

Recorded Zoom conference not the same as admissible video deposition

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With remote depositions having become the norm in light of COVID-19, some practitioners have assumed that because Zoom videoconference depositions are recordable, it is unnecessarily redundant to hire a videographer to formalize the process and that such video captures will be admissible in evidence. However, courts which have considered the issue have required adherence to procedural rules for the admissibility for video depositions.

The admissibility of videoconference depositions was faced head-on by U.S. Magistrate Judge Sunil R. Harjani of the Northern District of Illinois in *Alcorn v. City of Chicago*, 336 F.R.D. 440 (N.D. Ill. 2020). Harjani succinctly framed the issue: “The question presented in this matter is whether a party can record a deposition, using the ‘Zoom’ record function, where the court reporter has been retained only to stenographically record the deposition, and has declined to certify the video recording as an accurate record of the witness’s testimony.” Plaintiff’s attorney’s request to use the uncertified Zoom recorded deposition in support of her summary judgment motion and at trial was denied.

In so ruling, the court noted that a court reporter’s obligations to adhere to the protocols of the Federal Rules “are designed to ensure that a neutral individual administers the oath and that the deposition is an accurate reflection of the witness’s testimony. It removes doubt as to whether a recording or transcript has been tampered with or edited by either party. The process also maintains the integrity of the deposition, which can involve managing changes to the transcript, custody of the deposition materials, and appearances on video.”

The court noted that the court reporter’s certification of the deposition transcript is an insufficient safeguard to assure the integrity of a videoconference deposition:

“The court reporter in this case, who will stenographically record and transcribe the deposition, has declined to certify the accuracy of the Zoom recording as it is not his function. Rather, it is a certified videographer who has the appropriate training to serve as the Rule 28 officer and ensure that a video deposition is properly recorded with established procedures to go on or off the record, limit noise and interruptions, address technical glitches, and frame the camera on the witness. And it is the videographer who will complete the necessary certification under the Federal Rules to affirm the accuracy of the video recording of the deposition, not the stenographic reporter. Nothing in Rule 30 allows a party to engage in a secondary recording or transcription of a deposition, and treat that recording as the equivalent of the certified transcript prepared by the court reporter.”

The court further found that videoconference depositions had the inherent danger of distracting juries and prejudicing parties:

“[T]he jury would be given an inside look into all the attorneys’ home spaces, their tastes in books, photos of their families, their likely outdated CD collections, and the occasional child or pet that inevitably makes its way into the camera during a seven-hour deposition. None of this is necessary, and is frankly distracting. ‘Speaker view’ is even more problematic as lawyers often object after a question is posed, and lawyers and witnesses quite often speak over each other. That level of screen flipping is disconcerting.”

The court concluded, “A videoconference deposition is not the same as a video-recorded deposition. The former uses remote technology to conduct a deposition; the latter records and preserves the deposition in video format that could one day serve as a substitute for live testimony.”

Subsequent to *Alcorn*, other courts have held that the formalities for video depositions required by Federal Rule 30 must be adhered to in videoconference depositions. *Stowe v. Alford*, No. 19 C 1652 (Pursuant to Rule 30(b)(5), all persons present at a videoconference deposition must be identified by the court reporter at the outset of the deposition). See also, *Raiser v. San Diego City*, No. 19 C 0751, where the court cited *Alcorn* in similarly finding that videoconference depositions had to comply with Rule 30 (“In civil cases, it is this Court’s experience that during the pandemic counsel have routinely been able to meet and confer and agree on the need for appropriate protocols so that the rights of all parties are protected under Rule 30 during remote depositions”).

Notwithstanding the current availability of COVID-19 vaccines and “reopening efforts” across the country, remote videoconference depositions will likely continue to be commonplace. In *In Re Crosby*, No. 17 5391, a party which had sent a notice of a Zoom video deposition requested instead that the court compel the deposition to proceed in-person. The other party objected and requested that the deposition to proceed remotely as originally noticed. The court first noted the still-developing understanding of COVID-19 vaccination efficacy. The court also found that other jurisdictions had rejected efforts to require in-person witness examinations notwithstanding the availability of vaccinations. *Crosby*, citing *U.S. v. Berglund*, No. 20 CR 0200; and *Novello v. Progressive Express Ins. Co.*, No. 19 C 1618.

Accordingly, the court denied the request to compel in-person depositions and further required that the Federal Rules and local rules regarding remote video deposition protocols be “followed at all times.” Thus, at the present time, courts continue to require the procedural safeguards required by state and federal procedural rules with respect to videoconference depositions.

At the present time, in the absence of adhering to the requirements of existing procedural rules, litigators should assume that videoconference deposition recordings will be found to be inadmissible.

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