



MEMORANDUM

TO: Ron Luke

FROM: Bill Christian and Hailey Suggs

DATE: September 10, 2021

RE: Model Stipulations for Zoom Depositions

You have asked us to summarize the law governing oral depositions taken remotely without a court reporter and to propose stipulations to ensure the accuracy of depositions taken under such circumstances.

Circumstances when an oral deposition may be taken only by non-stenographic means. Parties routinely make a video recording of a witness's testimony at a deposition. Such videos can be useful at trial in presenting the witness's testimony to a judge or jury, but the official record of the deposition is the transcript created by a certified shorthand court reporter. But there is a limited exception in Texas law that allows a video to serve as the official record of the deposition, dispensing with the need for (and expense of) a court reporter.

Texas law requires that an oral deposition be taken stenographically—*i.e.*, with a certified court reporter present who prepares a transcript. Tex. Gov't Code § 154.101(f). But the law contains an exception allowing the deposition to be recorded non-stenographically only—*i.e.*, with just an audio or video recording—when the recording is made by a party, an attorney for a party, or an employee of either. Tex. Gov't Code § 154.114:

[T]he individuals authorized to make a non-stenographic recording are (1) a party to the litigation; (2) the attorney of the party; or (3) a full-time employee of a party or a party's attorney. Tex. Gov't Code § 52.033 (West 2005); Tex. R. Civ. P. 199.1; *see also* Tex. R. Civ. P. 203.6(a) ('A nonstenographic recording ... may be used to the same extent as a deposition taken by stenographic means.'). These individuals may record a deposition solely by

non-stenographic means without violating Government Code section 52.021(f).

Tex. Atty. Gen. Op. GA-0928, 2012 WL 1820939.¹

Circumstances when an oral deposition may be taken remotely. The Texas rules of civil procedure allow taking oral depositions remotely:

A party may take an oral deposition by telephone or other remote electronic means if the party gives reasonable prior written notice of intent to do so. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions. The officer taking the deposition may be located with the party noticing the deposition instead of with the witness if the witness is placed under oath by a person who is present with the witness and authorized to administer oaths in that jurisdiction.

Tex. R. Civ. P. 199.1(b). This Rule requires that the person swearing in the witness be present in the same room as the witness. But during the pandemic, the Texas Supreme Court effectively suspended this requirement and allowed witnesses to be sworn in remotely:

Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal, without a participant's consent ... allow or require anyone involved in any hearing, deposition, or proceeding of any kind—including but not limited to a party, attorney, witness, or court reporter, grand juror, or petit juror—to participate remotely, such as by teleconferencing, video conferencing, or other means.

Supreme Court of Texas Fortieth Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 21-9079 (July 19, 2021). The Supreme Court has renewed this Order authorizing remote oaths several times, with this most recent Order effective through October 31, 2021.

Together, these laws and rules allow a party's lawyer to notice an oral deposition to take place on a videoconferencing platform such as Zoom; swear in the witness remotely over Zoom (the lawyer taking the deposition may administer the oath if he or she is a notary); record the deposition using Zoom's record feature; and have the videorecording serve as the official record of the deposition, without the use of a

¹ After the Attorney General issued this opinion, Sections 52.021(f) and 52.033 of the Texas Government Code were re-codified at Sections 154.101(f) and 154.114, respectively.

court reporter or videographer. When the Emergency Orders expire, Tex. R. Civ. P. 199.1(b) will not allow remote oaths, but require the person swearing in the witness to be in the same room as the witness.

A non-stenographic deposition does not include the right to presentation to and signature by the witness. One important difference between stenographic and non-stenographic depositions is the witness's right to review and sign the deposition. For a stenographic record, the deposition officer must provide the transcript of the deposition for examination and signature to either the witness or the witness's attorney. The witness then has 20 days to prepare an errata sheet indicating any changes to the transcript, to sign the transcript under oath, and to return the transcript to the deposition officer. Tex. R. Civ. P. 203.1(b). These rights of presentation and signature do not apply "to non-stenographic recordings of oral depositions." *Id.* 203.1(c). Thus, when a deposition is recorded only by video, the witness does not have an opportunity to review the deposition and prepare an errata sheet. Our proposed stipulations below address this deficiency by giving the witness the option to submit an errata sheet when there is no stenographic record of the deposition.

A party may request exhibits be included as part of the non-stenographic recording. The rules provide that "[a]t the request of a party, the original documents and things produced for inspection during the examination of the witness must be marked for identification by the deposition officer and annexed to the deposition transcript or the non-stenographic recording." Tex. R. Civ. P. 203.4. Any party to the deposition should make sure that the person recording the deposition marks exhibits for inclusion in the non-stenographic record, and if not, object on the record. The Rules do not specify how to handle exhibits when the deposition is conducted remotely, with the witness and counsel in different locations. The proposed stipulations suggest ways to address this situation.

Any party has the right to copy, inspect, and object to the non-stenographic recording. The party that made or requested a non-stenographic recording of an oral deposition "must make it available upon reasonable request for inspection and copying by any other party." Tex. R. Civ. P. 203.3(c). If a party objects "to any errors and irregularities in the manner in which the testimony is transcribed, signed, delivered, or otherwise dealt with by the deposition officer," then the party may file a motion to suppress all or part of the deposition. Tex. R. Civ. P. 203.5. The proposed stipulations require the party taking the non-stenographic deposition to provide an exact electronic copy of the recording and any transcription of the recording to all other parties.

For good cause, a Court may require transcription of a non-stenographic deposition. Generally, a non-stenographic recording of an oral deposition “may be used to the same extent as a deposition taken by stenographic means.” Tex. R. Civ. P. 203.6(a). “However, for good cause shown, a court may require that the party seeking to use a non-stenographic recording or written transcription first obtain a complete transcript of the deposition recording from a certified court reporter.” *Id.* The Rule does not provide guidance on what may constitute “good cause,” nor are there any reported decisions defining or applying the term.

Other parties may also record the oral deposition by other means. Regardless of how the noticing party records the deposition, any other party may provide its own court reporter or videographer to make an independent record of the deposition. Tex. R. Civ. P. 199.1(c) requires that if the noticing party intends to record the deposition non-stenographically, it must provide at least five days’ notice of the intended method for recording the deposition:

At least five days prior to the deposition, the party must serve on the witness and all parties a notice, either in the notice of deposition or separately, that the deposition will be recorded by other than stenographic means. This notice must state the method of non-stenographic recording to be used and whether the deposition will also be recorded stenographically.

Upon receipt of such notice, any other party may “serve written notice designating another method of recording in addition to the method specified.” *Id.* If, for example, a party noticing a deposition states that the deposition will be recorded only by Zoom video and not stenographically, then any other party may arrange for a court reporter to take a stenographic record, or arrange for a professional videographer to record the deposition non-stenographically. The other party would have to provide “prior written notice” of any alternative method of recording the deposition and must bear the expense of the additional recording method “unless the court orders otherwise.” *Id.*

The best practice to ensure an accurate deposition is to always use a certified shorthand reporter to take a stenographic deposition—including hiring a court reporter when the party noticing the deposition will not. In the absence of a stenographic record, the party requesting the non-stenographic is responsible “for assuring that the recording will be intelligible, accurate, and trustworthy.” *Id.*

For depositions conducted remotely without a stenographic record, we propose the following stipulations. It should be noted that these stipulations are not necessary if a stenographic transcription is taken. The existing rules are sufficient to address a

situation where a court reporter is present and serves as the deposition officer. But when the attorney for the party noticing the deposition (or that attorney's secretary or paralegal) serves as the deposition officer and makes only a non-stenographic record of the deposition, then these stipulations can help fill in gaps in the rules and ensure that the record of the deposition is to help ensure the record of the deposition is "intelligible, accurate, and trustworthy." *Id.*

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for Plaintiff(s), on the one hand, and counsel for Defendant(s), on the other hand that:

Definitions

"Attending Counsel" means any legal counsel for a Party or Non-Party that is attending a Deposition, other than Deposing Counsel or Defending Counsel.

"Defending Counsel" means the legal counsel for the Party, Parties, Non-Party, or Non-Parties being deposed who is principally defending the Deposition. For a witness who is represented by personal and company counsel for the purpose of his or her Deposition, both personal and company counsel shall be treated as "Defending Counsel."

"Deposing Counsel" means the legal counsel for the Party or Parties noticing a Deposition.

"Deposition Officer" means the person responsible for recording the Deposition and providing the certification required by Tex. R. Civ. P. 203.2.

"Exhibit" means any document or electronically stored information that is presented to the Witness at a Remote Deposition.

"Party" or "Parties" means any plaintiff, any defendant, and any of their current or former employees, executives, officers, or directors.

"Non-Party" or "Non-Parties" means all natural or legal persons that are not Parties from whom a Party is seeking a Remote Deposition in the litigation.

"Remote Deposition" means any deposition by oral examination conducted pursuant to Texas Rule of Civil Procedure 199.1(b) where not all participants are physically present in the same location when the deposition by oral examination is taken.

“Witness” means any natural or legal person whose Deposition or Remote Deposition has been noticed in this litigation.

1. Remote Depositions in this case shall be taken in compliance with applicable local and state regulations and orders. *See, e.g.*, TEX. R. CIV. P. 199.1(b); Supreme Court of Texas Fortieth Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 21-9079 (July 19, 2021).

Videoconferencing

2. For Remote Depositions, a video-conferencing service will be used that allows video recording for later use in proceedings in this case, including trial. The video-conferencing software must have sufficient security features in place to prevent the public disclosure of protected information designated under any confidentiality order in the litigation. The parties agree that these video-conferencing services meet this requirement: [list]. If the party noticing the deposition or another party that plans to record the deposition wants to use a different video-conferencing service, the party must identify the service five business days before the deposition date and provide information establishing it meets this requirement.

3. Statements made on the record by the Witness, Deposing Counsel, Defending Counsel, and Attending Counsel must be visible and audible to all participants in the Remote Deposition, and all participants should each strive to ensure their environment is free from noise and distractions. Parties are responsible to object on the record at the time if questions or responses are not visible and audible.

4. Should technical issues, such as audio or video issues, prevent the Witness, Deposing Counsel, or Defending Counsel from reliably seeing one another or hearing one another, the Remote Deposition shall be recessed until the technical issue is resolved. The Parties and any appropriate Non-Parties will also act in good faith to account for any time lost to technical issues to permit the deposing Party to use the full time it is permitted for the Remote Deposition.

Exhibits

5. Any counsel questioning a witness shall be responsible for ensuring that any Exhibits they wish to mark and use at the Remote Deposition can be shown to the Witness and all other counsel at the Remote Deposition in a manner that enables

the Witness and other counsel to independently review the Exhibits during the course of the Remote Deposition. Such means of marking and using Exhibits for the Remote Deposition shall include, by way of example: (a) using a video-conferencing platform or other electronic application for presenting exhibits (*e.g.*, Zoom screen-sharing) which enables counsel to share Exhibits with other counsel; (b) sending via overnight courier in advance of the Remote Deposition sealed pre-marked Exhibits or courtesy copies to all other counsel, and, if not represented by counsel, the Witness; (c) making available via e-mail of file sharing site in advance of the Remote Deposition pre-marked Exhibits to all other counsel, and, if not represented by counsel, the Witness; or (d) any other means to which counsel agree.

Record of the Remote Deposition

6. A record of the Remote Deposition will be made by video. The Party of Deposing Counsel is responsible for ensuring that the recording is intelligible, accurate, and trustworthy. All persons using the video-conferencing service to view, listen to, or otherwise participate in the Remote Deposition will be identified on the record. The time shown on the video shall be the local time in the place where the Witness is located. Once proceedings go on the record, all Parties and appropriate Non-Parties must agree before the record stops, absent extenuating circumstances.

7. The Deposition Officer shall be responsible for ensuring that Exhibits are handled properly and included in the record of the Remote Deposition. During the course of the Remote Deposition, the Deposition Officer will announce the number of the Exhibit as it is being marked (*e.g.*, “Exhibit 1 is marked for identification,” or “This is being marked as Exhibit 1”). Exhibits are to remain in the custody and control of the Deposition Officer during the Remote Deposition and are a part of the nonstenographic video record of the Remote Deposition.

8. Within three business days after the conclusion of the Remote Deposition, the Deposition Officer shall make copies of all Exhibits used at the Remote Deposition and a copy of the video recording of the Remote Deposition available to all counsel by : (a) email; (b) a file-sharing site accessible by all counsel; or (c) any other means agreed to by counsel.

9. Within twenty days after the Deposition Officer makes a copy of the video recording of the Remote Deposition available pursuant to Paragraph 8, the Witness may submit an errata sheet to the Deposition Officer indicating any changes to the testimony. The errata sheet must indicate the time stamp for each change, the witness’s understanding of what is on the recording, the change, and the reason for

the change. The errata sheet must be signed under oath and served on all Parties. The errata sheet submitted by a Witness under this provision is part of the record of the Remote Deposition.