

Attorneys Beware: Zoom Depositions Are Likely Inadmissible

By **Phillip Zisook** (June 21, 2021, 11:57 AM EDT)

You get a notice of deposition via email. The notice provides that the deposition will be taken remotely through a Zoom videoconference.

The day of the deposition arrives and as your witness is testifying, you notice the red blinking light in the upper left corner of the screen designating that the deposition is being recorded.

As the deposition proceeds, it's no different than any other Zoom deposition, but for that flashing red recording light.

A break is taken and you question the court reporter whether he is putting the times of the breaks on the record. He answers that he forgot to note when the break started and proceeds not to note the breaks as the deposition continues.

You also ask whether the court reporter will be taking possession of the video after the deposition concludes, and he answers in the negative.

The deposition concludes, but no statements have been made on the record as to when the deposition began or concluded. Throughout the deposition, the attorneys, witness and court reporter all appear on the screen concurrently, and even the breaks and casual conversations are recorded.

Several months later, your opponent who took the deposition files a motion for summary judgment and includes with his motion the video of the Zoom deposition, which he recorded, as well as a certified transcript of the deposition.

Is the video admissible? As the law presently stands, the answer is no.

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 record what is already being recorded or is capable of recordation with the push of a button.

Such a belief disregards the chain of custody and integrity safeguards for video depositions required by Rules 28 and 30 of the Federal Rules of Civil Procedure.[1]

This issue was faced last August by U.S. Magistrate Judge Sunil R. Harjani of the U.S. District Court for the Northern District of Illinois in *Alcorn v. City of Chicago*.[2]

Judge 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.[3]

The plaintiff's attorney's seemingly simple request to use the uncertified Zoom recorded deposition in support of her summary judgment motion and at trial was denied.[4]

In so ruling, the court noted that a court reporter's obligations to certify the deposition pursuant



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to Rule 30 of the Federal Rules of Civil Procedure:

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.[5]

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

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. ... Plaintiff has also argued that it is the court reporter that will hit the record button on Zoom (for a small additional fee), and not counsel, in advancing her proposal. While that would prevent any allegation of selective recording by one party, it still does not resolve the issue that a non-certified version of the deposition which is not in compliance with Rule 30, will exist that the deposing counsel intends to use as equivalent trial evidence.[6]

As Judge Harjani recognized, even prior to COVID-19 and the advent of Zoom depositions, courts across the country, on balance, have held against a party's counsel's video recording of deposition being admissible under Rule 30 because such a recording is not a certified copy by an authorized officer.[7]

The court further found that a remote Zoom video capture, by its nature, had inherent dangers of distracting juries and prejudicing parties, through the varying ways in which attorneys are depicted in Zoom depositions:

[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.[8]

The court concluded:

A video conference 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.[9]

Thus, although attorneys or court reporters may record remote videoconference depositions for the attorney's use, the recording does not constitute admissible evidence for summary judgment or at trial.

If the intended use of a Zoom deposition is the creation of an admissible video capture of the deponent in either Illinois state or federal courts, the recording must be done through adherence to the applicable rules and by an independent videographer.

When an attorney tries to avoid hiring a videographer to record a Zoom videoconference deposition and simply records the video himself, the overwhelming likelihood is that the certified transcript will prove to be the only record of the Zoom videoconference deposition admissible in court.

Subsequent to Alcorn, other courts have similarly held that the formalities for video depositions required by Federal Rule 30 must be adhered to in Zoom videoconference depositions.[10]

Notwithstanding the current availability of COVID-19 vaccines, it is reasonably likely that remote

videoconference depositions will continue to be commonplace.

For example, in *In re: Crosby LLC*,^[11] decided this April by the U.S. District Court for the Eastern District of Louisiana, a party that 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 proceed remotely as originally noticed.

The court first noted the still-developing understanding of COVID-19 vaccination efficacy.^[12] The court also found that other jurisdictions to date have rejected efforts to require in-person witness examinations, notwithstanding the availability of vaccinations.^[13]

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."^[14]

Thus, at the present time, courts appear reluctant to deviate from the procedural safeguards required by the federal rules with respect to remote videoconference depositions.

The Alcorn decision explains in detail why a Zoom videoconference deposition is not independently admissible as a video deposition under presently existing court rules. However, it raises the question of whether the rules should be amended to reflect the changes in technology that have been accepted as commonplace in today's legal world and provide a protocol for moving forward.

As was argued in Alcorn, a certified transcript could demonstrate whether a video transcript accurately reflects the testimony given in a videoconference deposition. Yet, as Judge Harjani noted, that is only part of the issue.

Current aspects of a remote videoconference deposition recording inherently render admissibility problematic. Perhaps that issue could be addressed in a litigation-specific videoconferencing platform where the camera remains fixed on the deponent and does not include the images of attorneys or their varying videoconferencing environments.

In addition, the court reporter would have to note on the record start, break and end times and be vigilant to exclude extraneous conversations from the video record.

At the present time, in the absence of adhering to the requirements of Federal Rule 30 or its state court counterparts, litigators must assume that videoconference deposition recordings will be found inadmissible as evidence.

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[1] State court procedural rules typically require similar safeguards. See, for example, Illinois Supreme Court Rule 206 (g) which sets forth requirements for video depositions (separate and distinct from video conference depositions, which facilitate remote depositions as permitted by Illinois Supreme Court Rule 206(h) and through Circuit Court General Administrative Orders in response to Covid-19). Rule 206(g) requires that an independent videographer record the deposition pursuant to specified protocols to insure that the video capture is accurate and constitutes the full and unedited deposition. The protocols include identifying on the record and video (1) the videographer's name and address; (2) the date, time and place of the deposition; (3) the caption of the case; (4) the name of the witness; (5) the party on whose behalf the deposition is being taken; and (6) the party at whose instance the deposition is being recorded on an audio-visual recording device. Ill. Sup Ct. Rule 206 (g) (1). In addition, the court reporter must swear the videographer on camera and the videographer must state on camera the commencement time of the deposition, when breaks are taken, and the time when the deposition concludes. The beginning of each separate video tape must also be announced on camera by the videographer, noting its beginning and end. In addition, the videographer must take and retain custody of the recording, and sign an affidavit stating the duration of the deposition and certifying that the recording is true, correct, and has not been edited or altered. Ill. Sup. Ct. Rule 206 (g) (2). These Rules apply regardless of whether a video deposition is taken in-person or conducted

remotely. (Ill. Sup. Ct. Rule 206 (g)(2)).

[2] 336 F.R.D. 440 (N.D. Ill. 2020).

[3] Id. at 441.

[4] Id.



[5] Id. at 442.

[6] Id. at 443.

[7] Id.



[8] Id. at 444.

[9] Id.

[10] [Stowe v. Alford](#) , No. 2:190cv-01652 KJM AC, 2021 U.S. Dist. LEXIS 98021 at *6; 2021 WL 2073759 (E.D. CA May 24, 21). (Pursuant to Rule 30(b)(5), all persons present at a Zoom video conference deposition must be identified by the court reporter at the outset of the deposition). See also, [Raiser v. San Diego Cty.](#) , where the court cited Alcorn in similarly finding that Zoom video conference 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"). No. 19 cv 751-GPC(KSC), 2021 U.S. Dist. LEXIS 6819 at *16 (S. D. CA January 13, 2021).

[11] No. 17-5391 Section: M (4), 2021 U.S. Dist. LEXIS 82178 (E.D. April 29, 2021).

[12] Id. at *6.

[13] Id. at **8-9, citing [U.S. v. Berglund](#) , No. 20CR00200SRNTNL, 2021 U.S. Dist. LEXIS 78476, 2021 WL 1589548, at *2 (D. Minn. Apr. 23, 2021); and [Novello v. Progressive Express Ins. Co.](#) , No. 8:19-CV-1618-KKM-JSS, 2021 U.S. Dist. LEXIS 78299, 2021 WL 1597937, at *1 (M.D. Fla. Apr. 23, 2021).

[14] Id. at *9.