

# Issues with Remote Depositions and Hearings ... and How to Overcome Those Hurdles

by Alison Mullins and Shannon Peak

**A**t the outset of the United States' March 2020 lockdown in response to COVID-19, early skepticism of utilizing technology in lieu of in-person litigation and depositions quickly gave way to widespread adoption of remote court procedures to move cases along. This has advanced the legal profession immensely in a matter of months. As a new round of shutdowns begins in response to the resurgence in coronavirus cases, lawyers are better prepared to deal with depositions and hearings remotely as this manner of court proceedings has become universal.

While remote depositions and hearings quickly became the norm, the transition was not altogether a smooth one. And still, lawyers are finding that there are many challenges, some familiar and some new, that come with the processes of entirely remote litigation. The considerations covered here highlight the value that remote depositions and hearings can bring to a case, while also offering some considerations and strategies to overcome the hurdles.

## State of "Virtual" Law

Audio-visual and remote depositions have been codified in Virginia law since 1983, beginning with the Virginia Uniform Audio-Visual Deposition Act.<sup>1</sup> This Act is one of the first laws which regulates the procedures for setting, conducting, and preserving audio-visual depositions. In 1984, Virginia Supreme Court Rule 4:7A was adopted, expanding the procedural regulations to include when videoconferencing and teleconferencing depositions are permitted, as well as the procedures, uses, and filings for the same.<sup>2</sup> In 2001, these rules were updated to include conducting electronic video or telephonic hearings.<sup>3</sup> After more updates to technology, the laws were again revised to provide standards for personal appearances generally via two-way electronic video and audio.<sup>4</sup> These rules, while somewhat basic, provided the catalyst for the influx of rules and laws surrounding virtual depositions, which have now been expanded to hearings, to help fill the void created by the COVID pandemic.

On March 15, 2020, as COVID began to explode, bringing with it lock downs and avoidance of personal contact, the Supreme Court adopted a rule of court covering testimony taken by audiovisual means in Circuit Court civil cases.<sup>5</sup> This rule laid the foundation for expansive use of remote hearings and depositions. One day later, the

Supreme Court issued a Declaration of Judicial Emergency requiring attorneys to e-file pleadings, use telephonic or video technology for all necessary hearings, trials, or other matters, including arraignments.<sup>6</sup>

Since March, the Supreme Court extended and expounded upon its Order with the latest virtual specific language being included in the September 28, 2020, Eleventh Order Extending Declaration of Judicial Emergency, stating that "[a]ll courts should continue to conduct as much business as possible by means other than in-person court proceedings."<sup>7</sup> The Judicial Emergency Orders further give broad discretion to chief district and circuit court judges to implement additional local policies as needed.<sup>8</sup> Therefore, always remember to consult any local rules for remote court proceedings.



## Advantages

Remote hearings and depositions offer some sweeping advantages for attorneys. They are considerably more time and cost effective. Because of this, attorneys are often able to ask more questions or provide more content and stay on direction without the distractions of time-consuming travel, extraneous communications, or other in-person distractions. With a computer at your fingertips, remote depositions and hearings provide an attorney with the ability to have more materials at the ready, and the deposition or hearing itself can be easily recorded without the same cumbersome document pile or court reporter set up. Additionally, because of their remote nature, these hearings and depositions are more easily recorded in part because locating a court reporter is a non-issue. Court reporters are widely available, as they can transcribe the proceeding remotely from anywhere without the cost and time expense of traveling to the location of the hearing or deposition.

## Disadvantages

Remote hearings and depositions provide attorneys with numerous opportunities, but still come with their own challenges and disadvantages. Often, attorneys rely on body language and the nuances of in-person communication and conversation to assess the witness' credibility or usefulness, or the judge's leanings. This can be difficult if not impossible in a remote set up. There are often many faces on the screen, and knowing who to look at and when, as well as noticing subtleties in body language can be incredibly challenging. Also, technology mishaps or, alternatively, having too many materials at hand, can make you look disorganized or adversely affect your communication and advocacy skills. From a higher view, the general security of client and privileged electronic files should not be sacrificed because of using technology.

## Tricks of the Trade

To mitigate some of these issues, it is important to note that if a witness, expert, client, or some other individual is using firm equipment, it is essential to make sure that access to client files or other sensitive information is restricted. Exhibits and produced documents should be sent to the appropriate party before-hand, making sure to maintain the document's proper orientation to lessen any confusion or misunderstanding when presenting the documents. Participate in any court offered "test" hearings. When conducting a remote hearing or deposition, it is important to treat your office, or wherever your preferred remote location is, as a courtroom. Things like poor or motion censored lighting, background images and noise, failing to silence cell phones or alarm systems, the height and angle of the camera, and the quality of the microphone and speaker will all contribute to how lawyers present themselves to judges or witnesses. More importantly, these have a direct impact on a lawyer's ability to communicate and advocate for their client, so having these items properly placed, properly working, and properly visible are important factors. A good way to combat this is to label and close off all doors surrounding the designated room or office, putting others on notice to keep noise and disruption levels minimal (e.g., at our office we post signs around the office that say "Court Hearing in Progress" as a reminder).

Some suggestions on ways to manage documents and the logistics of the technology are to remember ease of use and keep things simple, such as: adding a second screen for documents rather than trying to fit too many documents and windows on one screen, and/or creating a separate and appropriately named folder for screen sharing files to prevent people outside your firm seeing creative file names, such as "Docs to Bury"—which has many different interpretations, none of which are good for opposing counsel or the court to see. These simple acts of preparation can help an attorney stay organized and focused on the task at hand.

## At the End of the Day...

COVID has pushed forward legislation and codification of technological advancements and utilization of them to first

encourage and now require attorneys to update their practices and adapt to the new normal. Attorneys are still finding new challenges with remote court proceedings, and this is in no way a conclusive list of things an attorney may experience in remote litigation. However, planning for these considerations and logistical strategies will help ease the transition into a remote world that is here to stay. Pre-COVID, remote litigation was an option available on the rare occasions when parties could not appear in the same location. Remote litigation is no longer an option, it is mandatory to comply with the rules of court and may not be going away any time soon. Given the benefits and continuing improvements in technology, it is likely that remote hearings and depositions will be the standard for litigation practices long after the pandemic made them necessary. ■



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## Endnotes

- 1 VA Code Ann., §§ 8.01-412.2 *et seq.*
- 2 VA Sup. Ct. Rule 4:7A.
- 3 VA Code Ann. § 16.1-93.1.
- 4 VA Code Ann. § 19.2-3.1.
- 5 VA Sup. Ct. Rule 1:27.
- 6 VA Sup. Ct., In re: Order Declaring a Judicial Emergency in Response to COVID-19 Emergency (March 16, 2020). This and other COVID-19 orders are available at: [http://www.courts.state.va.us/news/items/covid\\_19.pdf](http://www.courts.state.va.us/news/items/covid_19.pdf) (last visited Jan. 19/2021).
- 7 VA Sup. Ct., In re: Eleventh Order Extending Declaration of Judicial Emergency.
- 8 *See generally*, Endnotes 6 and 7; *also see*, VA Sup. Ct., In re: Order Extending Declaration of Judicial Emergency, March 27, 2020; VA Sup. Ct., In re: Third Order Extending Declaration of Judicial Emergency, April 22, 2020; VA Sup. Ct., In re: Fourth Order Modifying and Extending Declaration of Judicial Emergency, May 6, 2020; VA Sup. Ct., In re: Fifth Order Modifying and Extending Declaration of Judicial Emergency, June 1, 2020; VA Sup. Ct., In re: Sixth Order Extending Declaration of Judicial Emergency, June 22, 2020.