

Tips on Virtual Expert Witness Deposition Testimony – Part 2

By Merrie Jo Pitera, Kevin Ong, Adrienne Franco Busby, and Joseph M. Price



In the first part of this two-part series, shared in [last week's issue](#) of *The Voice*, a trial consultant offered insights into increasing witness credibility during virtual witness depositions. In the second half of this two-part article series, an expert and two trial lawyers highlight points of concern in the preparation and taking of a video deposition. Because some courts are now conducting or considering conducting virtual trials, these tips may also apply to live virtual trial testimony.

Tips From the Expert

Dr. Kevin Ong, Ph.D., P.E., is a principal engineer at Exponent, Inc., in Philadelphia, where he practices as a biomedical engineer. His background is in product design evaluation and failure analysis of medical devices, surgical instruments, and medical equipment, with a focus on evaluating how patient, surgical, and device/design factors influence clinical performance. He has recently gone through several video depositions, and he has a number of important observations from the witness chair about taking testimony remotely.

Set-up

Treat a virtual deposition like a live deposition. The expert witness must be comfortable, but not too comfortable, with the venue. A home office or study gives an air of formality for the expert; the kitchen table might distract from the gravity of the occasion. If you aren't in a more formal office-type setting, always be cognizant of what may be in the camera's view (e.g., art work, dirty dishes piled up in the sink, laundry on the bed) or anything else that may be a distraction to viewers. Point your camera toward a plain wall or consider a neutral Zoom-type faux background (but the latter may create a ghosting effect or silhouette around the witness). The expert should have water, coffee, refreshments, snacks, cough drops, and tissues all within easy reach to avoid disruption of the deposition flow.

Select a non-descript mug without logos, advertisements, or other distractions.

Ask for support from your family and organize their schedules around the duration of the deposition. For example, avoid children's musical instrument practice or backyard sports activities. Be cognizant of the schedule for lawn service visits, garbage pickups, and neighborhood construction, and disable nearby phone ringers. Keep children and pets out of the room (or off the same floor), if possible. Consider locking the door to the room you are in to avoid unnecessary interruptions.

Test drive the technical set-up with the attorney responsible for defending your deposition. Determine whether it is more effective for you to use the computer audio or phone audio with the platform being used for the deposition transmission. This may, in part, depend on whether the deposition will be videotaped. In most instances, there is better video-to-sound sync with the computer audio, but sound quality may not be as clear as phone audio. Phone audio is also not affected by Wi-Fi quality. As mentioned in [part one](#), a second monitor is recommended for viewing exhibits. Where to locate that monitor will depend on the logistics of the camera position and the rules discussed in part one concerning eye contact. Close other programs, alarms, alerts, or other distractions to avoid eyes inadvertently straying from the camera. This also helps with your concentration on the examiner, the question, or the exhibit. Turn off or set other devices (e.g., e-readers, tablets, smart speakers) in the home on airplane mode to improve Wi-Fi strength. This will help avoid weak reception and annoying freezes or delays.

During the Deposition

Know in advance what screen views will be used. Whose screen do you pin/focus on in the meeting application? Do you direct your attention to the active speaker or have a full panel view? Camera location may be determinative again here. If the opposing attorney sets the full screen on you for recording purposes, do you have application permissions/ability to change the setting on your monitor? We may be used to speaking to the examining attorney in a non-videotaped deposition, or looking at the video

camera during an in-person videotaped deposition, but be prepared to have a mirror-image of yourself on your computer screen during the virtual deposition and stay focused and looking at the camera when responding. The counsel defending the witness needs to make it clear to the expert what is discoverable/permissible. An expert witness needs to know what the ground rules are for the opposing attorney to ask the witness to open files or emails on his or her computer and share the expert's screen.

It is especially important to decide in advance of the questioning how exhibits will be handled.

- Will exhibits be provided to the witness prior to the deposition? Exhibits produced in advance allow the expert witness (and defending counsel) to anticipate questions.
- If the parties are using screenshare, it should be tested in advance to ensure that it operates smoothly.
- There may be a sense of less control of an exhibit that is being shared by the opposing attorney, compared to a paper copy in a live deposition or one provided in advance.
 - Ask opposing counsel to keep an exhibit on the screen as long as necessary for adequate review, rather than a quick flash on the screen.
 - Ask opposing counsel to zoom in or zoom out or to view other pages. Take your time. Read the entire document if needed. Defending counsel may wish to go off the record or take a break to enable the expert to have adequate time to review an exhibit to the full extent needed. That way, the expert can review the exhibit without drawing opposing counsel's attention to other sections that might be important to the expert.
- Remember that there may be time lags, resulting in overlaps between the expert and the examiner, so wait for the questioner to complete the question before anticipating and jumping in with the answer.
- Take a longer pause than usual to allow objections since physical cues are limited. These tips will also make the court reporter's job easier.

Remember, not every expert witness is a seasoned veteran of the deposition process, and even the experienced expert witness may never have been subjected to a virtual deposition.

Take more breaks if needed because it can be exhausting to stare at the screen for an extended period. See Manyu Jiang, "[The Reason Zoom Calls Drain Your Energy](#)," [bbc.com](#), April 22, 2020. Remember to mute the computer audio (or dial back in, if you are not using computer audio) during breaks. Consider using a camera cover during breaks. Be on alert and professional, as you may be videotaped by a participant with their cellphone or computer after you return from a break and while waiting for the videographer to start recording.

Finally, be prepared for the unexpected. Wi-Fi rebooting is often needed due to limitations of the platform technology. Weather-related connectivity issues are another possible disruption. And, of course, there is always the unexpected doorbell, dog bark, or three-year-old looking for a snack.

General Tips for Deposing Opposing Experts

Deposing the opposition's expert remotely creates a variety of obstacles not found in the normal face-to-face deposition. There is a

long laundry list of issues that are important to explore during the course of an adverse expert deposition. Remember, not every expert witness is a seasoned veteran of the deposition process, and even the experienced expert witness may never have been subjected to a virtual deposition. The usual admonitions are still relevant, but must be supplemented by the "new normal" considerations. Be sure to ask if the witness has previously given a deposition by videoconference? Inquire if the expert has ever given a deposition where the lawyer defending his or her deposition was in a different room, or where the court reporter who administers the oath and takes the transcript is in a different room?

Go over a few ground rules, because the situation is a little bit different from what the expert may be used to. Determine if the witness can see and hear the examiner, and whether there is any lag or delay when the examiner speaks. Obtain agreement that if any of those situations change, the witness will tell the examiner. Find out where the witness is physically located. Is anyone else on the premises with the expert? Is there anyone in the room with the witness?

Stress the importance that the examiner and witness should not talk over each other because it makes the court reporter's life very difficult. That is even more important with video, because there can be a little lag time with technology. Make sure the witness lets the examiner finish the question before the witness answers it. Because of the remote hookup, if the witness cannot hear the examiner or does not understand a question asked due to technology or otherwise, it is crucial to let the examiner know. Also, if the technology on the witness's end pauses or freezes or disconnects, the examiner must be advised immediately. The parties and witness should agree that, if that occurs, the proceedings will be paused until everyone is back online again.

The witness should understand that even though the court reporter is not in the same room, the expert is still under oath and that it is the same oath to tell the truth that would be given and affirmed if he or she were in a courtroom in front of a judge or jury. That oath applies to every question asked in the deposition.

Since the examiner is not in the room with the witness, the examiner cannot see what the witness has with him or her or how he or she is set up. Have the witness describe the physical set up.

- Does the witness have any documents or notes?
 - If yes, describe them in detail.
 - Have they been produced? If not, they should be requested.
- Is the witness using a laptop or a desktop to connect to the deposition?
- Other than that equipment, does the witness have any other electronic devices: a cell phone, an iPad, a landline, etc.?
- Is the witness communicating with anyone other than the examiner right now?
- Does the witness have any open texts, chats, emails, or notes or anything of the sort?
- Has the expert had any conversations with anyone at the deposition location?
- Does the witness understand that he or she is under oath and the testimony is the witness's and the witness's alone?

- Have the witness agree that it is not appropriate to consult with anyone by email, text, chats, notes, or any other means while the deposition is in session.
- The examiner should confirm with the witness from time to time that the witness has not had any undisclosed conversations with anyone during the deposition—whether on the record or during a break—since, in an ordinary deposition, setting the examiner can see the witness more completely than on a videoconference.

Determine if the witness had a chance to review any materials describing how the deposition will be conducted or if the witness had a practice run. Describe that the platform being used (e.g., Zoom) allows all of the people who are participating in the deposition to be seen on screen. Is the witness familiar with the platform and has he or she used it before? Advise that the witness's testimony is being recorded both by a court reporter and by a videographer.

Advise, from time to time, that the examiner may use an exhibit in the deposition. To do this, the examiner may upload a document to the court reporting agency's platform and will make it available for the witness and counsel to view. A less desirable alternative is to provide documents to the witness's counsel and court reporter in advance, thus losing any element of surprise. If sharing documents within the platform, you may want to describe the process in advance and determine if the system works for the witness and counsel, i.e.,

- Click on the exhibit in the folder labeled "MARKED EXHIBITS."
- Can the witness and counsel see that folder?
- Counsel can scroll independently of the witness.
- Have the witness and counsel confirm for the record that they are able to access that folder.
- Have the witness confirm if he or she is looking at a document during testimony and, if so, which one.

If at any time the witness is having difficulty obtaining access to or reviewing any exhibits, he or she should advise all counsel. If the witness testifies about an exhibit, the examiner should advise him or her that the examiner will assume that the witness was able to see it and review it in its entirety. The examiner needs to make absolutely sure that the witness advises if he or she is having any

technological difficulties on the witness's end. If you are defending a deposition, it is your responsibility to make sure that the examiner gives the witness the opportunity to scroll through the document. Experienced witnesses may ask, but even the most experienced witness can be thrown by the new context of the virtual deposition.

After each break, remind the witness that he or she is still under oath. Again, it is a good practice to have the witness confirm that he or she does not have any other lines of communication open—cell phone, text, instant messages, emails, etc., and that the witness has not communicated with anyone else “off the record.” Determine if the witness has any additional materials in front of him or her other than those he or she has already identified. If additional materials are present, the witness should provide a list and explain why he or she has them and where they were obtained. Finally, can the witness confirm again that he or she is still in the room alone and, if not, who else is in the room?

Conclusion

The general virtual practice of law during a pandemic is difficult, to say the least. Virtual depositions of expert witnesses add even more complex issues for the trial lawyer to deal with. Hopefully, these tips make that job slightly easier to accomplish in the “new normal.”

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