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## A Matter of Strategy Now: Remote Depositions Are Becoming a Tactical Issue

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Charles Toutant

### What You Need to Know

- In the post-pandemic era, some see a tactical aspect to the choice between in-person and remote depositions.
- Amid widespread adoption of remote depositions, some defense lawyers still prefer to conduct depositions face-to-face.
- Plaintiff lawyers who work on contingency are more inclined to conduct depositions remotely for economic reasons.

Remote depositions were infrequent before COVID-19 came along, but they quickly became old hat during the pandemic. Now, with in-person depositions once again a viable option, the choice between questioning a litigant face-to-face or remotely is sometimes taking on strategic significance.

Remote depositions are still popular for many litigators for financial and practical reasons, but some defense lawyers think plaintiffs lawyers are specifying remote depositions to give their clients some cover from the scrutiny of aggressive questioning.

### 'Try and Create That Additional Barrier'

Patrick Papalia of Archer in Hackensack is among those defense lawyers who favor in-person depositions for plaintiffs and other key witnesses, a stance that sometimes lands him at odds with opposing counsel.

"Now that the pandemic has subsided, and courts are now open for business and trials are now starting to resume, there's a certain tactic that attorneys are utilizing to try and create that additional barrier that we get with a remote deposition," said Papalia, who handles business and labor litigation.

"I can tell you, in my experience, that when you're confronting a witness, especially a witness where there's critical testimony or controversial testimony, where it's in dispute, that being in person presents opportunities that you wouldn't have in remote [depositions]," he said. "There are attorneys out there that recognize the benefit of sheltering a key witness or a key party in their case from a deposition, the benefit of having it remote, and I've seen adversaries advocate for remote."

Sometimes when plaintiffs counsel disagrees with that position, the dispute lands in the judge's lap.

There's no court rule in New Jersey addressing the issue, although disputes are likely to be decided on grounds similar to a New York court rule governing disputes between remote and in-person depositions, Papalia said.

That rule takes into account whether the witness is a party to the litigation, the importance of the witness' testimony, and the claims and defenses at issue, he said.

At a deposition, the defense lawyer must gather information to assess each witness' credibility in preparation for a trial, Papalia said. But seeing a witness' face on a screen makes it impossible to read their body language, he said.

A remote witness is more likely to engage in "mischief," such as referring to notes even after being told not to do so, he said. And a witness who is deposed while at home is more likely to try to end the deposition early, by claiming he had business to attend to, said Papalia, as one witness did recently in one of his cases.

Kelly S. Crawford, co-chair at Riker Danzig and head of its products liability and mass tort practice group, has clients who expect her to conduct live depositions.

But her adversaries often prefer to appear remotely, she said.

"I definitely see that there is a push to want to try and do things remotely, particularly, from my perspective, from the plaintiffs bar. They view it as more efficient, less expensive. They don't have to upfront the travel costs and all that kind of thing for the live deposition," Crawford said. "From my perspective, and my clients', it's still our preference to do them live and we do sometimes have debates about that with the court."

Technology for remote depositions was "pretty horrific" before the pandemic but it has greatly improved, she said. Most lawyers adjusted well to the change to remote depositions, she said.

"People like the flexibility of not having to have the travel time, being able to do them from, perhaps not the office, perhaps from a home office," she said. "But for many types of witnesses and particular cases, there's still a preference at least on our part for my clients in defense work to be face-to-face with the witness," Crawford said.

For medical doctors who serve as witnesses, getting them to fit a deposition into their schedule is so difficult that she tends to question them remotely, said Crawford. But for other witnesses, she echoed Papalia's comment about wanting to see a witness' "body language" during a deposition.

If the credibility of the person giving the deposition is at issue, "I think it's even more important for me to be in the room. I want to know what the surroundings are, what distractions might be in the background," Crawford said. "I don't think you give the same type of 100% focus on the process when you're remote. And interesting things happen at depositions when you're not on the record. You may have a conversation with an adverse lawyer or even with the witness or just human interaction that you utterly lose when you're doing things remotely."

If Crawford and her adversary can't come to an agreement about how to conduct a deposition, it's up to the judge to resolve the dispute. She said most judges have had experience conducting trials remotely and most of them didn't like the experience, which make them sympathetic to her position.

"I think that they appreciate the importance of human interaction and what is lost [in remote proceedings]. And so it hasn't been a difficult thing to advocate for. My sense is the courts really do appreciate that there's a human factor in law," Crawford said.

### **'We Want to Avoid That'**

Bhaveen Jani, who represents plaintiffs in automobile injury and premises liability cases at Stark & Stark in Hamilton, said that even with a choice between in-person and remote depositions in the post-COVID era, he continues to conduct nearly all his depositions remotely.

Defendants' depositions in automobile injury cases tend to be short, more so than plaintiffs' depositions, Jani said.

At in-person depositions, he has to bring along multiple copies of all pertinent documents, while at a remote deposition he can share documents electronically, which is more convenient, Jani said. He added that as a former defense lawyer, he had experience attending depositions in person, but he prefers conducting them remotely.

"For us on the plaintiff side, time is money. We're not billing per hour," he said. "So, for us, not having to drive and schlep somewhere for, maybe, a half-hour deposition and spending half a day dealing with the commute and the deposition and coming back, we want to avoid that."

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