

# **THE ART OF TAKING AND DEFENDING VIRTUAL DEPOSITIONS**

## **Speakers**

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### **I. Nuts & Bolts of Taking a Virtual Deposition—What a Virtual Deposition looks like**

1. Reporter provides their email address and everyone emails the reporter their appearance information.
2. Admonition – examining counsel setting forth on the record expectations related to texting, emailing or other communications not visible as if when you're in person (e.g. coaching)
3. Stipulation on the record – at the beginning of the proceeding setting forth that everyone is remotely present and if there are any parties, witnesses, counsel in the physically present with others that that is on the record
4. Exhibit handling - – clearly identify on the record so reporter can easily mark after the fact, especially if screen share is used
5. Creating a clear and accurate record
  - a. Identifying oneself
  - b. Quality of the audio – this may require some patience as the reporter may have to clarify speaker identification should the audio be degraded in any way
6. Options if plan A is not working out
7. Suggested ways to identify the remote deponent
8. What should and shouldn't you make part of the record
9. Handling of exhibits
  - a. Timing of production, method and format
  - b. HIPAA, PII, PHI concerns
  - c. Document Confidentiality
  - d. Electronic files are accessible-can be opened (i.e. files are not corrupt)

e. Software concerns – files produced in Native Format (CAD files, video files, x-rays, PDF, Excel, Word, etc.)

f. Different Methods:

(1) Examining attorney shares screen so the exhibit is viewable to all who are logged into that virtual proceeding and have monitor capabilities (computer monitor, iPad, table, cell phone)

(2) Sending PDF exhibits in advance to counsel and court reporter/agency coordinating the matter

(3) Emailing exhibits after introduction to reporter/attending counsel/deponent

(4) Emailing exhibits at the conclusion of the deposition after review for full inclusion and appropriately identified

(5) Previously printed, identified and shipped (virus concerns)

(6) Virtual Exhibit Platform – (example Exhibit Share, other methods)

(a) User ID/PW protected

(b) Secure storage portals

(c) Advance uploading to the portal, as well as on the fly

(d) Specific control over which documents you wish to introduce

JPEG, MPEG, etc.)

(e) Viewing options – are you file format restricted (PDF,

physical exhibit handling

(f) Evaluating features: Putting the virtual in place of

## II. Legal Aspects of Virtual/Remote Depositions

### A. Remote Depositions Before COVID-19

#### CRC 3.1010

(a) Taking depositions

Any party may take an oral deposition by telephone, videoconference, or other remote electronic means, provided:

(1) Notice is served with the notice of deposition or the subpoena;

(2) That party makes all arrangements for any other party to participate in the deposition in an equivalent manner. However, each party so appearing must pay all expenses incurred by it or properly allocated to it;

(3) Any party may be personally present at the deposition without giving prior notice.

(b) Appearing and participating in depositions

Any party may appear and participate in an oral deposition by telephone, videoconference, or other remote electronic means, provided:

(1) Written notice of such appearance is served by personal delivery, e-mail, or fax at least three court days before the deposition;

(2) The party so appearing makes all arrangements and pays all expenses incurred for the appearance.

(c) Party deponent's appearance

A party deponent must appear at his or her deposition in person and be in the presence of the deposition officer.

(d) Nonparty deponent's appearance

A nonparty deponent may appear at his or her deposition by telephone, videoconference, or other remote electronic means with court approval upon a finding of good cause and no prejudice to any party. The deponent must be sworn in the presence of the deposition officer or by any other means stipulated to by the parties or ordered by the court. Any party may be personally present at the deposition.

(e) Court orders

On motion by any person, the court in a specific action may make such other orders as it deems appropriate.

## **B. Laws/Rules Following COVID-19**

### **Emergency rule 11. Depositions through remote electronic means**

(a) Deponents appearing remotely

Notwithstanding any other law, including Code of Civil Procedure section 2025.310(a) and (b), and rule 3.1010(c) and (d), a party or nonparty deponent, at their election or the election of the deposing party, is not required to be present with the deposition officer at the time of the deposition.

(b) Sunset of rule

This rule will remain in effect until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted, or until amended or repealed by the Judicial Council.

**SB 1146**

~~SEC. 2.~~ **SEC. 3.**

Section 2025.310 of the Code of Civil Procedure is amended to read:

**2025.310.**

(a) ~~A person may take, and any person other~~ *At the election of the deponent or the deposing party, the deposition officer may attend the deposition at a different location than the deponent may attend, a deposition by telephone or other remote electronic means. via remote means. A deponent is not required to be physically present with the deposition officer when being sworn in at the time of the deposition.*

(b) ~~The court may expressly provide that a nonparty deponent may appear at the deposition by telephone if it finds there is good cause and no prejudice to any party. A party deponent shall appear~~ *Subject to Section 2025.420, any party or attorney of record may, but is not required to, be physically present at the deposition in person and be in the presence of the deposition officer. at the location of the deponent.*

(c) The procedures to implement this section shall be established by court order in the specific action or proceeding or by the California Rules of Court.

*(d) An exercise of the authority granted by subdivision (a) or (b) does not waive any other requirement of this title regarding the time, place, or manner in which a deposition shall be conducted.*

### **C. Telephonic v. Videoconference Deposition (A Contrarian View)**

- (a) Importance of nonverbal communication in evaluating witness
- (b) Confusion of nonverbal communication / Better written record
- (c) Use at trial on your own terms:
  - (1) Read into Record
  - (2) Blow-up and highlight key testimony
  - (3) Attorney with good speaking voice read witness lines from

witness stand

(See e.g., Wegner, Fairbank and Norman, Cal. Practice Guide: Civ. Trials and Evidence (TRG 2020) ¶ 1:38-1:39)

### **D. Stipulations**

#### **1. Additional Stipulations (or Discussions):**

- a. Neutral background
- b. Quiet place
- c. No emailing (email turned off)
- d. No texting (phone turned off)
- e. Quality/Computer with sufficient bandwidth
- f. Identifying everyone present and/or have all present on camera
- g. Deposition in lieu of trial testimony

#### **2. Note CCP 2025.340**

If a deposition is being recorded by means of audio or video technology by, or at the direction of, any party, the following procedure shall be observed:

(a) The area used for recording the deponent's oral testimony shall be suitably large, adequately lighted, and reasonably quiet ...

(g) The operator shall not distort the appearance or the demeanor of participants in the deposition by the use of camera or sound recording techniques.

(h) The deposition shall begin with an oral or written statement on camera or on the audio recording that includes the operator's name and business address, the name and business address of the operator's employer, the date, time, and place of the deposition, the caption of the case, the name of the deponent, a specification of the party on whose behalf the deposition is being taken, and any stipulations by the parties.

(i) Counsel for the parties shall identify themselves on camera or on the audio recording.

(j) The oath shall be administered to the deponent on camera or on the audio recording ...

(l) At the conclusion of a deposition, a statement shall be made on camera or on the audio recording that the deposition is ended and shall set forth any stipulations made by counsel concerning the custody of the audio or video recording and the exhibits, or concerning other pertinent matters.

(m) A party intending to offer an audio or video recording of a deposition in evidence under Section 2025.620 shall notify the court and all parties in writing of that intent and of the parts of the deposition to be offered ...

### **3. Note CRC 3.1010(e) (see above)**

## **II. Taking the Deposition as if you Were in Trial**

### **A. The Law—Use of Depo Testimony at Trial**

CCP § 2025.620—Generally, deposition is admissible against any party present at the deposition, or who had notice thereof and did not serve a valid objection

#### **1. Party Opponent Witnesses**

CCP § 2025.620(b)—An adverse party may use for any purpose, a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee under Section 2025.230 of a party. It is not ground for objection to the use of a deposition of a party under this subdivision by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing.

## **2. Unavailable Witnesses**

CCP 2025.620(c)—Any party may use for any purpose the deposition of any person or organization, including that of any party to the action, if the court finds any of the following:

(1) The deponent resides more than 150 miles from the place of the trial or other hearing.  
(2) The deponent, without the procurement or wrongdoing of the proponent of the deposition for the purpose of preventing testimony in open court, is any of the following:

(A) Exempted or precluded on the ground of privilege from testifying concerning the matter to which the deponent's testimony is relevant.

(B) Disqualified from testifying.

(C) Dead or unable to attend or testify because of existing physical or mental illness or infirmity.

(D) Absent from the trial or other hearing and the court is unable to compel the deponent's attendance by its process.

(E) Absent from the trial or other hearing and the proponent of the deposition has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process.

(3) Exceptional circumstances exist that make it desirable to allow the use of any deposition in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.

## **3. Physicians and Experts**

CCP 2025.620(d)—Any party may use a video recording of the deposition testimony of a treating or consulting physician or of any expert witness even though the deponent is available to testify if the deposition notice under Section 2025.220 reserved the right to use the deposition at trial, and if that party has complied with subdivision (m) of Section 2025.340.

### **B. Difference in Style and Substance of a ‘Trial Deposition’**

1. Tone
2. Focus/Brevity
3. Other Factors Depending on Witness

## **III. Defending the Deposition Remotely**

### **A. To be or not to be with your client?**

1. Health & Safety
2. Client comfort

3. Your comfort

**B. Client/Witness Preparation**

- 1. Practice runs—getting used to the setting & technology being used
- 2. Client/Witness preparation—traditional v. virtual

<b>Traditional Depo Talking Points</b>	<b>Virtual Depo Talking Points</b>
Review Depo notice and document request	Same, but with focus on virtual/remote implementations
Do not win case at deposition; only lose it	Same
Listen to question carefully	Same
Taking time to review documents	Same
Where to look when responding to question (traditional instruction)	Different—computer (the camera, particular face, etc.)
Pausing before answering	Same, but even more important
Objections	Different—look for the hand
‘Kicking under the table’ or otherwise needing breaks	Different—more direct
Talking to counsel during breaks	Different—stop video, mute AND call

**IV. Preparing Your Client/Witness to Make a Great Impression**

**A. Understanding Impression Formation**

**B. Tips for Your Client’s/Witness’s Virtual Deposition**

Tip #1—Have witness realize s/he is on video 100% of the time

Tip #2—Witness should avoid being too casual (even though in a casual environment)

Tip #3—Witness’ attire

Tip #4—Picking up and avoiding use of crutch words and phrases

Tip #5—Addressing body language

Tip #6—Straight back / back off the chair

Tip #7—Look at news anchor

Tip #8—Practice run

APPENDIX A

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\*NOTE: The following sample notice of deposition language is for informational purposes only and not for the purpose of providing legal advice. We strongly encourage you to review your local, state and any emergency COVID-19 rules regarding the procedural requirements for noticing and conducting remote depositions. Those rules may require stipulation of counsel, court order or other jurisdictional procedural requirement.

1 Jane Attorney; SBN 234234  
LAW OFFICES OF JANE ATTORNEY  
2 123 Any Street  
Anytown, State 92663  
3 Tel: (555) 555-555  
Attorney for the Defendant  
4  
5  
6  
7

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **COUNTY OF [NAME]**  
10 **[COURT DIVISION INFORMATION IF APPLICABLE]**  
11

12 JOHN SMITH,

13 Plaintiff,

14 vs.

15 JANE DOE.

16 Defendant.  
17  
18

) Case No.: \_\_\_\_\_

) [SAMPLE]

) **NOTICE OF TAKING REMOTE**  
) **VIRTUAL DEPOSITION IN LIEU OF IN-**  
) **PERSON APPEARANCE AND REQUEST**  
) **FOR DOCUMENTS**

19  
20 **PLEASE TAKE NOTICE** that [PLAINTIFF / DEFENDANT \_\_\_\_\_] will take the  
21 depositions of the following witnesses on the dates, times and locations set forth below:

22

Deponent	Date	Time	Remoted Virtual Link

23  
24  
25  
26

27 The depositions will be taken before a court reporter who will record the testimony  
28 stenographically. Said deposition will also be video or audiotaped pursuant to California Code of

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1 Civil Procedure Sections 2025.220(a)(5) and 2025.340, Rules of Court, CRC 3.1010 and as modified  
2 and supplemented Emergency Rule 11 of the Rules of Court. Any video or audiotape of such  
3 deposition will be used at trial. If not completed by the above date, the deposition will continue from  
4 day to day, excluding Sundays and holidays, until completed.

5 **PLEASE TAKE FURTHER NOTICE** that the deponents are requested to produce the  
6 documents and writings described in the document request attached hereto at a time that is mutually  
7 convenient for the parties but no later than at least one business day before the date noticed for  
8 deponents' deposition. To assist deponents in ensuring that the documents are timely received by  
9 counsel, deponents may email responsive documents to [email address], upload responsive documents  
10 using our file share site at [link], overnight the documents to the address of our law firm indicated  
11 above or contact us [phone number] to arrange for a runner to pick up the documents. [PLAINTIFF /  
12 DEFENDANT] reserves the right to re-depose deponents as to any documents and related issues not  
13 timely produced pursuant to this deposition notice or otherwise.

14 **NOTICE IS FURTHER GIVEN** that due to the COVID-19 pandemic and related shelter-in-  
15 place orders and/or social distancing orders, the deposition of deponents will be taking place via  
16 remote means as set forth above and will be coordinated by [name of court reporter], with a business  
17 address of [court reporter address]. Contact [court reporter] at [email] to retrieve the necessary  
18 credentials to access the remote deposition, as well as information related to any technical assistance  
19 you may require to assist with carrying out the virtual deposition. We encourage you to go to  
20 [website] for additional remote deposition information. Those who wish to appear in the physical  
21 presence of another do so at their own election; however, this noticing party is not requiring the in-  
22 person physical attendance of counsel, the witness or any other party to this action. The deposition  
23 will be taken, via remote means, before an officer authorized to administer the oath to the deponent.

24 **NOTICE IS FURTHER GIVEN** that, because this deposition will be taken remotely /  
25 virtually, it is necessary that you have access to a phone, internet as well as a computer with a camera,  
26 tablet, smartphone of similar device. It is also necessary that the location you select for deposition be  
27 adequately lighted, reasonable quiet and without distractions and that your appearance and  
28 surroundings not to distorted. Accordingly, a location with a neutral background is required; do not

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1 use virtual backgrounds. If you do not have access to such devices or such a suitable location for the  
2 deposition, please contact us immediately at [phone] [email] so that we can make arrangements for  
3 such access and provide a suitable location.

4 **NOTICE IS FURTHER GIVEN** that we reserve the right to conduct this deposition utilizing  
5 the secure web-based deposition option afforded by [name of provider] or telephonically to provide  
6 remote/virtual access for those parties wishing to participate in the deposition via the internet and/or  
7 telephone. Also take notice that we reserve the right to record the deposition either by stenographic  
8 means by a court reporter certified to record depositions or a digital reporter utilizing state-of-the-art  
9 digital recording equipment. Both the court reporter and digital reporter are authorized to administer  
10 the oath and serve as the deposition officer in the State of California. We further reserve the right to  
11 utilize the following: (1) Record the deposition utilizing audio or video technology; (2) Instant visual  
12 display such that the reporter's writing of the proceeding will be available to all who are a party to this  
13 proceeding to request and receive it in realtime; (3) Exhibit Capture (picture-in-picture) technology in  
14 which any exhibit reviewed by the deponent during the deposition can be captured visually; and (4) To  
15 conduct this deposition utilizing a paperless exhibit display process called Exhibit Share or a similar  
16 paperless virtual display platform. The parties are advised that, in lieu of a paper set of exhibits, they  
17 may be provided and displayed digitally to the deposition officer, deponent, parties and counsel. The  
18 exhibits will be compiled by the deposition officer for the purposes of exhibit stamping, and ultimate  
19 production of the final certified transcript.

20 Please contact the noticing attorney at least five (5) calendar days prior to the deposition to  
21 advise that it is your desire to appear via this remote participating means so that the necessary  
22 credentials, call-in numbers, firm name, email address, services, testing and information, if necessary,  
23 can be arranged and provided to you prior to the proceeding(s).

24  
25 Date: \_\_\_\_\_

26 Jane Attorney  
27 Attorney for the Defendant  
28