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Tips on Virtual Expert Witness Deposition Testimony – Part 1

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

The virtual, video-conferenced deposition has become, as much as many trial lawyers dislike it, a part of the "new normal." It will likely continue so, at least as long as the judicial system is faced with the strictures of the COVID-19 viral pandemic, and perhaps well beyond. Whether the profession returns to the "old normal" once the pandemic is (hopefully) vanquished remains to be seen, but the general consensus seems to be that it won't happen anytime soon.

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Quote of the Week

"For my part, I am almost contented just now, and very thankful. Gratitude is a divine emotion: it fills the heart, but not to bursting; it warms it, but not to fever."

— Charlotte Brontë

Tips on Virtual Expert Witness Deposition Testimony – Part 1

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The virtual, video-conferenced deposition has become, as much as many trial lawyers dislike it, a part of the "new normal." It will likely continue so, at least as long as the judicial system is faced with the strictures of the COVID-19 viral pandemic, and perhaps well beyond. Whether the profession returns to the "old normal" once the pandemic is (hopefully) vanquished remains to be seen, but the general consensus seems to be that it won't happen anytime soon.

While video depositions have been with us for some time, they are presently the rule, not the exception and, in some instances, that rule has been codified. *See, e.g.*, FRCP 30(b)(4). Expert witness video depositions have a number of overlaps with lay witness depositions, but there are also some special considerations that trial lawyers need to consider. In this two-part article series, a trial consultant, 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 Trial Consultant

Merrie Jo Pitera, Ph.D., is a trial consultant with 30 years' experience educating witnesses and attorneys regarding the factors that increase and decrease credibility in the eyes of key decision makers: judges, jurors, and arbitrators.

Every time someone meets another person, they are immediately sizing them up. Is this a nice person? Do they know what they are talking about? Are they full of themselves to the point their arrogance gets in the way of hearing their message? This automatic evaluation process is especially significant in a courtroom context, where the outcome rests primarily on the believability and effective communication of information by each side's witnesses.

Credibility

Decision makers' evaluations of an expert witness (be it judge or jury) use similar cues to evaluate credibility. The four factors that comprise credibility that decision makers use are knowledgeability, likeability, trustworthiness, and confidence. Stanley L. Brodsky, Michael P. Griffin, & Robert J. Cramer. *The Witness Credibility Scale: An Outcome Measure for Expert Witness Research*. Behav. Sci. Law, 28 (6), 892–907 (2010). Jurors assess these four factors via a witness's delivery of his or her testimony—via verbal and non-verbal communication. In addition to body language (*e.g.*, eye contact, fidgeting, etc.), one of the non-verbal cues used by jurors to determine the witness's credibility (via the four factors) is "appearance," which means how the witness looks, i.e., from the clothes he or she is wearing to the way he or she looks on video. The latter concern is the reason for this article. With video depositions, appearance takes on heightened meaning. Think back to movie appreciation class. Think Alfred Hitchcock, the master of using camera angles and lighting to impose meaning to his characters. With a simple tilt of a light, cinematography can turn a "hero" into a "villain." Being able to see peoples' faces, especially their eyes, allows us to assess them. Are they being genuine? Are they telling the truth? Do they have any motives?

How a witness is presented on camera can significantly affect how jurors or judges perceive the witness's credibility even before the witness says a word.

What does cinematography have to do with virtual witness depositions? Having watched many genres of movies over our lifetimes, we have all been socialized, much of the time implicitly, with the meanings of camera angles, lighting, and shadows created by cinematographers. Thus, how a witness is presented on camera can significantly affect how jurors or judges perceive the witness's credibility—even before the witness says a word. In our new normal of virtual depositions, most likely set up by the witnesses themselves (in their homes or home office without the help of a video technician), more attention should be taken to ensure that a witness has the proper angle and lighting. Most of us do not have the ideal set up. We set the computer monitor or laptop on the table and sit in front of it. The camera may be

too low or too high, inadvertently creating an impression of the witness. So, how do we preserve witness credibility via camera/lighting set-up during a virtual witness deposition?

Let's start with the camera angle.

Angle

- **Camera angled up.** This can occur when the computer camera is placed lower relative to the witness' seating position. Witnesses in this set up appear as if they are looking down on their audience, which makes the witness appear large relative to the screen perspective. This angle projects dominance as the witness looks down at the camera. Then, when the lighting casts a shadow upwards, it creates a cinematography effect of fear and/or danger—as in a horror film. The person on camera is often perceived as the "bad guy."
- **Camera angled down.** This happens when the camera is placed too high relative to the seated position of the witness. Unfortunately, this angle is often used in cinema to make a witness appear small or vulnerable. That is, this angle implicitly signals a lack of dominance or power. Add in lighting from below, and a credible expert can turn into a witness who appears suspect and/or implies a negative impression.

Lighting

- **Find Natural Light.** Natural lighting softens a witness's appearance, making that person appear more relatable

Camera angled up.

Camera angled down.

Backlit.

Bottom lighting.

and engaging. We recommend finding a window and placing it in front of you. Lighting from the top creates bags under the eyes, and lighting from behind the witness darkens the shot—neither of which are flattering but more importantly affect perceptions of credibility. While it may not be possible to have the perfect lighting, testing it will help determine if any light coming from behind a witness has a negative effect on the picture and the perception of the image.

- — Shadows are not a witness's friend. As implied above, shadows can change the perception of someone, just like shadows change the mood of a movie instantaneously, from a pleasant effect to a moody and/or dangerous drama. Paying attention to the proper lighting will help minimize the implicit, often negative, perceptions exuded by shadows.
- — Ideally, you want a close-up (head, shoulders) with natural lighting and the camera at eye level, which creates a stronger connection with the audience (i.e., the judge or jury). It allows jurors to evaluate the witness's demeanor by better viewing the person's facial expressions. It also allows the witness to better connect (virtually) with his or her audience.

Where to Look?

- Eye contact is one of the most important non-verbal factors used by decision makers to assess whether a witness is credible. Assuming a Zoom platform is being used, all of the attendees are visible with a box (either with their camera on or not). And while there are settings to hide non-video participants, it is still important to define where the witness should look to give the appearance that he or she is talking to the questioner. Often, we tend to look at ourselves because it gives us someone to speak to. However, our box is small and often in a corner, making the witness look down, giving the appearance that he or she is reading notes or avoiding eye contact, which has more serious implications from a credibility standpoint. Be sure to look into the camera when answering. This takes practice, given the awkwardness of the situation. That is why we recommend a test practice session be conducted with a few generic mock questions to give the witness a chance to engage the proper techniques.
- A second screen is recommended for exhibits. This way the witness can visibly demonstrate to the decision-maker observer that he or she is diligently reviewing the exhibit. However, when answering questions, the witness should remember to return his or her eye contact to the original camera.

Avoid Being Too Comfortable

While a witness may be at home giving their deposition, the expert should treat the deposition as a formal event and not be lulled into the casualness of his or her environment. Once that happens, unconscious habits of which we are more aware when in person tend to occur, such as

Good lighting and eye contact.

Good lighting.

having a visual reaction like rolling one's eyes, biting one's nails, repeatedly touching one's face, fidgeting, or swiveling in one's chair.

Ensuring the Environment of the Room

Recently, stories about remote depositions raise reasons to ensure the witness room doesn't have anything helpful to the witness outside the view of the computer camera. For instance:

- It is difficult to know if a witness has a Post-It note or a second or even third monitor set up with talking points (*e.g.*, cheat sheet). While we ask the questions (noted below) regarding what the witnesses has in the room with him or her, one suggestion to consider is a Face-Time-type video with the witness conducting a virtual tour of his or her meeting space—a 360-view whether at the start, randomly during the deposition, or after a break. This tour would finish by having the witness show you what programs are open on his or her computer. One caveat on the virtual tour: the defending lawyer may find such a tour objectionable and the ensuing dispute may serve to derail the deposition before it starts, and also irreparably damage any rapport or good will developed with opposing counsel. We suggest using the idea with caution and with the consideration of the type of relationship you have, or want to have, with opposing counsel.
- Ensure the witness's other devices, like phones, are outside of the room and no chat programs such as TEAMS, Google Chat, etc., are open.
- If the witness is in a conference room, it is important to learn who else is in the room. I recommend that person to also be on camera to ensure they are not giving facial cues or holding up notes off camera, or even giving an audible cue, which recently happened to a colleague who was taking a deposition of an opposing witness.

Virtual examinations are likely here to stay. In next week's issue, an expert and two trial lawyers weigh in on best practices for preparation and taking of video depositions.

With more than 30 years of experience, Merrie Jo Pitera, Ph.D., CEO of **Litigation Insights**, is a psychology and communication expert who assists counsel preparing their cases in complex litigation. Litigation Insights is a national, woman-owned company with 26 years of experience conducting jury research, developing trial graphics, and assisting counsel with jury selection, case presentations, and courtroom technology during trial.

Kevin Ong, Ph.D., P.E., is a principal engineer in the biomedical engineering and sciences practice at **Exponent, Inc.**, in Philadelphia. He provides engineering consulting services related to product liability and intellectual property litigation matters, as well as product design consulting services to the life sciences industry.

Adrienne Franco Busby is a partner and member of **Faegre Drinker**'s product liability and mass torts trial practice in Indianapolis. She represents manufacturers of pharmaceuticals, medical devices and consumer products across the United States and Canada. Ms. Busby has experience in trials and preparing expert witnesses in multiple disciplines.

Joseph M. Price is a senior trial lawyer and member of **Faegre Drinker**'s product liability and mass torts practice in Minneapolis. Mr. Price brings decades of experience and a passion for solid science to representing pharmaceutical and medical device makers in complex litigation, mass tort and class action products liability cases. He serves on the steering committee for the DRI Drug and Medical Device Committee.

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Climate Change Hot Sheet

By John Guttmann

In recent weeks, there have been important developments in both climate change causation litigation and cases in which plaintiffs argue that businesses are not ready for the effects of climate change. The latter are sometimes called climate change adaptation cases, because the plaintiffs are generally arguing that industrial facilities should be adapted in anticipation of coming weather effects.

On the causation front, the United States Supreme Court has granted a writ of certiorari in *BP p.l.c., et al. v. Mayor & City Council of Baltimore,* No. 19-1189, cert. granted, 591 U.S. ___, (October 2, 2020). This litigation is one of a number of cases in which plaintiffs are raising common law claims against fossil fuel producers. The core theory is that the defendants' products are a primary cause of climate change. Baltimore brought its case in Maryland state court. The defendants removed the case to federal district court, citing multiple bases for removal including the federal officer defense. The district judge remanded the case to state court. The defendants appealed, which is permitted when the federal officer defense was a basis for removal. The Fourth Circuit affirmed the remand. The defendants filed a petition for a writ of certiorari, arguing that, under the statute permitting federal officer removal, the circuit court should have considered all of the bases for removal asserted in the trial court by the defendants. The issue on which the Supreme Court has granted certiorari is procedural. It is, however, significant not only for other climate change cases, but also for other litigation in which businesses act pursuant to federal requirements and, therefore, cite federal officer removal as a basis for removing cases to federal court.

Because of the importance of the issue to business, DRI has submitted an amicus brief in the United States Supreme Court in support of the petitioners' argument. (See page 11 for more about DRI's brief.)

On the adaptation front, the United States District Court for the District of Rhode Island recently issued a ruling on a motion to dismiss filed by Shell in *Conservation Law Foundation v. Shell Oil Products US, et al.,* C.A. No. 17-396 WES (D.R.I. September 28, 2020). In general terms, the plaintiff alleges that Shell's petroleum products terminal in Rhode Island is not prepared to withstand the effects of increasingly intense storms, such as greater storm surge, increased precipitation, and increased wind. In its ruling, the court held that the plaintiff lacks standing to assert claims related to risks that may arise in the future, because they are not imminent risks and are, therefore, too speculative. The court held that the plaintiff does have standing to assert claims with respect to risks that it alleges are present today or might arise in the very near term. The case will now move into discovery.

John S. Guttmann *is a principal in the law firm* **Beveridge & Diamond, P.C.**, *and is based in its Washington, D.C., office. His practice focuses on toxic tort, product liability, and environmental and natural resource damages litigation. He represents clients in a range of industries including oil and gas, chemicals, defense, real estate, and consumer products. Over the past 35 years, Mr. Guttmann has litigated nationally in federal and state courts, including bench and jury trials. John is member of the DRI Board of Directors and a past chair of the DRI Toxic Torts and Environmental Law Committee.*

COVID-19

Lessons from the Pandemic

By Rosary Hernandez

2020 has been quite a year—full of unprecedented events, national tragedy, unexpected challenges, and endless lessons in resilience and adaptability. While each of us has been touched in different ways, no one has fully escaped the effects of the COVID-19 pandemic. It has profoundly affected both our personal and professional lives. Lawyers and law firms are no exception.

While I have personally enjoyed having my college-aged kids home, I am also heartbroken that they are being deprived of a "normal" college experience. Because my kids are older, we have not faced the challenge of a virtual elementary school education. Kudos to the parents successfully juggling those demands. Although we have graciously been spared the death or illness of a loved one from this relentless disease, we know multiple people whose families have been far less fortunate. Our hearts go out to everyone so affected.

This pandemic provided strong evidence that working from home can be productive and efficient if employees are equipped with the right technology and support.

In the midst of this national challenge and new reality, where personal contact is discouraged, as Americans and lawyers, we must find a way to move forward in life and business. This pandemic, and the dramatic changes it has wrought on our ability to gather and connect, has dramatically altered the practice of law. The effects of social distancing have halted in-person court appearances and effectively stopped jury trials. Well-attended conference room meetings have ceased. A profession based on relationships has fundamentally shifted. I suspect the last eight months will have a lasting effect on our profession for years to come.

On a positive note, this pandemic provided strong evidence that working from home can be productive and efficient if employees are equipped with the right technology and support. Our firm upgraded its network and equipped our teams with the necessary equipment to work effectively from home with full remote access. This has allowed employees to have more autonomy and flexibility. I have had staff and fellow attorneys tell me they are more productive because they are dressed in sweats and have eliminated commutes.

Similarly, depositions, court appearances, and mediations are all moving forward remotely. "Virtual everything" has become the new normal. Candidly, we have already observed cost efficiencies for clients, as events and court proceedings are shortened and streamlined. Several clients have indicated that the necessity of travel will be heavily scrutinized moving forward. In Arizona, local courts are developing protocols for remote jury selection in the hope of getting the log-jammed trial calendar back on track. Several mock events and dry-runs have already occurred. Remote trials and jury selection are tentatively scheduled to commence in 2021.

While we all welcome the opportunity to provide more cost-effective and efficient services for our clients, we collectively miss the inherent benefits of an in-person practice. Associate training and mentoring is more difficult, and we are all deprived of the inherent benefits of an impromptu strategy discussion with valued colleagues down the hall.

As a member of the legal community, I sincerely hope we will emerge from this experience wiser and with increased mindfulness and empathy. I am optimistic that we can retain the positives of "work-from-home," while preserving an office culture of collaboration and mentorship of junior lawyers. We should implement the lessons learned and move forward in a more appreciative manner when we are able to gather together once again.

Rosary A. Hernandez, a shareholder at **Tiffany & Bosco PA**, is first-generation Cuban American. Her areas of practice include commercial and business litigation, professional liability defense, construction law, and tort defense including tortious interference and related claims. Since 1993, she has represented clients in litigation and arbitration in Texas, Arizona, and California. Ms. Hernandez is a member of the DRI Board of Directors and a past chair of the DRI Diversity and Inclusion Committee

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Jason Hendren

DRI member Jason Hendren of **Wright Lindsey & Jennings LLP** in Rogers, Arkansas, recently obtained summary judgment in Phillips County Circuit Court on behalf of a hospital in a medical malpractice case. Mr. Hendren argued the motion in person, although steps were taken to maintain social distancing in the courtroom. All participants wore masks, but the attorneys were allowed to remove theirs when they made their respective arguments from a lectern located at least six feet away from everyone else in the courtroom. The trial court granted summary judgment in favor of the hospital, based upon Arkansas's requirement of expert testimony on the essential issues of standard of care and causation in complex medical malpractice cases. The plaintiff claimed significant injuries and medical bills as damages, and efforts to settle the case prior to the hearing had failed.

Keep The Defense Wins Coming!

Please send 250–500 word summaries of your "wins," including the case name, your firm name, your firm position, city of practice, and email address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to DefenseWins@dri.org. Please note that DRI membership is a prerequisite to be listed in "And the Defense Wins," and it may take several weeks for *The Voice* to publish your win.

DRI Files Amicus Brief with U.S. Supreme Court in Baltimore Climate-Change Case

DRI has filed an amicus brief in the U.S. Supreme Court supporting the petitioners in *BP p.l.c. v. Mayor and City Council of Baltimore*, No. 19-1189.

The case is one of several brought by state and municipal governments around the country seeking to hold energy companies responsible for global climate change. Baltimore brought the lawsuit in Maryland state court against 26 multinational companies that sell or produce fossil fuels. The city seeks to recover damages it purportedly has sustained and will continue to sustain because of climate change allegedly caused by the energy companies' operations.

The question before the Supreme Court is narrower and relates to an important issue of federal-court jurisdiction. After Baltimore filed the lawsuit, the energy companies removed the case from Maryland state court to federal district court. They asserted several grounds for federal jurisdiction, including that Baltimore's claims necessarily arise under federal law and that the claims relate to actions taken by the energy companies at the direction of federal officers.

The district court remanded the case to state court. The energy companies appealed the district court's remand order to the U.S. Court of Appeals for the Fourth Circuit. The court of appeals held that it did not have appellate jurisdiction to review any ground for removal addressed by the remand order except for the federal-officer ground.

The Fourth Circuit's decision turned on 28 U.S.C. §1447(d). That statute generally bars appellate review of remand orders but contains an exception for "an order remanding a case . . . removed pursuant to" the federal-officer or civil-rights removal statutes. The Supreme Court will decide whether appellate jurisdiction under §1447(d) is limited to the federal-officer and civil-rights removal grounds, or instead extends to all grounds for removal addressed in a remand order.

DRI's brief contends that, when it enacted §1447(d), Congress authorized complete appellate review. To start, Congress has enacted several statutes that, like §1447(d), define an appellate court's scope of review at the level of an "order." The Supreme Court and lower courts have understood such statutes to mean what they say: when a statute authorizes review of an "order," the entire order comes before the appellate court. By contrast, Congress has enacted other statutes that authorize review only of particular questions, showing that Congress knows how to limit appellate review when it wishes to do so.

What's more, complete appellate review comports with Congress's policy behind §1447(d) and federal jurisdiction more generally. Congress enacted the general prohibition on review of remand orders either to relieve the Supreme Court's docket at a time when intermediate appellate courts did not exist or to hasten the resolution of removed cases. Either way, when it decided to allow appeals from orders remanding cases removed under the civil-rights or federal-officer removal statutes, Congress set aside those interests. Congress having done so, there is no compelling basis for a court of appeals not to review a remand order in its entirety.

DRI's brief was authored by Matthew T. Nelson and Charles R. Quigg of Warner Norcross + Judd LLP in Grand Rapids, Michigan. Mr. Nelson is the chair of DRI's Amicus Committee.

To read the brief in its entirety, please click here.

MG+M Supports CWE

On Thursday, November 12, **Manning Gross + Massenburg LLP** sponsored the virtual fundraiser and 25-year celebration of the Center for Women & Enterprise (CWE) a nationally known nonprofit organization dedicated to helping people start and grow their businesses. Since 1995, CWE has worked with more than 46,000 Massachusetts, Rhode Island, New Hampshire, and Vermont entrepreneurs. CWE also operates the Veterans Business Outreach Center of New England, which focuses on assisting veterans, active duty service members, and military families with starting and growing their businesses. Learn more at https://www.cweonline.org.

#CWEGala2020 #CWETalk #womensupportingwomen

"DRI Cares" content is coordinated by **James Craven** of Wiggin and Dana LLP and **Rebecca Nickelson** of Sinars Slowikowski Tomaska LLC. To submit items for upcoming issues, please contact them at jcraven@wiggin.com and **rnickelson@sinarslaw.com**.

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Grant Gard

Why is it important to help other people who need our help?

Because it is nice. And we need to be nice because that makes God happy.

If you could put on a project to help out others, what would you do?

Organize and set up a kitchen and helpers to make people food who don't have food.

Tell me something about you that you think I might not know?

I write my name the best in my class.

What's a memory that makes you happy?

Me and daddy playing soccer on the Nintendo switch.

What's the hardest part about being a kid?

Sometimes loving my baby sister because she screams a lot (*That's a 1 year old for you! - lg*) and having to go to bed early because of school.

If you could give one gift to every kid in the world, what would it be?

A video game that each kid would like based on things they like because not everyone can buy one or lives by a store that has them.

What is your perfect meal?

Cheese Pizza. Lemonade. Brownies.

Grant Gard, who just turned six, is the son of DRI member Laura Gard, a partner at Kightlinger & Gray LLP in Merrillville, Indiana, and her husband, Craig.

"DRIKids" content is coordinated by **Diane Pumphrey** of Wilkins Patterson Smith Pumphrey & Stephenson PA and **Laura Emmett** of Strigberger Brown Armstrong LLP. To submit items for upcoming issues, please contact them at dpumphrey@wilkinspatterson.com and lemmett@sbalawyers.ca.

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