic conference room is no different than a physical conference room. As an attorney would not allow a stray person to enter a conference room discussing sensitive issues, they should not allow that in a video deposition.

Although use of remote depositions require party agreement, see CR 30(b)(7), it is suggested parties should not use HIPAA or other protections to erect objections to proceedings unreasonably.

Provided the technology is used correctly, the likelihood of unwanted intrusion appears slight with unwelcome entry typically being the result of participants not properly safeguarding login credentials. However, Zoom and similar platforms have options to ensure uninvited people cannot enter and to constructively “lock” the door to prevent others joining. Zoom also offers what it calls a “HIPAA compliant” conference being used by medical providers to mirror the secrecy of a doctor’s physical office. It is not suggested that need be, much less should be, done for every deposition where medical issues are discussed but is identified here as an option if the parties reasonably deem it necessary.

7. **Q: May a witness be allowed to view information without disclosing that to counsel?**

A: No.

Reason: Although there is no specific civil rule or statute addressing this, it is both custom and practice and adherence to a courtroom standard that any materials viewed by a witness are marked as an exhibit unless the parties agree it need not be marked. Further, adherence to a courtroom standard does not allow a witness to view materials in order to assist their testimony unless the requisites of ER 612 are satisfied requiring the adverse party an opportunity to review the material the witness has used to refresh their recollection in order to “cross-examine the witness thereon.”

8. **Q: May a party use the “record” function of a video platform to record the deposition?**

A: Yes, subject to the following issues.

Reason: (1) RCW 9.73.030(1)(a) requires notice must be given and consent obtained if an electronic communication is recorded. Court reporters already routinely record depositions to assist with transcription. Recording via the platform should be no different.

(2) If the intention is to take a video deposition, the requisites of CR 30(b)(8) must be satisfied. If the case is Federal, the concurrent rule must be satisfied. If that is not done, the recording should not be considered a video deposition under the applicable Rule. It is simply a recording.

(3) If any party or witness objects, RCW 9.73.030(1)(a) may prohibit the recording.

9. **Q: How should deposition exhibits be handled?**

A: There is no difference as compared to a standard, in-person deposition.

Reason: The Supreme Court's order allowing remote affirmation only changed the rule regarding affirmation. It did not affect other rules regarding exhibits nor did it excuse compliance with them. Arguably, a party desiring to use exhibits at a remote deposition must make arrangements in advance that satisfy the standard rules. Best practice likely requires providing all parties, the witness, and the court reporter all exhibits in advance. If that is not possible or the parties deem it not necessary, arguably CR 30(b)(7) allows the parties to agree to a procedure they deem fair and appropriate.

10. **Q: Does the oath need to be modified or must there be an additional disclosure the deposition is being taken pursuant to CR 30(b)(7) whereby the parties have agreed to take a deposition by "telephone or by other electronic means?"**

A: No.

Reason: Telephone, remote video, and other electronic depositions were already permissible and that type of notice or modification to the oath was not required. The only modification by the April 2, 2020 Supreme Court order was to allow the oath to be administered without the deponent being physically before the reporter. No additional language need be stated to comply with that order; it is self-executing.

11. **Q: Should parties and/or the witness be required to turn off their cell phones?**

A: No.

Reason: That is not required now and nothing in the April 2, 2020 Supreme Court order alters that. However, see the guidance in response to questions 4 and 6.

12. **Q: Which party bears the burden of ensuring the function of the technology being used?**

A: Each party is responsible for their own technology.

Reason: CR 30(b)(7) already allows parties to agree to telephonic or remote depositions. Nothing in the April 2, 2020 order changes that. A party who

agrees in accord with that civil rule arguably does so subject to the ability to effectuate that agreement no differently than any other agreement under CR 2A. A more difficult issue is a failure of technology or a lack of preparation by one party that precludes any participation in the deposition. Guidance will not be provided on that contingency but it is suggested parties consider CR 1 indicating all rules should be “construed and administered to secure the *just*, speedy, and inexpensive determination of every action.” (Italics added). It is suggested taking a deposition, knowing a party is not participating due to a failure of technology, would likely not constitute the “just” administration of the rules.

13. **Q: Who should pay the associated cost?**

A: That is for the parties to decide.

Reason: CR 30(b)(7) requires the parties to agree to a deposition by means other than an in-person stenographic reporter. Such an agreement inherently implies an agreement as to who will bear that cost. Custom and practice suggests that costs fall to the party requesting the deposition no differently than the noting party pays the appearance fee for the court reporter. However, the civil rule allows the parties to reach any agreement in that regard.

14. **Q: How should remote video depositions be noted?**

A: Any notice should provide all information necessary to access and attend the remote deposition.

Reason: CR 30(a)(1) requires, among other things, that the noting party “shall state the time and place for taking the deposition.” If a deposition is to be taken by electronic means that inherently requires all necessary phone numbers, URLs, passwords, and any other information required to access the video deposition be provided in the notice of deposition. Further, while not required by the rules, best practice would be for all participants to provide a phone number for use as needed.

15. **Q: Can an unwilling witness be compelled to attend an electronic or remote video deposition?**

A: No.

Reason: There are several reasons.

(1) CR 30(4) requires that “testimony at a deposition... by other than stenographic means” be done by the stipulation of the parties. Although the word “party” most often refers to the plaintiff and defendant, it appears inconsistent to not consider a

third-party witness a party in this context particularly given third-party witnesses have the right to object to a deposition subpoena under CR 45(c)(2)(B). It appears better reasoned that a third party-witness would have to agree to deposition in that manner. Also and independent of that;

(2) Inherent in CR 45(e)(2), and explicitly in CR 45(h) which sets forth the form a subpoena “should... substantially” follow, is the requirement the witness be timely noticed of a specific physical place where the testimony shall be given. Even assuming an electronic conference room may constructively be considered a place, there appears to be no authority under the civil rules to compel a disagreeable witness to have, or utilize on-demand, the technology required to attend such a deposition. While the civil rules provide attorneys the ability to issue subpoenas compelling physical presence, there is no provision providing authority to compel someone to access a video conference room or phone conference call much less to utilize their own technology to make themselves available for it.

However, arguably such a witness could be physically compelled to a location assuming compliance with CR 45, and then remote technology used for others including the court reporter to attend.

16. **Q: Must a witness be paid a witness fee and mileage to present at a remote, video deposition?**

A: Yes to a witness fee. No to mileage unless they actually travel.

Reason: RCW 2.40.020 requires payment of a witness fee “upon demand” by the witness for their attendance. Attendance electronically takes place whether or not they travel. However, if they are not traveling, the statute does not require payment of mileage. Mileage is payable only for “going to the place where they are required to attend.” Id.

It is not the intention of this guidance to provide technology advice. There are a great many issues that may arise that are technical, and require a technical solution, but are not within the scope of the civil rules. It is suggested however, as explained in response to hypothetical question 12, CR 1 imposes duties on attorneys as to any proceeding that are not obviated by proceeding by a remote, video deposition.